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

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

JAN 2 1995

MEMORANDUM FOR THE REGULATORY ADVISORS AND AGENCY REGULATORY REFORM WORKING GROUP

FROM: Sally Katzen

RE: Meeting on Cross-Cutting Regulatory Issues

Attached please find the agenda and briefing paper for the continuation of the regulatory cross-cut meeting (date and time to be announced). Please call if you have any comments or questions.

**CROSS CUTTING ISSUES**
**AND**
**GENERAL REGULATORY APPROACHES**

Second Installment
January 5, 1995

The approaches discussed below are those on the list distributed for the December 21st meeting that were not discussed at that meeting; you may recall we have already touched on performance standards, bubbles/marketable permits, audited self regulation, contractual mechanisms, and (briefly) regulatory budget. For purposes of our further consideration, we suggest the following order:

1. Enhance Public Participation
2. Streamline Paperwork
3. Provide Incentives to Review Existing Regulations
4. Revisit Federalism Issues
5. Eliminate Statutory Deadlines
6. Use of Information
7. Introduction to Customer Service Issues

1. Enhance Public Participation: A variety of laws and rules limit the ability of regulators to talk with those to be regulated (or those intended to benefit from the regulation). While these restrictions were imposed for good reason to curb abuses ("smoke filled rooms"), they now often serve more as a barrier to meaningful communication between the rule-writers and those affected by the regulation. Consequently, important information is too often not exchanged, creating a gap between the good intentions of rulewriters and the practical realities of life.

Two paths for improvement exist:

(1) **Reduce current barriers**

(a) Eliminate all administrative, pre-NPRM, ex parte rules; and

(b) Seek repeal of the Federal Advisory Committee Act (FACA), or carve out exemptions for State/local/tribal governments, for scientific or technical advisors, or for operations or mechanical advisors or consultants.

Any (all) meetings would be accompanied by simple disclosure of when who met with whom about what (as in E.O. 12866).

Pro:
- -- E.O. 12866 calls for vetting proposals with those affected, but agencies claim their rules preclude them from doing so.
- -- Would provide reality check and might produce better way to do the regulation.
- -- Would reduce adversarial relationship in rulemaking.

Con:
- -- Would encourage suspicions of undue influence by big business.
- -- These "sunshine" provisions were advocated by Democrats and strongly supported by Democratic constituencies.
- -- Consultation can be time consuming and expensive.

(2) **Encourage more formal consultation**

(a) Select several high-profile regulatory negotiations;

(b) Establish a consultation system based on the "European model," where goverment, business, and interest groups meet to negotiate on an industry-wide basis an approach to a perceived problem.

Pro:

- -- Leads to better understanding of the issues
- -- Those who participate in developing solutions more readily accept and support them
- -- Reduces adversarial environment

Con:

- -- Heavy up-front costs (both in time and resources)
- -- Sunshine can lead to posturing and confrontation
- -- Difficult to find/fund representatives of the public

Current Uses: Numerous agencies have made efforts to reach out to stakeholders (see E.O. 12866 One-Year Report, pp. 14-23 for examples).

Potential Uses: Virtually all regulations could be improved with earlier consultation with affected parties and with reality check in final stages. A super reg-neg could be convened to deal with a particularly controversial regulatory issue (e.g. ergonomics, etc.) to highlight responsiveness to concerns.

2. <u>Streamline Paperwork</u>: Many small businesses, local governments, and citizens know their Federal government primarily through its forms and reporting requirements. Because these are frequently unintelligible, duplicative, burdensome, or annoying, they are among the most often criticized aspects of the government. In fact, to many, paperwork <u>is</u> the Federal government.

Streamlining government paperwork can be done through a number of means:

(1) Establishing a "paperwork budget" and reducing "burden hours" by a specific percentage (the theory underlying the Paperwork Reduction Act);

(2) Giving agency heads authority to waive information requirements if it can be demonstrated that certain information can be more effectively collected by another means or from another source;

(3) Precluding incorporation of the actual form in rules so it can be modified without full notice and comment procedures.

(4) Using technology to make information easier to submit and to make better use of information submitted.

<u>Pros</u>

-- Addresses a major public complaint about government.
-- Reduces costs and burdens, particularly on small businesses.
-- Facilitates changes based on experience, changed circumstances, etc.

<u>Cons</u>

-- Percentage reduction is arbitrary.
-- Information is needed for compliance and enforcement.
-- If form is not in rule, question may arise about enforceability.
-- Not all regulated entities are computerized.

<u>Current Uses</u>: The Paperwork Reduction Act gives some authority to OIRA for (1) and (4), but there has been no higher level reinforcement. Some agencies routinely follow (3).

<u>Potential Uses</u>: All agencies could take paperwork burden more seriously.

3. <u>Provide incentives for agencies to review existing regulations</u>:

Though "lookbacks" -- reform of current regulatory programs -- are included in Section 5 of E.O. 12866, it has proven more difficult than we would have anticipated for agencies to undetake these time consuming, generally thankless tasks. (See One-Year Report, chapter IV.) New incentives for re-engineering of current programs are necessary, particularly in a time of reduced resources.

Two approaches have potential:

(1) Require agencies to respond within a specified period of time to any **petition** (that includes specified information) to eliminate a particular regulatory provision. Petitions that must be denied because a particular provision is required by statute would be transmitted to the relevant congressional committees.

<u>Pro</u>

-- This would encourage private parties to identify rules that impose unjustifiable costs on society.
-- This would present Congress with potentially valuable information about ineffective regulatory statutes.
-- This would further the idea of an accountable government, open to petitions from its citizens.

<u>Con</u>:

-- The agencies might be overwhelmed with paper.
-- Agencies' priorities (and use of limited resources) would be driven by special interest (petition writing) groups.
-- Could raise expectations that cannot be realized.

(2) Agencies should periodically **examine** the costs and benefits of regulations that impose large costs and **repropose** rules where the actual costs and benefits differ markedly from those anticipated before the rule was promulgated.

<u>Pro</u>

-- Would ease the burdens caused by inefficient regulations
-- Would provide analytic data to improve techniques of estimating costs and benefits for future rules

<u>Con</u>:

-- Would require use of agency resources, taking some away from the development of new regulations.

-- Would introduce additional controversy over selection of test cases.

Current Uses: Department of Treasury answers all correspondence with set time limit; Department of Transportation has done review of past rules without the reproposing piece.

Potential Uses: Each agency could choose (1) or (2) or a pilot project area within (1).

4. Revisit Federalism Issues. In addition to asking *whether* government should regulate and *how* it should regulate, we need also ask *who* --which level of government-- should do the regulating. In some cases, Congress has--for political reasons--felt obliged to address problems that are best addressed by States or localities. Conversely, in some instances, state and local governments have maintained partial control over areas better regulated solely by the central government.

These judgments should be revisited, particularly in light of larger trends shaping our economy and polity. Just as the functioning of markets may improve and render regulation obsolete, so the regulatory capacities of state and local entities may improve and render federal regulation unnecessary. And, in sectors in which concurrent federal and state regulation once made sense, the globalization of the economy may now support a preemptive federal role.

The justifications for federal regulation are familiar:

- to ensure certain national values and objectives, such as the protection of civil rights.
- to control externalities, such as interstate flows of pollutants;
- to secure economies of scale, such as through investments in research;
- to establish uniformity, where essential for interstate or international commerce;
- to minimize collective-action problems, such as a deregulatory "race to the bottom" among the States; and
- to redistribute resources among States or regions.

So too are the justifications for leaving regulation to state, local, and tribal jurisdictions:

- to enhance local control and public participation;
- to improve efficiency by tailoring solutions to local needs;
- to encourage experimentation with different regulatory methods and goals.

Consider three suggested approaches:

(1) Convene **summit** of Federal and State regulators in particular sectors to consider reallocating roles.

(2) Require each agency to **nominate an area for devolution** to the states. Examples previously discussed include de-federalizing Superfund and Safe Drinking Water, where the federal role could be limited to cost-sharing and technical assistance.

(3) Provide authority for the head of an agency to grant **waivers** -- on a priority basis -- of any provision of the new law if a State, local, or tribal community: (1) was overburdened by unfunded federal requirements; (2) suffered from economic distress as measured by poverty, outmigration, joblessness, etc., or social distress; or (3) developed an innovative proposal to improve an economic or social condition or a federal program. Communities would have to provide a strategic plan which would describe the purposes for the waivers and a timetable with a sunset date of the waiver. These waivers would be temporary and would not be subject to judicial review.

5. <u>Eliminate Statutory Deadlines</u>: During the last decade, Congress has increasingly specified the time for issuing regulations, often without regard for the complexity of the task or the other priorities of the agency. We could seek legislation to eliminate or extend statutory deadlines for rulemaking proceedings.

<u>Pro</u>:

-- Agencies would be able to set priorities, rather than being driven by statutory and judicial deadlines.

-- Good science and good analysis would not be squeezed out by arbitrary deadlines.

<u>Con</u>:

-- There would be little basis for forcing action unreasonably withheld by an agency.

-- Some issues can be analyzed forever.

<u>Potential Uses</u>: EPA is now largely driven by statutory deadlines. Department of Education has also lived with very tight limits. Both would produce "more sensible" rules with more time.

6. Use of Information: Information disclosure may be used as a substitute for regulation. Providing information on a product or service, for example, would permit potential consumers to weigh risks for themselves, rather than having the government do it for them by banning or restricting use of the product or service.

Pro:

- -- The public rather than the government makes decisions regarding products and services.
- -- Less costly than traditional regulation.
- -- Faster to implement and to modifify in response to changing circumstances.
- -- Could utilize modern technology for electronic dissemination of information.

Con:

- -- Assumes literate and educated consumer.
- -- Information must be carefully presented in a way that is easy to understand and useful to consumer decision-making.
- -- Mandatory information dissemination can be a form of burdensome, command-and-control regulation. If voluntary, information may lack uniformity or accuracy.
- -- May burden small entities disproportionately.

Current Uses:

-- Food labeling provides uniform nutritional information for consumers, as well as food content labeling; safe food handling labels for fresh meat and poultry; fair packaging standards; textile/wool/fur content and care labeling on clothing; energy efficiency labeling; domestic content and country of origin; automobile fuel efficiency; drug information inserts.

Potential Uses:

-- Provide information to and educate workers about repetitive stress syndrom rather than require compliance with design standards; improve food content labeling and eliminate food "standards of identity."

7. Introduction to Customer Service Issues: Regulators are notorious for not being customer friendly. This custom must change. Some modest proposals:

- Require a political appointee in each agency to certify that he or she has read in its entirety and understands each rule that is promulgated.

- Require each agency to establish an ombudsman to be available to those with questions or complaints.

- Encourage compliance rather than penalties:

  -- Prohibit agencies from appraising an employee's performance on the basis of the number of citations he or she issues [see recent DOL changes]

  -- Give those who violate regulations notice and an opportunity to cure the violation before issuing a citation (exclude imminent health and safety risks)

**CROSS CUTTING ISSUES**
**AND**
**GENERAL REGULATORY APPROACHES**

Agenda

I. Process-Based Ideas

A. Weeding Out Old Rules
- Petitions
- Reevaluation/Sunset of Big Ticket Items

B. Increase Public Participation
- Federal Advisory Committee Act (include disclosure)
- Ex Parte Rules (include disclosure)
- Consultation Plus
- Negotiated Rulemaking

Ng Reg

C. Simplify/Streamline Paperwork Requirements
- Information Collections
- FOIA
- Electronic Media
- Coordinated Application Process

D. Customer Service
- Ombudsman
- Notice with Right to Cure (exclude imminent health and safety risks)
- Prohibit Performance Appraisal Based on Number of Citations Issued

go to Elaine's group on Customer Service

E. Statutory Deadlines

F. Regulatory Budget

G. Waiver Authority → waivers

H. Certification by Political Appointee

II. Substance-Based Ideas

A. Performance Standards
B. Bubbles
C. Cost Bubbles
D. Marketable Rights
E. Information Disclosure
F. Self-Certification/Audited Self-Regulation

III. Federalism

**CROSS CUTTING ISSUES**
**AND**
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Agenda

# I. PROCESS-BASED IDEAS

## A. **Weeding Out Old Rules**

Proposed text could get expedited treatment

- Petitions: By Executive Order, require every agency to respond within 120 days to any petition to eliminate a regulatory provision. If the grounds for denial are that the regulatory provision is required by statute, the petition, the agency response, and the statutory language would be sent to the appropriate Congressional committees. [This idea is based on section 553(e) of the APA, which provides for the right to petition and on the President's theme of responsibility and accountability.] This could be accompanied by a Presidential call for specific examples of regulatory requirements that are outdated or unnecessary.

- Reevaluation/Sunset of Big Ticket Items: By Executive Order require each agency to evaluate the impacts of a recently issued economically significant rule (i.e., final rule issued between 1989 and 1993). In particular, the agency would compare the actual costs associated with the rule with the projected costs from its regulatory impact analysis, and the benefits attained with the benefits predicted. [DOT's National Highway Traffic Safety Administration's review of vehicle safety standards is the model for this proposal.] The agency may learn something about its cost-benefit analysis, and if there is a serious discrepancy, the rule should be reproposed.

## B. **Increase Public Participation**

- Ex Parte Rules (include disclosure): By Executive Order require agencies to eliminate all administrative, pre-NPRM ex parte rules. Also require each agency General Counsels to review his/her agency's ex parte rules that go beyond the requirements of the APA and justify any continuation of those rules. (Disclosure of the existence of such meetings, contacts or calls should be required, as it is for the OIRA Administrator under E.O. 12866.)

- Federal Advisory Committee Act (FACA) (include disclosure): Seek legislation to repeal FACA. [Every agency that has sought to consult with those affected by its rules has found FACA to be a barrier to that process.] If this is not possible, seek certain exemptions to FACA:
  - o Exempt State, local and tribal officials

- o Exempt technical or scientific advisors (e.g., science advisory boards) with non-policy making functions.
- o Exempt operations or mechanical advisors or consultants concerning advise on how the language will really work (or not work, as the case may be).

Again, disclosure of consultations would be placed in the rulemaking docket.

- <u>Consultation Plus</u>: Establish a consultation system based on the European model, where government, business and interest groups meet prior to notice to negotiate on an industry-wide basis a regulatory approach to a perceived problem.

- <u>Regulatory Negotiations</u>: Conduct a regulatory negotiations on particularly high visibility regulations; for example, USDA/HHS's effort to introduce the Hazard Analysis Critical Control Points (HACCP) to food inspection.

C. **Simplify/Streamline Paperwork Requirements**

- <u>Information Collections</u>: Information collections requirements are too often incorporated into rules themselves, rendering an entire rulemaking proceeding necessary before a form can be changed. To get at this problem, require by Executive Order that, to the extent permitted by law and with such exceptions as the President/Director/OIRA Administrator shall designate (e.g., IRS), agencies should use regulations only to establish their authority to collect information related to a specific topic. Specific forms, questions, or data elements to be collected would be reviewed through the Paperwork Reduction Act process, rather than promulgated through APA rulemaking.

- <u>FOIA</u>

- <u>Electronic Media</u>

- <u>Coordinated Application Process</u>

D. **Customer Service**

- <u>Ombudsman</u>: By Executive Order require agencies to create an ombudsman for regulatory affairs who would serve as the agency head's representative regarding complaints about regulatory standards and enforcement. The ombudsman could be required to respond to all complaints within a specified amount of time.

- <u>Notice with Right to Cure (excluding imminent health and safety risks)</u>

- Prohibit Performance Appraisal Based on Number of Citations Issued

E. **Statutory Deadlines:** Seek legislation to eliminate or dramatically extend existing statutory deadlines for developing or promulgating regulations. (This would effectively permit agencies to establish regulatory priorities and conduct adequate analysis, rather than be driven by statutory or consequent judicial deadlines.)

F. **Regulatory Budget:** Construct an Executive Branch regulatory budget, allocating to each agency the amount of spending it could impose on the public through discretionary regulation. [Budgets could be based on averages for previous years, or some other criteria.] This could be done by:
o Establishing a regulatory paygo system. If agencies wanted to impose higher costs than provided by the budget, they would have to identify regulatory offsets. (OMB could act as scorekeeper "certifying" agency cost estimates for significant rules.)
o Establishing a baseline minus 5% (or some other % reduction) budgeting goal, to provide incentives for more cost-effective or reduced regulation.

G. **Waiver Authority**

H. **Certification by Political Appointee:** Before a new regulation is issued, require a high-ranking political appointee (e.g., Secretary, Deputy Secretary, Assistant Secretary) to certify that he/she has read and understood it.

II. SUBSTANCE-BASED IDEAS

A. **Performance Standards:** Performance standards are more efficient than design standards because they allow the regulated entity flexibility to meet the standard in the most cost effective way. Regulatory agencies, however, seldom adopt performance standards because they are difficult to enforce. To create an incentive for performance standards, require agencies to establish, as a defense to an enforcement action, that a regulated entity has met the implicit performance standard, even though if it may not have followed the agency's precise formula for compliance. Denial by the agency of such a defense could be appealed to the federal courts.

articulate a description.

B. **Bubbles:** Make greater use of bubbles -- areas within which a plant or firm could meet a performance standard, devising themselves the most efficient means to doing so. Many variations on the bubble concept are possible, including risk bubbles.

C. **Cost Bubble:** A more flexible bubble, which would allow a firm to meet the same objective (such as safety or risk reduction) by committing to spend a given amount of funds on a specific project that the firm would guarantee would accomplish more safety or risk reduction that the proposed government action. (The GM-Pena case is the model here.)

D. **Marketable Rights:** This approach establishes "property" rights which are assigned to owners, who are then permitted to trade among themselves. (Acid rain allowances and fishing rights are two examples where marketable permits have been established and are working.)

E. **Information:** Under this approach, information disclosure is used as a substitute for regulation. (For example, educate businesses and workers about repetitive stress injuries, rather than establishing design standards.)

F. **Self-Certification/Audited Self-Regulation**

G. Use of Insurance/Bonding initiative

III. FEDERALISM

Have agencies examine their regulatory programs and report to the President within six months on which ones could be turned over to state and local governments successfully.

December 21, 1994
9:15 a.m.

**CROSS CUTTING ISSUES
AND
GENERAL REGULATORY APPROACHES**

The Cross-Cutting Subgroup has looked at various ways to improve some of the perceived deficiencies of the regulatory system. We do not assume that regulations are an evil intrusion on an otherwise idyllic world; rather, we assume that though some regulations are necessary and desirable, the current system for producing and implementing rules is broken and needs fixing.

The goals of the ideas presented below (like the goals of E.O. 12866) are to make regulation less costly, less intrusive, and more easily understood. The group also identified a number of initiatives (listed at the end of the paper) that could be included under the "Customer Service" rubric. We also identified two subgroups of the regulated community that deserve special consideration: State, local, and tribal governments and small businesses. Small business is the subject of another subgroup, and State and local issues will be discussed there as well.

The purpose of this paper is to discuss briefly a range of cross-cutting approaches that could be productive both in improving the regulatory process government-wide and in sending a message to the bureaucracy and the public that we will <u>not</u> be conducting business as usual. Because the regulatory system is wide-spread, multi-layered and legally-based, we specifically include ideas to reform and cut through the process of establishing regulations to create a more efficient and less complex and burdensome system.

Those items marked below with asterisks will be discussed at the first meeting; the rest at subsequent meetings.

* 1. Use of Performance Standards

* 2. Use of Bubbles/Marketable Permits

* 3. Use of Audited Self-Regulation

* 4. Use of Contractual Mechanisms

* 5. Regulatory Budget

6. Use of Information in Place of Regulation

7. Reduce Barriers to Public Participation

8. Provide Incentives For Agencies to Review Existing Regulations

9. Streamline Paperwork Requirements

10. Waivers

11. Eliminate Statutory Deadlines

12. Federalism

13. Customer Service Proposals

1. Use of Performance Standards. "Performance standards" set objectives or goals to be met by those to be regulated. They fins it contrasted to what is more commonly used at present -- less flexible "design" or "command and control" standards, which specify particular technologies or practices that must be used by those being regulated. Executive Order No. 12866 states that performance standards are preferable to design standards.

Pro:

-- More cost-effective (greater benefits for a given level of costs or reduced costs for a given level of benefits) and less intrusive than inflexible design standards.
-- Innovation is encouraged and rewarded.
-- Regulatory objectives are made clear from the onset.
-- Extends idea of "waivers" to every regulated entity.

Con:

-- Difficult to measure compliance and thus to enforce.
-- Difficult to articulate the regulatory objective.
-- Those regulated may want design standards for protection against liability.
-- May require extensive information collection or more frequent monitoring.

Current Uses:

-- OSHA Permissible Exposure Levels (sets eight-hour averages for presence of specific chemicals in the workplace); DOT auto safety standards; Animal welfare rules; environmental air and water rules.

Potential Uses:

-- Performance Standards could be used wherever performance can be measured (e.g., food safety; other environmental rules; hazard communications).

2. Bubbles/Marketable Permits: The "bubble" approach treats several sources of safety or environmental risk as if they were a single unit. It therefore frees a firm from having to concern itself with each particular source of risk or emissions, enabling it instead to use its resources most cost effective reduction in aggregate risks or emissions. The "marketable permit" approach represents an expansion of the bubble approach. It assigns each firm a specified level (or license, such as airline landing slots or fishing quotas) and authorizes firms below the specific level to sell their credits or excess licenses to another firm that finds it less expensive to purchase the credits or to use the licenses more efficiently).

Pro:

- -- More increases cost-effective.
- -- Encourages and rewards innovation.
- -- Greater flexibility in meeting performance standards; encourages firms to go beyond minimum compliance requirements.

Con:

- -- Difficult to determine equivalences and hence to measure compliance with bubbles and even more so with marketable permits.
- -- Difficult to allocate rights initially.
- -- May create "hot spots," where risks are concentrated disproportionately.

Current Uses: EPA adopted its "bubble" policy for air emissions from plants in 1980. EPA also allows "averaging" across truck engines for emissions of certain pollutants. DOT's CAFE standards for cars are another example. Takeoff and landing rights at congested airports can be traded and sold. Radio and television spectrum licenses are allocated through auctions. Market trading mechanisms helped reduce lead in gasoline. Individual Transferable Quotas are beginning to be used in fishery management. The Acid Rain trading program is a good example of this approach.

Potential Uses: Allow auto makers to treat individual vehicles as "bubbles" for safety from varied impacts; expand use in environmental regulations.

3. Self-Certification and Self-Regulation: Under self-certification schemes, firms certify that they have complied with applicable regulations (rather than having to obtain pre-approval from the regulator). Under self-regulatory schemes, individual firms in an industry form or use an existing association to set rules to which all members will adhere. This association will be charged with policing its members. Under either approach, government might audit the compliance of either individual firms or the intermediary private organization.

Pro:

-- Self-certification (in lieu of preapproval regulations) reduces delay in making available life-saving or cost-saving products or technologies.
-- Requires regulated industry to take greater responsibility for achieving the regulator's goals.
-- Reduces bureaucracy by trimming the need for enforcement staff.
-- Regulations are more likely to be more sensible and better tailored to the industry because they are designed by those who know the industry well.

Con

-- Harm could occur before government auditors discover problems.
-- Firms themselves may prefer the certainty of a pre-approval, command and control regime.
-- Capture of the regulators by the industry is more likely.
-- Anticompetitive problems (i.e., barriers to entry, collusion) could be created by bringing firms in an industry together.

Current Uses: Self-Certification: DOT auto safety regulation; consumer product safety (e.g., clothing flammability standards); tax payment. Self-Regulation: National Association of Broadcasters' self-regulation of commercial television practices; securities regulation (stock exchanges); HHS and NSF science research regulations, which require self-monitoring, self-investigations, and self-reporting by institutions that receive federal grants. Underwriters Laboratory certification on electrical appliances.

Potential Uses: Self-Certification as replacement for FDA medical devise approval; USDA prior label approval; EPA permits for modifications of production processes in the electronics industry. Self regulation: nursing homes; seafood safety.

4. <u>Use of Contractual Arrangements:</u> Use contractual arrangements, such as insurance and enforceable contracts between the regulator and the regulated party, in place of direct regulation.

a. <u>Insurance-based approaches</u>: The government might refrain from direct regulation if the regulated industry obtained sufficient insurance against the harm the government wished to prevent. Insurers would have an incentive to monitor risks and insure that regulated entities reduced them to desirable levels. The government's role would be limited to making sure that a desirable level of insurance was purchased.

<u>Pro</u>

-- Expands enforcement capacity by enlisting the resources of insurance and surety companies.
-- Avoids unnecessary government intrusion in private industries.

<u>Con</u>

-- May create barriers to entry for small businesses.
-- Could increase the cost of doing business if surety company charges high premium or requires large collateral deposit. Some businesses may be vulnerable to price fluctuations in the insurance market.
-- Insurers may be unwilling to accept innovative new technologies designed to diminish risks.

<u>Current Uses</u>: Oil tanker regulation; fire insurance; workers compensations; crop insurance, etc.

<u>Potential Uses</u>: RCRA

b. <u>Enforceable Contracts in Place of Regul[illegible]</u>: [illegible]gencies could be encouraged to use "enforceable contrac[illegible] way of assuring continued "good practices" by an industry [illegible]or the "good actors" within the industry), instead of imposing regulatory requirements on the industry.

<u>Pro</u>

-- Rewards good behavior; avoids imposing a burdensome regulatory scheme on industries that are behaving responsibly.
-- Allows regulatory agencies to focus regulatory resources on problem areas, rather than requiring agencies to allocate resources to address de minimis problems.

Con

-- Agencies may lack legal authority to use and enforce "private" contracts requiring private firms to follow certain practices.

Current Uses: EPA is presently taking comments on this approach as part of its NPRM on the listing of certain wastes from the dye and pigment industry because of statutory requirement to consider plausible mismanagement.

Potential Uses: If it is acceptable for the dye and pigment industry, can be used for refineries and possible other industries.

5. <u>Establish a Regulatory Budget</u>: The total cost of agency regulations on the private sector would be capped. Each agency would then be limited in the amount of private costs it could impose on private parties through regulation. A variation would include a percentage reduction each year.

<u>Pro</u>:

-- Would reduce the cost of regulations on the economy or would force agencies to find offsets for the cost of new regulations.
-- Would force agencies to set regulatory priorities.
-- Could encourage agencies to rewrite existing regulations in a more cost-effective manner.
-- Agencies would have to defend their proposed regulations vis-a-vis those of other agencies.

<u>Con</u>:

-- Does not take benefits of regulation into account.
-- Difficulty in setting baseline and/or scoring. There is no way to verify actual regulatory spending by the private sector, and likelihood of accounting gimmicks is large.
-- If done by legislation, would shift control over regulatory activity to Congress, thereby inviting micromanagement and frustrating Administration priorities.

6. Use of Information: Information disclosure may be used as a substitute for regulation. Providing information on a product or service, for example, would permit potential consumers to regulate their own behavior, rather than having the government decide for them by banning or restricting use of the product or service.

7. Reducing Barriers to Public Participation: A variety of internal government rules limit the ability of regulators to talk with those to be regulated. While these were issued for good reason to curb abuses ("smoke filled rooms") they now serve more as a barrier to meaningful communication between the rule-writers and the regulated. Consequently, important information is not exchanged and a disconnect has developed between the good intentions of rules and the practical realities of commercial life.

Two paths for improvement exist:

(1) Reduce current barriers -- (a) eliminate all administrative, pre-NPRM, ex parte rules; (b) repeal the Federal Advisory Committee Act (FACA), or carve out exemptions for State/local/tribal governments and/or for technical or scientific advisors. These would be accompanied by simple disclosure of when who met with whom about what (as in EO 12866).

(2) Encourage more consultation -- (a) encourage use of regulatory negotiation; (b) establish a consultation system based on the European model, where government, business, and interest groups meet to negotiate on an industry-wide basis an approach to a perceived problem.

8. Provide incentives for agencies to review existing regulations. Section 5 of E.O. 12866 requires the agencies to review existing regulations. Regrettably, little has been achieved to date. Two suggestions for improvement exist:

(1) Require each agency to respond within a specified period of time to a petition to eliminate a particular regulatory provision. Petitions that must be denied because a particular provision is required by statute could be transmitted to the relevant congressional committees.

(2) Agencies should periodically reexamine the costs and benefits of regulations that impose large costs and repropose rules where the actual costs and benefits differ markedly from those anticipated before the rule was promulgated.

9. Waivers: On any new legislation or reauthorization bill, grant the relevant agency or department head the ability to waive any provision of the new law if a State or local community is overburdened by unfunded mandate requirements, economic or social distress, or has an innovative proposal to improve an economic or social condition or a federal program. The waiver would be temporary and the community would have to provide a strategic plan.

10. Streamlining Paperwork: Many small businesses, local governments, and citizens know their Federal government primarily through its forms and reporting requirements. Because these are frequently unintelligible, duplicative, burdensome, annoying, or nonsensical, they are among the most often criticized aspects of the government. In fact, to many, paperwork is the Federal government. Streamlining government paperwork can be done through a number of means: (1) establishing a "paperwork budget" and reducing "burden hours" by a specific percentage; (2) reviewing individual forms and requirements to reduce and eliminate unnecessary forms and requirements; (3) using technology to make information more easily submitted and to make better use of information submitted. Other ideas include giving agency heads authority to waive information requirements if it can be demonstrated that certain information can be more effectively collected by another means or from another source.

11. Eliminate Statutory Deadlines. Seek legislation to eliminate or extend statutory deadlines.

12. Federalism Issues. A final crosscutting issue concerns the scope of federal regulatory authority and the role of State and local governments. In addition to asking whether government should regulate, we need to also scrutinize which level of government should do the regulating.

13. Customer Service Proposals:

- Require a political appointee in each agency to certify that he or she has read in its entirety each rule that is promulgated.
- Require each agency to establish an ombudsman.
- Encourage compliance rather than penalties:
    - o Prohibit agencies from appraising an employee's performance on the basis of the number of citations he or she issues.
    - o Give those who violate regulations notice and an opportunity to correct the violation before issuing a citation (exclude imminent health and safety risks).

THE WHITE HOUSE

WASHINGTON

December 21, 1994

MEMORANDUM FOR THE VICE PRESIDENT

CC: THE CHIEF OF STAFF

THROUGH: CAROL RASCO
KATIE MCGINTY

FROM: Paul Weinstein (DPC), Tracey Thornton (Leg), Sally Katzen (OMB), Michael Davis (OEP), Peter Yu (NEC), Marvin Krislov (Counsel)

SUBJECT: **Takings Strategy**

Prior to the midterm election, the working group on takings was grappling with the issue of whether the Administration should compromise on takings amendments to secure passage of the President's environmental agenda. The election has radically changed this situation. Takings, which is addressed in the House Republican "Contract", is likely to be a centerpiece issue in the next Congress. It should be noted that "takings" means different things to different people. "Takings" in the constitutional sense means any government "taking" of private property that invokes the Just Compensation clause and requires that the government compensate the property owner. The courts have historically determined the point at which this occurs. However, many proponents of "takings" or "private property" legislation attempt to provide for compensation well beyond that required by the Constitution or to impose onerous administrative requirements on regulatory agencies unrelated to constitutional requirements. The Republican "Contract", and most other legislation proposed (by both Republicans and conservative Democrats) in the past, falls into both categories.

*The purpose of this memorandum is to outline options for responding to efforts to pass takings legislation. Option 1 recommends the President draw the line early against accepting legislative changes to takings. Option 2 differs mainly from Option 1 in that it proposes utilizing the Cabinet (in testimony, etc.) to deliver a strong message and hold the President's involvement (and veto threat) until the most strategic time. Option 3 is a quiet engagement approach that places a greater emphasis on engaging the Hill in crafting legislation and a communications strategy for developing a non-big government approach to protecting the legitimate rights of landowners from unreasonable takings while ensuring the ability of the Federal government to* *effectively protect the health and safety of our citizens and our natural environment. Option 3 does not assume the President can sustain a veto on takings legislation agreed to by Senate and House moderates.*

**Political Landscape**

The takings issue presents a potentially difficult dilemma between sound policy and the potential reaction of the public to our position. Unlike unfunded mandates or risk legislation, aggressive takings legislation would do more than simply change the techniques used for funding and managing federal regulation; it would also alter almost 200 of years constitutional law. Tampering with constitutional requirements without a principled reason is hardly the type of legacy this Administration wishes to leave. On the other hand, the private property rights movement is strong and growing, and opposition to takings legislation without, at a minimum, changing the debate so that people see the legislation for what it really is, could cast the Administration as being unsympathetic to property rights. Providing an alternative means of addressing legitimate concerns of property owners would allow us to diminish this concern to some extent.

It is important to recognize that opposition to property rights legislation proposed is broad-based -- reaching well beyond the environmental community. Civil rights, religious, health care, consumer, labor, planning, sportsmen, and other groups are clearly on record opposing such legislation. Over 30 state Attorneys General recently wrote the Congress opposing takings legislation that goes beyond what the Constitution requires. The National Conference of State Legislatures have strongly opposed such legislation as well. It is not clear that these groups would oppose legislation to address the legitimate claims of property owners, but they clearly oppose measures as broad and intrusive as those discussed below.

**Background**

The Fifth Amendment of the U.S. Constitution states that "private property" shall not "be taken for public use without just compensation." In other words, if the government needs your land to build a public road or a hospital, the government must pay compensation. Whether a regulation results in a "taking" generally depends on a number of fact specific considerations, including the relative intrusiveness of the regulation, its economic effect on the property owner, and the owner's particular circumstances and investment-backed expectations. For any case where the landowner feels aggrieved, the Tucker Act and the U.S. Constitution guarantee such landowner the right to bring suit in the Federal Courts to seek compensation.

Those opposed to governmental, and particularly environmental, regulation have seized on and exploited the public's concern over protection of private property in an effort to thwart legitimate governmental action to protect the public interest. These efforts typically, and sometimes successfully, portray necessary regulation and protection of private property as mutually exclusive, which of course they are not. These "property rights" interests have grown into a powerful force composed of many organizations and backed by conservative think tanks.

The private property rights or takings debate has been brought to light in the past few years primarily in the context of the Clean Water Act Section 404 "wetlands" program and the Endangered Species Act (ESA). Many feel that these programs impose substantial and unnecessary burdens on landowners. It is important to remember that this Administration has developed a solid roadmap (not yet completely implemented) for improving the wetlands program and is currently in the process of developing a package of administrative reforms for the ESA.

The private property rights movement has been active legislatively at both the state and federal levels. Bills to advance the "private property" cause have been introduced in the majority of state legislatures, although so far they have been enacted in only a few states. In the Congress, many and varied bills have been introduced in both Houses. In general, the bills attempt to thwart environmental, health and safety regulation by at least raising the specter of requiring compensation as a result of virtually all governmental regulation, thereby making such regulation economically infeasible.

Major federal legislative efforts in the 103rd Congress include:

• Senator Dole/Heflin's legislation (S. 2006) to require complex takings analyses before a wide range of governmental action can take place. A version of this bill, improved by changes made by Senator Bumpers but retaining a problematic judicial review provision, was adopted as an amendment to the Safe Drinking Water Act in the Senate. The Dole legislation is cumbersome, but it is better than the "Contract" bill because it does not address the compensation issue.

• Representative Tauzin's proposal to provide compensation for any governmental action that diminishes the value of any piece or portion of property by more than 50%.

## Republican "Contract"

The House Republican "Contract" bill is more extreme than any prior legislative proposals. The "Contract" would provide that property owners are entitled to compensation for agency actions that reduce the value of property. This title would:

• Entitle property owners to compensation "for any reduction in the value of property owned by the property owner" that results from "a limitation on an otherwise lawful use of the property imposed by final agency action" and that "is measurable and not negligible." Reductions in the value of ten percent or more are deemed not negligible. The entitlement extends by express definition to "any interest in land" and "any proprietary water right."

• Require that if a property owner unilaterally demands compensation for a particular agency action, the agency must stay its action and make an offer to compensate the property owner for the diminution in the value of the property.

• Provide that if the property owner rejects the offer, the property owner may submit the matter for arbitration before a private arbitrator, whose decision is binding on both the agency and the property owner.

The budgetary impacts of this bill are considerable. Significant costs will be incurred not only from the costs of compensation, which might range into the tens of billions of dollars, but also from the costs of appraising, disputing, and arbitrating these issues whenever a demand for compensation is made. In addition, legislation will create a need for a new bureaucracy to respond to the flood of requests for permits and other regulatory rulings. Finally, there are constitutional questions as to whether Congress can remit the adjudication of statutory or constitutional rights to a private person.

**Strategy for the Next Congress**

The working group looked at a range of options aimed at resolving the takings issue. It is the opinion of all the members of the group that takings legislation has the greatest potential to damage the Administration's ability to protect public health, safety, and the natural environment. We have narrowed the list of options down to three. All three options agree with respect to the desired substantive outcome. All offices agreed that the President should be prepared to veto any legislation that requires compensation to property owners beyond that required by the Just Compensation Clause of the Constitution, and that less extreme legislation consistent with the attached principles should be acceptable to the Administration.

In addition, all offices strongly endorse developing a coordinated communications strategy designed to change the debate on takings, and believe that such a strategy is key to holding off extreme takings legislation. Using the model that defeated the Arizona takings proposition in November, we would work to develop a coalition of sportsmen, religious groups, mayors and governors, environmentalists, and public health advocates who are opposed to changing the takings law for different reasons. Attached (attachment 2) is a draft strategy developed by OEP which they plan to discuss with interest groups subject to your approval.

The difference between the options lies essentially in the degree to which the Administration, and particularly the President, become engaged in the debate on this issue. Option 1, proposes that the President identify this issue as a "core" issue, and be actively engaged in the debate including an early and public veto threat. Option 2 is essentially the same as Option 1 except that it recommends that the cabinet secretaries lead the attack against the "Contract" takings legislation and delay the threat of a Presidential veto until the appropriate time. Option 3 proposes that the Administration work quietly with its friends on the Hill to craft an acceptable legislative alternative to the "Contract", but that the Administration not publicly engage on the issue.

**Option 1: Draw The Line**

Several members of the working group believe that of all the "trinity" regulatory issues, changes to the takings law is one legacy this President does not want. They support a riskier, but perhaps bolder, strategy. Proponents of this option propose the President identify the takings issue as a "core issue" and pro-actively exploit the radical nature of the Contract bill. In particular, they proposes that the President

• State that he supports sound unfunded mandates, risk, and cost-benefit legislation, but believes that the takings bill is unwise as a matter of governance and unsound as a matter of law;

• Adopt a public position against the Contract bill and emphasize that the bill represents:

- an unjustified corruption of two centuries of constitutional jurisprudence; and
- an extreme measure designed to end government as we know it--writing the final chapter of the Reagan-Stockman dismantling of government; and

• Proceed administratively (aggressively), including either modifying or augmenting the Reagan Executive Order so that it appears stronger.

• Threaten to veto any takings bill, such as the one included in the "Contract", that fundamentally changes the takings jurisprudence so carefully developed by the Founders and the Supreme Court.

Analysis

As the Republican Contract makes clear, the regulatory issues may be defining issues for the Administration and the next election. Accordingly, we face a critical strategic choice: does the President pursue compromise and damage control, or does he stake out an aggressive position. Both approaches have familiar weaknesses: a compromise strategy may engender criticism that "no one knows what the President stands for" and afford the President no credit from either side. An aggressive position could force a politically difficult veto (and possible override) if the legislation is not substantively changed and the debate is not recast according to the communications strategy.

**Option 2: Modified Draw The Line**

Proponents of this approach believe that it is vital for the Administration to engage fully in the debate over takings legislation -- including the President at the appropriate time. In this regard, some of the group believe that Option 1 should be modified as noted below:

• We must first agree on a set of principles (Attachment 1) which clearly outline the Administration's position. The principles should be clear to all on where we draw the line -- the President should veto any legislation that provides compensation beyond the levels required under the current law and the Constitution.

• In early to mid-January, the Cabinet Secretaries and Assistant Secretaries should mount an aggressive campaign against the "Contract" takings proposal. Using the principles noted above, we should tell the public how bad the bill is -- more red tape, more litigation, reduced protection of public health and safety and the environment, and it is a budget buster. In addition, we should publicize the Administration's initiative to provide regulatory relief to the small landowner. For example, we can package a fairly impressive list of reforms for the wetlands and endangered species programs. Further, we could advocate legislative reforms to the judicial takings process that would reduce the expense and delay experienced by small landowners.

• At the appropriate time the President and the Vice President should speak unequivocally about the issues raised in the "Contract" on takings. The President should make clear his commitment to the protection of property rights while saying the "Contract" bill simply goes to far and will be bad for the middle and working class Americans. The timing of the President's involvement should be discussed further. The major point here is that unlike Option 1, we do not believe the President should come out immediately with a veto message on takings nor issue an Executive Order. Rather we should use our Cabinet (in testimony, etc.) to deliver a strong message and hold the President's involvement until the most strategic time.

As previously discussed in this memorandum, proponents of this approach believe that a well coordinated communications strategy designed to change the debate on takings is vital. Substantial support should be generated to support the Administration's position on takings.

Analysis

Same advantages as Option 1 but with the additional one of providing some flexibility on the Presidential veto threat. This approach requires the White House to effectively coordinate a successful communications strategy. Outside interest groups are already gearing up to respond to Republicans and others on takings legislation.

**Option 3: Quiet Engagement**

Statement Of Principles

Using last year's unfunded mandates strategy as a model, the working group has developed a statement of principles that could guide the Administration's position in relation to compromise legislation (Attachment 1). The principles set forth the Administration's strong and unwavering commitment to protecting private property rights and our recognition that landowners (emphasis on small property owners) must often follow time consuming and expensive procedures when challenging a government decision on a Federal permit or making a claim of a constitutional taking of their property. The principles also propose some general administrative and legislative changes to address any property owners' legitimate concerns with the process. Under this option, these principles will not be made for public consumption but are instead designed to help guide the Administration in its negotiations with the Hill and to provide guidelines for the agencies. Selected sections of the principles may be shared with advocacy groups with whom we will be working to develop a communications strategy.

Advocates of this strategy believe that the key to moderating takings legislation coming out of the Congress lies in a behind the scenes dialogue with key moderates in the Senate, which is traditionally more bipartisan than the House and where the filibuster provides the minority leadership with some additional leverage. We have already had some preliminary discussions with the staff of Senators Bumpers and Baucus. They indicated a desire to work with us quietly on developing a reasonable alternative bill to the "Contract" put forth in the House. Senator Bumpers worked with Majority Leader Dole on legislation last year which we may very well have to accept in some form. It is the strong recommendation of the working group that the President should veto any legislation that provides compensation beyond the levels permissible under current law (Bumpers' and Baucus' staff concur.)

Over the next two weeks Bumpers' staff will be conferring with the staff of the new Senate Majority Leader to see if they can come to some general agreement. Senator Baucus will do the same with Senator Chafee. Since Senator Heflin, who cosponsored the Dole bill last year, is the ranking minority on the Judiciary Committee Subcommittee to which takings legislation will be referred and is up for reelection in 1996, we will confer with his staff shortly. We have also had preliminary discussions with Senators Daschle and Glenn's staff. Daschle's staff favors the attempt at compromise approach and plans to talk to Baucus and Bumpers. Glenn's staff reluctantly concede probable defeat and plan to talk to Kennedy and Moynihan's staffs. We plan to meet with Bumper's and Baucus' staff in approximately a week and provide them with our principles pending your approval.

This group also recommends reconvening the working group of Democratic Senators that was put together last year by White House Legislative Affairs. This group includes the staff of Senators Biden, Bumpers, Baucus, Breaux, Nunn, Johnston, Conrad, Daschle, Glenn, and Hollings.

If Bumpers' is unable to reach a compromise with Dole, we will need to assess our strength to sustain a veto in the Senate and work with the Democratic leadership to develop some amendments that may siphon off a few Republicans while holding the Democrats.

The key difference between this approach and Options 1 and 2 is that we believe a veto message by the President or a cabinet-led attack against the takings language in the "Contract" could be counterproductive.

Analysis

While there are advocates within the Administration on both sides of the debate on unfunded mandates and risk/cost-benefit analysis, we could find no one within the EOP or agencies who support changing takings law -- except for some administrative improvement to help small property owners get expedited consideration. In addition, compromise legislation, which will be difficult to agree on, may feed the criticism that "no one knows what the President stands for." On the other hand, many believe that the takings/private property debate resonates much more strongly with the American people than either unfunded mandates or risk, and therefore, we should not put the President in the position of having to oppose takings legislation.

**Recommendation**

The working group on takings could not reach a consensus position.

**Decision**

_____ Option 1

_____ Option 2

_____ Option 3

_____ Discuss Further

Attachment 1

# PROPERTY RIGHTS STATEMENT OF PRINCIPLES

The Clinton Administration has been, and continues to be, a champion of the rights of the Nation's landowners. The President firmly believes that private ownership and use of property is a cornerstone of this country's heritage and tradition -- as well as our economic strength.

The President and his Administration are committed to ensuring that Federal programs do not impose unwarranted burdens on landowners. In this regard, the Administration will redouble its efforts to take administrative action to make regulatory programs more fair, flexible, and efficient. Further, the Administration will work with the Congress on legislation that addresses legitimate concerns without sacrificing effective protection of human health, public safety, and the environment.

At the same time, the President is concerned that "property rights" legislative proposals currently being considered inappropriately inhibit the ability of Federal, State, and local governments to effectively protect the health and safety of our citizens and our natural environment; and result in more bureaucracy, more red tape, and increased taxes -- an inequitable result for middle and lower-income families and individuals. Further, such proposals create what is essentially a "bad neighbor" policy -- where neighbors will have to fight it out among themselves to protect their property.

The following principles will serve as a guide for the Administration in its discussions with Congress, interest groups, and the public. These principles cover a range of specificity from general Administration positions to specific programmatic reforms for wetlands and endangered species programs.

## Private Property Rights Principles

1) The Clinton Administration firmly believes that private ownership and use of property is a cornerstone of this country's constitutional heritage and historical tradition, as well as its economic strength.

2) The Fifth Amendment to the Constitution provides that private property shall not be taken for public use without just compensation.

3) The Clinton Administration recognizes fully its obligation to ensure that the requirements of the Just Compensation Clause of the Constitution are fulfilled at all times by making it clear that all executive branch agencies have a fundamental responsibility to protect property rights and to ensure that landowners are free from unwarranted burdens on private property. Agencies will continue to assess the impacts of their activities on private property.

4) The Clinton Administration recognizes that many government actions affect private property in some way -- often the value of the property will be enhanced and sometimes the value of property will be diminished.

5) The Clinton Administration recognizes the importance of Federal, State, and local government programs that protect the Nation's health, safety, and environment. In most cases these programs are working in harmony with landowners and many of the negative perceptions concerning property rights are not consistent with the facts. For example, approximately 95 percent of all Federal wetland permits are issued.

6) The Clinton Administration recognizes that landowners must often follow time consuming and expensive procedures when challenging a government decision on a Federal permit or making a claim of a constitutional taking of their property. Accordingly, the Administration will respond through administrative action where possible and work with the legislative and judicial branches to streamline regulatory and compensation procedures for

**landowners. Such action will include, but will not necessarily[1] be limited to the following:**

- *Establishment of a small landowner assistance office to provide information to property owners on regulatory procedures and requirements and on the procedures for filing a claim for compensation for an alleged taking. The office will review complaints and advocate to the relevant agency or department in favor of those which they believe have merit;*

- *Streamline procedures for landowner compensation where the government and the landowner are in agreement that a Federal action has resulted in a regulatory taking;*

- *Establishment of an administrative appeals process for landowners who are denied permits under the wetlands rules. This streamlined process will allow landowners to challenge permit decisions without the expense and time required if they go to court -- currently a landowner's only recourse;*

- *Establishment of an administrative appeals process for landowners that disagree with wetlands jurisdiction decisions. This will provide significant relief for landowners who under the current system can challenge a jurisdictional determination only after applying for a permit and going to court;*

- *To increase predictability and reduce delays, establish deadlines for making permit decisions;*

- *Simplify the permit application process by creating across agencies one application for small property owners and a one-step process for applying;*

- *Base Endangered Species Act (ESA) decisions on sound science by requiring formal, independent scientific peer review of all proposals to list species and all draft plans to recover species;*

- *Give people quicker ESA answers and greater certainty by: speeding up the permitting process for low impact activities, making compliance*

[1] Many other wetlands and Endangered Species Act reforms may be possible and are currently under consideration.

*inexpensive and quick for small-scale activities; identifying at the outset activities on private lands that are compatible with the ESA, so as not to tie up land use and development unnecessarily; providing certainty to landowners who participate in conservation planning, and protecting them against later demands for additional mitigation and payments;*

- *Treat private landowners more fairly by: facilitating economic use of private land by acquiring additional habitat to be protected, from the military when bases are closed, by enrolling existing federal lands in habitat reserves, by arranging for purchases of RTC lands, etc.; creating presumptions in favor of economic use of land by private owners whose activities create only negligible impacts on ESA listed species; creating presumptions in favor of economic use of land by individual homeowners, and small tract, low impact activities;*

- *Providing incentives to landowners who voluntarily agree to enhance habitat on their lands by insulating them from restrictions if they later need to bring their land back to its previous condition.*

- *Setting priorities in the listing of species to ensure that public and private resources are used as efficiently and effectively as possible.*

7) **The Clinton Administration will work with the Congress to ensure that individual property rights are protected and that the legitimate interests of the public are not diminished. In this regard, the Clinton Administration will support property rights legislation that is consistent with the above principles.**

8) **The Clinton Administration will not support legislative proposals that establish unnecessary requirements for compensation that go beyond what is required by the Constitution or inhibit the ability of Federal, state, and local governments to protect the health and safety of our citizens. Current legislative proposals, including the Contract with America legislation, could adversely affect:**

• *ZONING LAWS, including those that prevent the establishment of an adult bookstore next to the neighborhood school or church;*

• *WORKER HEALTH AND SAFETY LAWS, including those that require employers to protect employees from safety and health hazards in the workplace, as well as child labor laws;*

• *ENVIRONMENTAL LAWS, including those that prevent landowners from storing barrels of toxic waste near a neighborhood or by a school.*

• *CIVIL RIGHTS LAWS, including those meant to halt unfair housing practices or job discrimination;*

9) **The Clinton Administration will not support legislation that establishes arbitrary thresholds for compensation beyond which is required by the Constitution. Further, such an approach:**

- *creates a bad neighbor policy and unnecessary layers of wasteful bureaucracy, more red tape and more litigation. It would be unjust to compensate landowners who cause pollution and/or devalue their neighbors property.*

- *is a needless budget buster -- paying polluters and potentially costing taxpayers billions;*

- *raises significant constitutional concerns.*

Attachment 2

## COMMUNICATIONS STRATEGY

### Define the Debate

The primary goal is to ensure that the Republican Contract's takings clause does not slip through under the radar screen. Environmental agencies and NGO's are currently doing research to help with this. Most energies will focus on clearly defining 10–30 specific examples that show how bad this clause is (creating "poster children" that can compete with the poster children the Wise Use movement has created).

One such example: It will be impossible to enforce SMCRA, meaning rivers will again run orange in Appalachia and the health of children (not to mention the property values of their parents) will be in decline.

Another example: FERC will have difficulty moving in any direction on licensing power lines. If they refuse to grant a license, the power generator will file a claim. And if they do grant a license, those homeowners whose property abuts the transmission line corridor will file claims of their own.

Once this research is further along, the community will start a series of events that show the impact of these examples. The events will be visual and will involve real folks. If the stories are compelling enough -- and they will be -- they will take on lives of their own.

### Outreach to Other Constituencies

The environmental community and agencies believe it's best to have a spokesperson other than an environmentalist leading this effort. This strategy was used in defeating Arizona's takings legislation by 60 percent. The debate is more likely to be won if people realize this is a raid on the Treasury and an attack on the public's health and safety. The environmental NGO's have begun to meet with other constituencies -- for example, they recently met with AFL-CIO officials.

This process needs to take place inside the Administration as well. The Departments of Labor and Justice and the Office of Management and Budget, for example, may have the best examples of the horrible impact the takings clause would have. Each department needs to be doing the same kind of research that the environmental agencies have undertaken.

NATIONAL PERFORMANCE REVIEW

NATIONAL PERFORMANCE REVIEW
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FAX TRANSMITTAL SHEET

DATE: ____________

NUMBER OF PAGES: 7, incl. cover

TO: Jennifer Klein

TELEPHONE NUMBER: ____________

FAX NUMBER: ____________

FROM: Jean Logan

COMMENTS: Hi. Hope this is helpful
Happy holidays. I'll look forward
to meeting you Jan. 3rd.
J.

P.S. my memo to Mike was based
on an earlier draft of his memo — hope its
not too confusing!

From: Jean Logan

Hi Mike-

It was nice to meet you in person today. I'm realy looking forward to working with your group.

Your draft memo was faxed to me a little while ago for review, and I just wanted to share a couple of my thoughts. There are two things that I know the Vice President is interested in: big, bold, "outrageous" (his word) ideas, and developing a customer service approach to regulation. In light of that, I'd recommend that you modify the "Goals/Objectives" portion of your memo slightly, by focusing on the bold ideas theme just as you have, and by discussing the need to work with affected parties and other regulators to develop a comprehensive "customer friendly" regulatory strategy.

I think that recognizing conflicting statutory requirements, and developing legislative proposals would necessarily follow from such an approach, and don't need to be stated as our overarching goals.

Hi--just got off the phone with you, so here are a few more thoughts as we discussed

On page 2: proprosed language under "Timetable"

We are currently scheduled to present our recommendations to the VP on _____, *(Mike--are you sure about Rasco going to the Pres in feb? This is news to me. My understanding is that we'll have a couple months of presentations to the VP and reg group, and that decision making will begin in early March, participants to be determined)* At that meeting we should be prepared to present alternative models of government influence in the workplace/labor arena.

While this is a very short time frame, please bear in mind that our purpose is not to do a rule-by-rule, regulation-by-regulation review. Rather, we should be developing dramatic models for reforming/revamping the federal governement's approach to workplace safety and labor regulation. And in line with a customer approach, we want to consider not just well defined regulatory schemes (e.g.OSHA) individually, but also look at the impact of all the various regulatory schemes on the businessman as he attempts to meet societal goals of health and safety. We need to consider what other areas of regulation overlap with workplace/labor regulation, and do what we can to bring the right people into our discussion

I would like our first mtg to be _______. At that time, we will discuss possible bold approaches, set a preliminary agenda for our meeting with the VP, and assign briefing paper responsibilites. I would then like to meet two days later on... to continue fleshing out our proposals. At that second meeting we may well want to include some folks from the other regulatory sectors whose area of regulatory oversight overlaps with ours.

Mike--I hope this is helpful--I think you're very wise to ask people to start thinking about this now, and to come prepared with bold ideas on the 4th. And I'm sure you're right that there is already research out there--altho it might be wise to encourage people to look in unusual places besides your classic repositories of regulatory ideas (e.g. OECD, Regulation magazine, previous studies in Carter, reagan, bush years etc) For instance, I've found some interesting things going on in Chile (privatization of social security), S africa (non binding codes) etc.

Have a GREAT holiday; my office will know how to reach me and I'll be checking voice mail, so feel free to track me down if need be.

Sorry so messy —

D.

THE WHITE HOUSE

WASHINGTON

December 20, 1994

**MEMORANDUM FOR TIM BARNICLE, ASSISTANT SECRETARY FOR POLICY, AND MEMBERS OF THE WORKPLACE SAFETY AND LABOR WORKING GROUP**

**FROM:** Mike Schmidt, White House Domestic Policy Council

**SUBJECT:** Regulatory Reform Initiative

Thank you for your participation in the Administration's regulatory reform initiative. As you know, the Vice President is initiating a bold regulatory reform effort aimed at developing a new paradigm in the way that the Federal Government seeks to achieve its goals and objectives by improving the current regulatory process and reducing conflicting statutory requirements and unnecessary regulations. The purpose of this effort will be to decrease the regulatory burdens currently shouldered by individuals, the private sector, and state, tribal, and local governments.

You have been asked to be a member of the working group looking at Workplace Safety and Labor Regulations, which I have been asked to head. In my opinion, the success of this effort relies heavily on your knowledge and expertise. You have had the opportunity to see both the positive and negative aspects of the regulatory system as it applies to work safety and labor. We all know that the problem is frequently one of good people being trapped in bad systems, and I want to work with you to find out what obstacles you face in the regulatory process, and what changes can be made that would allow you to do your work better.

**Goals/Objectives of the Review**

In order for this review to be successful, we need to focus on regulatory philosophy and systems, not individual regulations. Given this charge, the Work Safety and Labor Working Group has been asked to come up with recommendations in three areas: First, recommendations that include bold, innovative, and "outrageous" ideas for changing the regulatory process, such as moving to market incentives such as voluntary regulatory structures, multi-media regulation, streamlining agency responsibilities, increasing waiver authority, fostering regulatory simplicity including one-stop shopping and single forms for a series of regulations, and establishing a presumption against issuing new regulations; second, a discussion of the need to work with affected parties and other regulators to develop a comprehensive "customer friendly" regulatory strategy; and third, a review and identification of conflicting statutory requirements that are driving the creation of unnecessary regulations and a possible legislative proposal (or proposals) that would reduce such requirements.

## Timetable and Agenda for Action

Obviously, the task is an enormous one. I have also just found out that we are currently **scheduled to give a presentation to the Vice President on January 17. At this meeting, we should be prepared to present some alternative models of government influence in the workplace safety/labor arena.** Given this extremely short time-frame, we cannot look at every area of Workplace/Labor regulation. Similarly, our purpose is not to do a rule-by-rule, regulation-by-regulation review. Rather, we should be working toward developing dynamic models for reforming/revamping the federal govenment's approach to workplace safety and labor regulation. Therefore, I propose that we narrow our focus to two-or-three areas of regulation that are particularly controversial and burdomesome on individuals, the private sector, or state and local governments, and focus our attention on those areas.

I would like to have our **first meeting on Wednesday, January 4, from 1:00 to 3:00pm in room 211 OEOB.** At this meeting, I would ask that you bring to the table your recommendations for the two or three regulatory areas within the workplace safety and labor arena that we will focus our attention on. At this meeting, we will discuss any alternative approaches to this process, and discuss the timeline for meetings that we will need to follow in order to be ready for a January 17 briefing. We will also set a preliminary agenda for our meeting with the VP and assign briefing paper responsibilities. I have attached a draft timeline and agenda for your review and comment. This meeting will be extremely important to the entire process, so please plan on attending.

After coming to a decision on a process and timeline, I would propose that the group meet again on **Friday, January 6, 1995, from 1:00pm to 3:00pm in room 476 OEOB.** At this meeting, I would ask all members to come prepared with two documents. First, in each of the two/three areas in which you have knowledge and experience that we decide to focus on, a list of problems/obstacles in the regulatory process that you would like to see corrected. Second, a list of recommended solutions to these problems/obstacles. The Administration is suggesting a "Blue-Sky" approach to this process (as in, "the sky is the limit"), in an effort to facilitate the flow of ideas and comments. So please bring a range of suggested solutions, both bold and conservative. The important thing to remember is that the focus of this exercise is to come up with ways to reduce the regulatory burden on individuals, the private sector, and state, tribal, and local governments, and also to begin to put together alternative models of government influence in the workplace/labor arena.

Because of the holidays and the short time frame that we have been given, it is important that you bring as much information to the first two meetings as you can, so that we can hit the ground running. I assume that, given your knowledge of these issues, you already will have a pretty good idea which areas we need to focus on and can begin working on the two documents for the meeting on Friday, January 6 almost immediately, without waiting for an "official" decision to be made at the meeting on January 4. I would also suspect that a number of studies and research has already been done in these areas that you can draw on in coming up with proposed solutions.

If you have any comments or questions on any of this, please do not hesitate to contact me at: 202-456-5567; if you cannot reach me, feel free to contact my assistant, Meghan Kelly, at 456-2846. Thank you again for your assistance on this important Administration initiative.

## TENTATIVE TIMELINE AND AGENDA FOR WORKING GROUP MEETINGS

**JANUARY 4, 1995:**
At this first meeting, we will determine the two or three areas of regulation that we will focus our attention on. This meeting will also be the place for us to discuss any alternative approaches to this process, and to discuss the timeline for meetings that we will need to follow in order to be ready for a January 17 briefing.

**JANUARY 6, 1995:**
The second meeting will focus on the recommendations and ideas for reform of the regulatory process in each of the two/three chosen areas. To this end, bring 2 - 5 pages of ideas which would facilitate a more productive and effective regulatory process. At this meeting, we will finalize a timeline for future meetings.

**JANUARY 10 or 11, 1995:**
Agenda to be determined.

**JANUARY 13, 1995:**
Agenda to be determined.

**JANUARY 16, 1995:**
Review final recommendations and presentation for Vice President on January 17.