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COMMENT

High Hopes and Failed Expectations: The Environmental Record of the 103d Congress

by James E. Satterfield

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Congress had tried and failed to reauthorize the Federal Water Pollution Control Act (FWPCA),¹ the Endangered Species Act (ESA),² and the Resource Conservation and Recovery Act (RCRA).³ Its attempt to elevate the U.S. Environmental Protection Agency (EPA) to a cabinet-level department had been blocked in the House of Representatives, and its attempt to reform the General Mining Law of 1872⁴ had been blocked in both houses.⁵

The new Congress would be different, many pundits predicted. A Democrat was President for the first time in 12 years, and Democrats held majorities in both houses of Congress. Environmentalists predicted that the union of these forces would facilitate the passage of significant environmental legislation. And the new Congress had an ambitious environmental agenda: Not only did the FWPCA, the ESA, and RCRA⁶ need reauthorizing, but Superfund⁷ authorization was set to expire, state and local governments called for revisions to the Safe Drinking Water Act (SDWA),⁸ and many legislators still supported mining law reform.

This Comment reviews the environmental record of the 103d Congress. It follows the course that Congress took in attempting to reauthorize and reform these laws.⁹ It also examines some of Congress' other failures, as well as its isolated successes. It analyzes the reasons for these failures and considers the possibilities for environmental legislation in the 104th Congress, when Republicans will have majorities in both the Senate and the House.

1. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

2. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

3. 42 U.S.C. §§6901-6992k, ELR STAT. RCRA §§1001-11012.

4. 30 U.S.C. §§22-54 (1988).

5. For further discussion of the 102d Congress' environmental record, see James E. Satterfield, *A Tale of Sound and Fury: The Environmental Record of the 102d Congress*, 23 ELR 10015 (Jan. 1993).

6. RCRA reauthorization received almost no congressional attention during the 103d Congress. See *RCRA Reauthorization Unlikely This Year*, CRS Environmental Policy Specialist Says, 23 Env't Rep. (BNA) 3108 (Apr. 9, 1993); *No Broad RCRA Reauthorization Foreseen; Recycling/Solid Waste Transport Bill Possible*, 24 Env't Rep. (BNA) 2038 (Apr. 1, 1994).

7. Superfund is the popular name of the Comprehensive Environmental, Response, Compensation, and Liability Act (CERCLA). 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.

8. 42 U.S.C. §§300f to 300j-26, ELR STAT. SDWA §§1401-1465.

9. See *supra* note 6.

When the 103d Congress convened on January 5, 1993, many observers believed that it would make up for the dismal environmental record of its predecessor. The 102d

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The Backdrop

Before considering the 103d Congress' attempts to complete its environmental agenda, it is important to look at its entire legislative agenda. During the 103d Congress, efforts to reform health care, reduce the deficit, combat crime, and approve trade pacts such as the North American Free Trade Agreement consumed enormous amounts of congressional time. And, in the end, time was the enemy of much of the 103d Congress' environmental agenda. But it was not the agenda's only enemy.

A triad of principles supported by conservative legislators, and dubbed the "triple threat" (or "unholy trinity") by environmentalists, dogged environmental legislation throughout the 103d Congress.¹⁰ The triad calls for an end to "unfunded mandates" that the federal government imposes on state and local governments, an expanded definition of federal action constituting "takings" and thus requiring compensation to private property owners, and a requirement that federal agencies undertake comparative-risk and cost-benefit analyses before issuing regulations.¹¹

It is also important to remember that although Democrats held majorities in both the Senate and the House during the 103d Congress, this was not tantamount to control. Especially in the Senate, where 60 senators are needed to defeat a filibuster,¹² a minority of legislators can often thwart legislative action. At the start of the 103d Congress, there were 57 Democrats and 43 Republicans in the Senate. In the House, there were 258 Democrats, 176 Republicans, and 1 Independent.¹³ Furthermore, some conservative Democrats sided with Republicans on environmental issues. This ideological makeup set the stage for some fierce political battles.

Superfund Reauthorization

The Development of Comprehensive Reform Proposals

From the beginning of the 103d Congress, Superfund reauthorization was a top priority. The statute only provided for appropriations from the Superfund trust fund through September 1994,¹⁴ and the taxing authority that funded the program was due to expire in December 1995.¹⁵ In addition, the program's shortcomings had received widespread attention, and virtually every interest group, from environmentalists to industry and insurers, was calling for its reform.¹⁶

At the beginning of the first session, legislators introduced

a variety of bills addressing isolated aspects of the statute. Sen. Frank Lautenberg (D-N.J.), Rep. Christopher Smith (R-N.J.), and Rep. Robert Torricelli (D-N.J.) introduced bills to limit municipal liability.¹⁷ Sen. Alfonse D'Amato (R-N.Y.) and Rep. John LaFalce (D-N.Y.) introduced bills on lender liability.¹⁸ And Rep. Al Swift (D-Wash.) introduced a bill to require EPA to establish a program to encourage voluntary cleanups.¹⁹

But it was clear early on that the primary vehicle for Superfund reauthorization would be a comprehensive reform bill. In July 1993, the Clinton Administration convened an interagency taskforce to develop a proposal on comprehensive reform.²⁰ The taskforce included White House domestic and economic policy advisors and representatives from EPA, most cabinet-level agencies, and the Office of Management and Budget.²¹ In a June 30, 1993, letter to EPA Administrator Carol Browner, Rep. John Dingell (D-Mich.), chairman of the House Energy and Commerce Committee, and Representative Swift, chairman of that committee's Subcommittee on Transportation and Hazardous Materials, requested the Administration to produce a bill before Congress' 1993 Labor Day recess.²² Nevertheless, the interagency taskforce set November 30, 1993, as its target for producing a bill.²³

In December 1993 and January 1994, the Administration released draft "legislative specifications" the taskforce had prepared. The draft specifications proposed replacing EPA's use of applicable or relevant and appropriate requirements²⁴ with national health-based standards. Under the specifications, EPA would have determined national generic cleanup levels for a limited number of chemicals common to Superfund sites. The cleanup levels would have been different for sites subject to different uses.²⁵ The specifications would have provided for an informal, nonbinding allocation of liability at Superfund sites,²⁶ and a process for expedited settlements of de minimis and de micromis liability.²⁷ They would not have abolished retroactive liability.²⁸ But they

17. S. 343, 103d Cong., 1st Sess. (1993) (Senator Lautenberg's bill); H.R. 540, 103d Cong., 1st Sess. (1993) (one of Representative Smith's municipal liability bills); H.R. 541, 103d Cong., 1st Sess. (1993) (another of Representative Smith's municipal liability bills); H.R. 2137, 103d Cong., 1st Sess. (1993) (Representative Torricelli's bill).

18. S. 1124, 103d Cong., 1st Sess. (1993) (Senator D'Amato's bill); H.R. 2462, 103d Cong., 1st Sess. (1993) (Representative LaFalce's bill). For a discussion of these bills, see Edward B. Sears & Laurie P. Sears, *Lender Liability Under CERCLA: Uncertain Times for Lenders*, 24 ELR 10320, 10329-30 (June 1994).

19. H.R. 2242, 103d Cong., 1st Sess. (1993). These are but a few of the numerous Superfund bills that legislators introduced early in the first session of the 103d Congress.

20. *Administration Launches Group to Draft New Superfund Law*, INSIDE EPA WKLY. REP., July 16, 1993, at 1.

21. *Id.* at 1, 8.

22. *Id.* at 8; *House Committee Leaders Tell EPA Not to Delay Reauthorization Work*, 24 ENV'T REP. (BNA) 416 (July 9, 1993).

23. *Administration Launches Group to Draft New Superfund Law*, *supra* note 20, at 8.

24. See 42 U.S.C. §9621(d), ELR STAT. CERCLA §121(d).

25. *Administration Proposes National Health-Based Standards*, INSIDE EPA'S SUPERFUND REP., Dec. 29, 1993, at 3.

26. *Administration Floats Draft Reforms for Superfund Liability*, INSIDE EPA'S SUPERFUND REP., Jan. 14, 1994, at 1, 3.

27. *Id.* at 2.

28. In August 1993, the U.S. Department of the Treasury floated

10. Some environmentalists discarded the term unholy trinity, considering it blasphemous, and began using the phrase triple threat. See Rena I. Seinzor, *The Reauthorization of Superfund: Can the Deal of the Century Be Saved?*, 25 ELR 10016, 10016 n.3 (Jan. 1995).

11. See *id.*; *Republicans Stand Ready to Transform Agenda*, N.Y. TIMES, Nov. 11, 1994, at A1, A26.

12. See Paul Starobin, *When Clinton Is Ready to Deal . . . Will Dole Be Ready to Talk*, 24 NAT'L J. 2740, 2741 (1992).

13. See NATIONAL COMM. TO PRESERVE SOCIAL SEC. & MEDICARE, CONGRESSIONAL DIRECTORY FOR THE 103RD CONGRESS 17, 57 (1993).

14. See 42 U.S.C. §9611(a), ELR STAT. CERCLA §111(a).

15. See 26 U.S.C. §4611(e) (1988 & Supp. IV 1992).

16. Erin McNeill, *Superfund Tops Agenda of Environmental Panels*, ENVTL. & ENERGY STUDY CONF., SPECIAL REP., Jan. 28, 1993, at 10.

would have limited the liability of municipal generators and transporters at a site to between 4 and 10 percent of total cleanup costs.²⁹

Throughout 1993, a group of representatives from environmental groups, industry, state and local governments, and insurance companies met to develop a reform package of its own.³⁰ The group, named the National Commission on Superfund (NCS), sought to produce a consensus proposal in order to facilitate passage of a Superfund reform bill.³¹ To foster open and meaningful discussions, the NCS excluded federal officials, included (among its industry members) representatives from a wide range of businesses, and included only chief executive officers or their equivalents.³²

The NCS released its proposal on December 21, 1993.³³ The proposal supported the development of national health-based standards that would have allowed for flexibility to account for a limited number of site-specific characteristics. The proposal would have provided for selecting the best available technology to clean up a site for its intended use and for developing a formula to determine cleanup levels for the 100 most frequently occurring contaminants at Superfund sites. The proposal would have required EPA to convene a negotiated rulemaking proceeding shortly after Superfund reauthorization in order to develop the formula. The proceeding would have included all Superfund stakeholders. In addition, the NCS proposal would have only required permanent treatment for so-called hot spots. Permanent treatment would have been the preferred option at "warm spots"; at other spots, either long-term containment or permanent treatment would have been allowed, provided the national standards were "reliably" met. The proposal recommended remediation of groundwater contamination unless the groundwater was naturally unusable or contaminated by non-Superfund sources. Also, the proposal advocated retaining Superfund strict liability, but requiring a mandatory, binding allocation process at every national priorities list (NPL) site. The proposal would have based allocations on the so-called Gore factors, and would have raised taxes on industry to pay for "orphan shares."³⁴

Sen. Max Baucus (D-Mont.), Sen. John Chafee (R-R.I.), Sen. Frank Lautenberg, and Senator Durenberger (R-

Minn.)—all members of the Senate Environment and Public Works Committee, which would address Superfund reform—favored the NCS proposal.³⁵ The proposal the Administration released on February 3, 1994, also favored that approach but differed from it in a few significant ways.³⁶

Unlike the NCS proposal, the Administration's proposal provided for nonbinding allocation of liability among potentially responsible parties (PRPs) and no new taxes to pay for orphan shares. The Administration's proposal would have provided for protection against contribution actions for PRPs who settle their liability to the federal government and pay a premium to compensate the United States for the litigation risk of pursuing nonsettlers.³⁷ The proposal would not have affected retroactive application of the CERCLA liability scheme, but would have exempted prospective purchasers from §107(a)(1) liability if they demonstrated that hazardous substance disposal occurred at the site before they purchased it, that they took reasonably necessary steps to address hazardous substance releases, and that they cooperated with those responsible for conducting response actions.³⁸ The proposal would have required EPA to develop national generic cleanup levels for specific hazardous substances, reflecting, among other things, reasonably anticipated future land use.³⁹ Remedy selection would have been based on long-term reliability rather than permanence.⁴⁰ The proposal would have capped the liability of municipal solid waste generators and transporters at 10 percent of the total response costs incurred at the site,⁴¹ and would have established an Environmental Insurance Resolution Fund to promote settlement of insurance claims related to CERCLA liability for waste disposed of before 1986.⁴² In addition, the proposal would have allowed EPA to authorize states to conduct response activities at NPL sites if it determines that the states have the legal and technical ability to conduct such activities.⁴³

On the day the Administration released its proposal, Representative Swift introduced it as H.R. 3800.⁴⁴ On February 7, 1994, Senators Baucus and Lautenberg introduced S. 1834, a companion bill.⁴⁵ On March 24, Rep. Bill Zeff (R-N.H.) introduced a rival Superfund reform bill, H.R. 4161.⁴⁶ His bill would have eliminated retroactive liability,

proposal to abolish retroactive liability under Superfund. *Treasury Department Suggests Scrapping Current Liability Scheme*, INSIDE EPA'S SUPERFUND REP., Sept. 8, 1993, at 3. Dr. Benjamin Chavis, executive director of the National Association for the Advancement of Colored People, supported the proposal. *EPA Alarmed by Civil Rights Leader's Support of Radical Superfund Fix*, INSIDE EPA WKLY. REP., Oct. 22, 1993, at 1. The idea has many adherents and is likely to resurface in the 104th Congress.

29. *Administration Floats Draft Reforms for Superfund Liability*, *supra* note 26, at 1.

30. *National Commission Calls for Fair-Share Binding Allocation*, INSIDE EPA'S SUPERFUND REP., Dec. 29, 1993, at 7.

31. See Steinzor, *supra* note 10, at 10017.

32. See Steinzor, *supra* note 10, at 10021.

33. *National Commission Calls for Fair-Share Binding Allocation*, *supra* note 30, at 7. The NCS released its final report in 1994. See Steinzor, *supra* note 10, at 10017 n.8.

34. See Steinzor, *supra* note 10, at 10030. "Orphan share" refers to the liability of a company that is unknown, insolvent, or not in existence. See Erin McNeill, *Superfund Bill Moves to Next Level in House*, ENVTL. & ENERGY STUDY CONF., WKLY. BULL., May 16, 1994, at B13.

35. *Consensus Superfund Plan Gets Senate Boost; May Form Basis for Bill*, INSIDE EPA WKLY. REP., Jan. 14, 1994, at 8, 9.

36. *Administration Sends Superfund Bill to Congress; Swift Introduces Bill*, INSIDE EPA'S SUPERFUND REP., Feb. 4, 1994, at 1; see also Steven M. Jawetz, *The Superfund Reform Act of 1994: Success or Failure Is Within EPA's Sole Discretion*, 24 ELR 10161 (Apr. 1994).

37. *Administration Sends Superfund Bill to Congress; Swift Introduces Bill*, *supra* note 36, at 1; *Summary of Administration's Superfund Reauthorization Bill*, INSIDE EPA'S SUPERFUND REP., Feb. 4, 1994, at 2, 7-8.

38. *Senate Version of Administration Proposal for Superfund Reform, Accompanying Summaries, Released February 3, 1994*, Daily Env't Rep. (BNA), Feb. 4, 1994, at S-52 to -53.

39. *Id.* at S-11, S-46.

40. *Id.* at S-11.

41. *Id.* at S-32.

42. *Id.* at S-56.

43. *Id.* at S-22.

44. See H.R. 3800, 103d Cong., 2d Sess. (1994).

45. S. 1834, 103d Cong., 2d Sess. (1994).

46. H.R. 4161, 103d Cong., 2d Sess. (1994).

implemented a "fair share" liability system, and allowed states to administer Superfund programs.⁴⁷ Republicans announced that they would work with the Administration-backed bills,⁴⁸ but the Zelif proposal gained new life at the end of 1994.⁴⁹

Additional opposition to the Administration-backed bills arose from other quarters. In early March 1994, a Natural Resources Defense Council draft memorandum condemned the bills as weak and suggested that given the possibility of amendments further weakening them, environmental groups would probably have to "kill" Superfund legislation, a position environmentalists later disavowed.⁵⁰ Some members of industry raised concerns that the bills would have expanded liability.⁵¹ And an EPA advisory panel found the bills' cleanup levels unclear.⁵² Nevertheless, the bills' principal supporters—Representative Swift and Senator Lautenberg—forged on.

Committee Action

□ *The House Committees.* Representative Swift announced that the pace of Superfund discussions would have to move quickly in order to reauthorize the statute before the end of the 103d Congress. He scheduled his subcommittee's markup of the Administration-backed House bill for April 1994.⁵³ But discussions bogged down over contentious issues, such as remedy selection. In April, Representative Swift convened a series of meetings of industry, government, and environmental group representatives to develop a compromise on remedy selection. Believing that the group was not making progress quickly enough, on April 12, the staff of Representative Swift's Subcommittee on Transportation and Hazardous Materials canceled further meetings of the group, and Representative Swift canceled his scheduled April 27 markup of H.R. 3800. Swift suggested that Superfund reform was in peril.⁵⁴

Then EPA proposed a remedy selection compromise. Under the proposal, EPA would have convened a regulatory

negotiation to set national numeric risk reduction goals and to develop standard formulas for determining cleanup goals for particular sites. The proposal would have continued the current law's preference for treating waste at highly toxic sites, but would have allowed greater flexibility in using containment or other less costly approaches at other sites.⁵⁵ Representative Swift announced that he would use the proposal in a markup vehicle if it received sufficient support from interested parties, and industry and environmental representatives gave the proposal guarded support.⁵⁶

Swift's subcommittee approved a revised H.R. 3800 on May 11,⁵⁷ and the full Energy and Commerce Committee approved it a week later.⁵⁸ The bill would have required EPA to develop a single, national goal for risk reduction and national regulations for chemical contamination, but would allow EPA to consider site-specific factors in developing cleanup plans. The bill would have retained the current law's strict, retroactive, and joint and several liability scheme, but it would have provided for a nonbinding "fair share" allocation of liability among PRPs. The bill also would have provided for an Environmental Insurance Resolution Fund to settle insurance claims relating to pre-1986 waste disposal.⁵⁹

The bill then moved to the House Public Works and Transportation Committee, chaired by Rep. Norman Mineta (D-Cal.). At the time, FWPCA reauthorization legislation was competing for the committee's attention. Nevertheless, Representative Mineta announced that the committee would consider the Superfund bill first. He said that he did not expect to make significant changes to it because the coalition of support for it was so fragile.⁶⁰

On July 22, 1994, Representative Mineta released his "mark" of the bill. His proposal would have allowed EPA to adopt lower groundwater cleanup standards if the bill's higher standard was technically impracticable. It also would have allowed EPA to consider other factors, such as the urgency of using the groundwater as drinking water, if only a small amount of contamination remained and cleaning it up would add significant cost.⁶¹ On July 28, the Public Works and Transportation Committee approved a revised H.R. 3800, including an amendment to extend the Davis-Bacon Act⁶² to cover Superfund sites

47. *Republican Congressman to Introduce Alternative to Clinton Plan*, INSIDE EPA'S SUPERFUND REP., Mar. 23, 1994, at 1.

48. *Id.*

49. In November 1994, Representative Zelif and Sen. Robert Smith (R-N.H.) were reportedly drafting legislation to eliminate Superfund retroactive liability. *Zelif, Smith Revive Effort to Eliminate Retroactive Liability*, INSIDE EPA'S SUPERFUND REP., Nov. 30, 1994, at 1.

50. *Environmentalists Threaten to Halt Debate on Reauthorization*, INSIDE EPA'S SUPERFUND REP., Mar. 23, 1994, at 3; *Environmentalists Back Away From Threat to Kill Superfund Bill*, INSIDE EPA WKLY. REP., Mar. 25, 1994, at 13; *Bliley Reveals to Industry Group Draft of Environmentalists' Legislative Strategy*, Daily Env't Rep. (BNA), Mar. 16, 1994, at AA-1.

51. *EPA Reconsiders Move to Broaden Liability Beyond Hazardous Substances*, INSIDE EPA'S SUPERFUND REP., Mar. 9, 1994, at 9. The Administration's proposal would have expanded liability under CERCLA §107 beyond releases of hazardous substances to include releases of other pollutants and contaminants. See, e.g., S. 1834, 103d Cong., 2d Sess. §404(g) (1994). The provision expanding liability in this way was deleted in committee. See *Superfund Reform Legislation as Approved by Senate Subcommittee on June 14, 1994*, Daily Env't Rep. (BNA), Special Supplement, June 16, 1994.

52. *NACEPT Panel Members Question Cleanup Levels in Reform Bill*, INSIDE EPA'S SUPERFUND REP., Mar. 9, 1994, at 9.

53. *Environmentalists Threaten to Halt Debate on Reauthorization*, supra note 50, at 3.

54. *Swift Cancels Superfund Talks, Admits Prospects for Bill Are Dim*, INSIDE EPA WKLY. REP., Apr. 15, 1994, at 1, 4.

55. *Summary of Proposed Remedy Selection Revisions*, INSIDE EPA'S SUPERFUND REP., May 4, 1994, at 5, 8-9.

56. *EPA Remedy Selection Plan Gains Guarded Support From Industry, Enviro*, INSIDE EPA'S SUPERFUND REP., May 4, 1994, at 4; *New EPA Superfund Plan Draws Cautious Support; Markup May Follow*, INSIDE EPA WKLY. REP., Apr. 29, 1994, at 1, 10.

57. *House Subcommittee Passes Reform Bill Unanimously; Hurdles Remain*, INSIDE EPA'S SUPERFUND REP., SPECIAL REP., May 13, 1994, at 1.

58. *Momentum for Reforming Law Continues as House Panel Unanimously Approves Bill*, Daily Env't Rep. (BNA), May 19, 1994, at AA-1.

59. Erin McNeill, *Superfund Bill Moves to Next Level in House*, ENVTL. & ENERGY STUDY CONF., WKLY. BULL., May 16, 1994, at B13; Erin McNeill, *Superfund Begins Senate Journey*, ENVTL. & ENERGY STUDY CONF., WKLY. BULL., May 23, 1994, at B1, B2.

60. *Committee Action on Superfund to Precede Markup of CWA Rewrite Bill*, Mineta Says, Daily Env't Rep. (BNA), June 29, 1994, at AA-1.

61. Erin McNeill, *Superfund Heats Up in Both Houses This Week*, ENVTL. & ENERGY STUDY CONF., WKLY. BULL., July 25, 1994, at B15, B16.

62. 40 U.S.C. §§276a to 276a-5 (1988). The Davis-Bacon Act requires

where the federal government is funding only part of the cleanup. The amendment would have required payment of "prevailing" local wage rates to workers at such sites.⁶³ The amendment would hurt the bill when its supporters tried to bring it to the House floor.⁶⁴

Staff of the Energy and Commerce and the Public Works and Transportation Committees met to reconcile the two committees' versions of H.R. 3800, and in early August, they produced a compromise bill, H.R. 4916.⁶⁵ The bill would have added two factors that EPA must consider in choosing a groundwater cleanup plan—the implementability of the remedy and the time frame in which the remedy goal will be achieved in relation to the urgency of the need to use groundwater.⁶⁶ The bill would have required EPA to set a single national goal for reducing risk to human health and the environment and would have required cleanup of groundwater at Superfund sites to SDWA standards, but would have allowed EPA to set a lower standard if it judged the higher standard impracticable.⁶⁷ The bill retained the Davis-Bacon Act amendment.⁶⁸

In the meantime, the House Ways and Means Committee was considering the bill's tax scheme for funding the Environmental Insurance Resolution Fund. On August 19, after almost two weeks of delays and only two days of debate, the Committee approved the measure, with only slight changes. The measure would have raised \$8.1 billion over 10 years. During the first four years, the bill would have raised 70 percent of the annual funding for the Environmental Insurance Resolution Fund through a tax on certain commercial insurance policies written between 1968 and 1985, and 30 percent through a prospective tax on premiums on certain commercial insurance policies. During the next six years, the bill would have raised 65 percent of the revenues from a prospective tax, 25 percent from a retrospective tax, and 10 percent from insurers writing policies that give rise to Superfund claims.⁶⁹

□ *The Senate Committees.* On June 14, 1994, Senator Lautenberg's Subcommittee on Superfund, Recycling, and Solid Waste Management approved S. 1834 along party lines.⁷⁰ Republican members of the Subcommittee had complained that the reauthorization process was moving too quickly with

federal government contractors to pay workers according to the wage rate prevailing in the area where the work is performed.

63. Erin McNeill, *Senate Environment to Act on Superfund*, ENVTL. & ENERGY STUDY CONF., WKLY. BULL., Aug. 1, 1994, at B19.

64. See *infra* note 84 and accompanying text.

65. *Compromise House Superfund Bill Increases Groundwater Cleanup Flexibility*, INSIDE EPA WKLY. REP., Aug. 12, 1994, at 4.

66. *Excerpts of Groundwater Provisions in House Compromise Bill*, INSIDE EPA'S SUPERFUND REP., Aug. 10, 1994, at 1, 2; *Compromise House Superfund Bill Increases Groundwater Cleanup Flexibility*, *supra* note 65, at 4.

67. Steve Cook, *Superfund Reauthorization*, ENVTL. & ENERGY STUDY CONF. WKLY. BULL., Aug. 15, 1994, at A6, A7.

68. *Id.* at A7, A8.

69. *House Panel Approves New Superfund Tax Despite Concerns*, INSIDE EPA WKLY. REP., Aug. 26, 1994, at 9, 10; *House Ways & Means Approves \$8 Billion Insurance Tax to Fund EIRF*, INSIDE EPA'S SUPERFUND REP., Aug. 24, 1994, at 1.

70. *Senate Staff Plan Talks Aimed at Bipartisan Accord on Superfund*, INSIDE EPA WKLY. REP., June 17, 1994, at 10. The bill was reportedly based on the proposals of the coalition convened by Representative Swift in April 1994. *Id.*

too little input from them.⁷¹ The bill that the Subcommittee approved would have provided for nonbinding allocation of liability among PRPs,⁷² would have required remedy-selection determinations to consider cost and reasonably anticipated future land uses,⁷³ and would have established an Environmental Insurance Resolution Fund to promote settlement of insurance claims related to Superfund liability for waste disposed of before 1986.⁷⁴ The bill would have required EPA to develop standardized exposure scenarios, formulas, and methodologies for remedial action risk assessments, and would have allowed the Agency to conduct facility-specific risk assessments where such standardized formulas or methodologies were unavailable.⁷⁵

In an effort to gain bipartisan support for the bill, Senator Baucus, chairman of the full Environment and Public Works Committee, prepared a revision to it.⁷⁶ The revision would have set a single, national cleanup goal of reasonable certainty of no harm to human health or, in effect, a one in one million chance of harmful effects. The revision would have allowed EPA to lower the level to one in ten thousand if the technology does not exist, or is too costly, to meet the higher standard. This gave industry the risk range it wanted, but included strict rules for deviating from the higher standard. In addition, the revision provided that if cleaning up groundwater to SDWA standards—the current requirement—was almost technologically impossible, responsible companies would be required to contain the contamination and to pay a fee into a fund that would finance research on improving groundwater cleanup technology and would reimburse polluters that test innovative cleanup technologies.⁷⁷ The Committee approved the revised bill on August 3, 1994.⁷⁸

The Senate Finance Committee then considered the bill's tax provisions. After rejecting an attempt by Sen. Malcolm Wallop (R-Wyo.) to delete the provisions for financing the insurance fund, the Committee approved the bill's tax provisions on September 28.⁷⁹ The Finance Committee, the last Senate committee whose approval was needed before the bill could approach the Senate floor, approved a plan under which, during the first four years, a retrospective tax on direct insurers that wrote certain commercial liability coverage would have generated 46 percent of the annual funding, a retrospective tax on certain commercial liability reinsurers would have generated 23 percent of the funding, and a prospective tax on direct premiums written by commercial insurers would have generated 31 percent of the funding. During the following six years, a prospective tax

71. *Senate Committee Meeting Indicates Hurdles for Reforming Law Still Exist*, Daily Env't Rep. (BNA), May 20, 1994, at A-8.

72. *Superfund Reform Legislation as Approved by Senate Subcommittee on June 14, 1994*, Daily Env't Rep. (BNA), June 16, 1994, at S-74.

73. *Id.* at S-101 to -102.

74. *Id.* at S-115.

75. *Id.* at S-95 to -96.

76. *Senate Staff Plan Talks Aimed at Bipartisan Accord on Superfund*, *supra* note 70, at 10.

77. McNeill, *supra* note 61, at B15, B16.

78. *Senate Committee Approves Bill, Rejects Repeal of Retroactive Liability*, INSIDE EPA'S SUPERFUND REP., SPECIAL REP., Aug. 4, 1994, at 1.

79. *Senate Finance Approves Tax Provisions in Reform Bill in Last Stop Before Floor*, Daily Env't Rep. (BNA), Sept. 29, 1994, at AA-1.

on direct premiums for commercial insurance policies would have generated 66 percent of the funding, a retrospective tax on insurance premiums would have generated 23 percent of the funding, and an assessment on insurers subject to Superfund claims would have generated 11 percent of the funding. The Committee's proposal would have set multiyear caps on the taxes.⁸⁰ Although the proposal was intended to garner the support of the reinsurance industry, the Reinsurance Association of America pulled its support.⁸¹

Attempts to Bring Superfund Reform to the Floor

H.R. 4916 went to the House Rules Committee, which needed to decide which of 50 suggested amendments legislators could propose on the House floor.⁸² House Democrats, fearing that significant alterations to the bill would destroy the delicate compromise it was based on, tried to bring the bill directly to the floor under a suspension of the rules, but they failed.⁸³ Debate raged over contentious Davis-Bacon Act and cost-benefit analysis provisions.⁸⁴ House Democratic leaders doubted they could succeed on the floor because House members would see little point in fighting for the bill when the Senate version, S. 1834, faced a likely Republican filibuster. As a result, on October 5, Representative Dingell announced that the bill was dead.⁸⁵ S. 1834, however, never even reached the Senate floor because senators were waiting for the House to act.⁸⁶

FWPCA Reauthorization

Along with Superfund reauthorization, reauthorization of the FWPCA was a top priority of the 103d Congress from the start. In 1987, Congress had amended the FWPCA to create a program of EPA loans to state revolving loan funds for construction and improvement of water treatment facilities.⁸⁷ The program provided for federal "seed" money, and the authority for the federal government to provide this money was set to expire at the end of September 1994.⁸⁸ This was the principal force behind the drive to reauthorize the Act. But a major impediment stood in the way—the debate over reforming wetlands protection.

During the 102d Congress, subcommittees of the Senate Environment and Public Works and the House Public Works and Transportation Committees held over 20 hearings on FWPCA reauthorization without marking up proposed leg-

islation.⁸⁹ Reauthorization efforts became mired in the controversy over wetlands protection.⁹⁰

In early 1993, wetlands protection led the discussion on FWPCA reauthorization. On January 6, 1993, Rep. Don Edwards (D-Cal.) introduced H.R. 350,⁹¹ an environmentalist-backed bill that would have increased federal wetlands protection by expanding the list of activities subject to permitting under FWPCA §404 to include activities that are currently exempt from §404 or authorized under the less rigorous general permitting program.⁹² On March 11, 1993, Rep. Jimmy Hayes (D-La.), introduced H.R. 1330,⁹³ an industry-backed bill that would have reduced the ambit of §404 wetlands protection by creating a tripartite classification system based on assessed wetlands value and affording each class different levels of protection.⁹⁴ The two bills were seen as alternative models that would define the debate over reforming wetlands protection.⁹⁵ But by mid-1993, key legislators were seeking a more bipartisan solution to the wetlands dilemma and FWPCA reform.

On June 15, 1993, Senators Baucus and Chafee, the chairman and ranking Republican, respectively, of the Senate Environment and Public Works Committee, introduced a reauthorization bill, S. 1114.⁹⁶ Conspicuously absent from the bill was a provision on wetlands law reform. In S. 1114, Senators Baucus and Chafee attempted to create a compromise bill. The bill would have authorized \$2.5 billion annually for state revolving loan funds beginning in fiscal year 1995. It would have increased that amount by \$500 million per year until the year 2000, but not in years in which Congress failed to meet deficit-reduction targets.⁹⁷ The bill also would have given state and local governments more flexibility in how they could spend the money. In addition, it would have required EPA to review and revise existing, and adopt new water quality criteria; it would have required states to revise their nonpoint source pollution control plans; and it would have adopted EPA's draft policy for controlling combined storm and sanitary sewer overflows.⁹⁸

Senators Baucus and Chafee addressed wetlands reform in a separate bill, S. 1304,⁹⁹ which they introduced on July 28, 1993. The bill would have set tight deadlines for permit processing and would have required even shorter permit processing time for wetlands in an approved wetlands and watershed management plan. The bill would have estab-

89. Steve Daniels, *Clean Water Momentum Slows; Wetlands Plan Issued*, ENVTL. & ENERGY STUDY CONF., SPECIAL REP., NOV. 30, 1993, at 4.

90. See Satterfield, *supra* note 5, at 10022.

91. H.R. 350, 103d Cong., 1st Sess. (1993).

92. For a detailed discussion of H.R. 350's provisions, see James E. Satterfield & Moira McDonald, *Hayes v. Edwards*, NAT'L WETLANDS NEWSL., May/June 1993, at 7.

93. H.R. 1330, 103d Cong., 1st Sess. (1993).

94. See *id.*

95. *Id.*

96. S. 1114, 103d Cong., 1st Sess. (1993). Senators Baucus and Chafee had led the Senate's unsuccessful effort to reauthorize the FWPCA in the 102d Congress. See Satterfield, *supra* note 5, at 10022.

97. 139 CONG. REC. S7244 (daily ed. June 15, 1993) (statement of Senator Baucus).

98. *Id.* at S7244, S7245.

99. S. 1304, 103d Cong., 1st Sess. (1993).

80. *Id.*

81. *Id.*

82. Erin McNeill, *Superfund Reauthorization*, ENVTL. & ENERGY STUDY CONF., WKLY. BULL., Sept. 19, 1994, at A7.

83. *Last Efforts to Revive Superfund Underway; Republicans Vow to Oppose Bill*, INSIDE EPA'S SUPERFUND REP., Oct. 5, 1994, at 1.

84. *House Reform Action Delayed Further; Insurance Fund Provisions See Changes*, Daily Env't Rep. (BNA), Sept. 26, 1994, at A-6 to -7.

85. John H. Cushman Jr., *Congress Forgoes Its Bid to Speed Cleanup of Dumps*, N.Y. TIMES, Oct. 6, 1994, at A1.

86. Erin McNeill, *Coalition Support Fails to Propel Superfund Bill*, ENVTL. & ENERGY STUDY CONF., SPECIAL REP., Oct. 13, 1994, at 2, 3.

87. Water Quality Act of 1987, Pub. L. No. 100-4, §212, 101 Stat. 7, 22 (codified at 33 U.S.C. §1381, ELR STAT. FWPCA §601).

88. *Id.* §212(a), 101 Stat. at 27 (codified at 33 U.S.C. §1387, ELR STAT. FWPCA §607).

lished a process for appealing permit decisions and would have authorized use of mitigation banks. The bill would have exempted prior converted croplands from regulation under §404, and would have exempted wetlands areas established in uplands, such as stock ponds and areas created by irrigation. The bill also would have expanded the activities subject to regulation to include draining, excavating, ditching, and mechanized land clearing of wetlands. In addition, the bill would have encouraged the development of wetlands and watershed management and would have directed federal agencies and states to establish a national wetlands restoration strategy.¹⁰⁰

Both S. 1114 and S. 1304 were taken up by the Senate Environment and Public Works Committee's Subcommittee on Clean Water, Fisheries, and Wildlife, chaired by Sen. Bob Graham (D-Fla.). In January 1994, Senator Graham produced a proposal, also designated S. 1114, as a substitute for both bills. He claimed that the proposal was substantially similar to the two bills.¹⁰¹

The Graham proposal was intended to reduce the original S. 1114's burden on state governments, which had protested the imposition of federal requirements on states without commensurate federal funding¹⁰²—a position that constituted one leg of the triple threat.¹⁰³ The Graham proposal would have addressed nonpoint source pollution and encouraged states to address pollution on a watershed-wide basis.¹⁰⁴ In addition, it would have eliminated EPA's power to veto individual state permit approvals under §404 and would have required facilities with annual releases of toxic chemicals of 200,000 pounds or more to develop plans for reducing their use of such substances. It also would have required EPA to publish a list of chemicals that adversely affect plant, animal, and human development, and to develop a plan for reducing the total discharge of such chemicals by at least one-half over 10 years. The proposal would have authorized funding of \$2.5 billion per year through fiscal year 2000 for state loans and authorized higher amounts based on Congress' achieving certain deficit reduction goals.¹⁰⁵ In addition, the proposal included a provision requiring the U.S. Army Corps of Engineers and EPA not to take private property without just compensation, essentially tracking the language of the Fifth Amendment to the U.S. Constitution.¹⁰⁶

On February 1, 1994, the Clinton Administration released its own proposal for revising the FWPCA. Like the Graham proposal, the Administration's proposal would have addressed nonpoint source pollution and restricted toxic chemical discharges. In addition, it would have provided \$13 billion over 10 years to state revolving loan funds and \$200 million in direct grants. It included the goal of maintaining the current amount of wetlands acreage and would

have directed states to address water pollution on a watershed-wide basis.¹⁰⁷

On February 25, 1994, the Senate Environment and Public Works Committee approved a revised S. 1114.¹⁰⁸ The bill would have required states to improve plans for controlling nonpoint source pollution by requiring landowners in "impaired" areas to take steps to reduce polluted runoff. The bill would have authorized \$2.5 billion annually for state revolving loan funds through the year 2000, but would have increased the amount to a total of \$5 billion subject to Congress' meeting certain deficit reduction targets. The bill would have increased the percentage of EPA clean water loans that states could use for watershed planning to 25 percent by fiscal year 2000. The bill would also have required EPA and states to negotiate the extent of the Agency's power to veto individual state permit approvals. In addition, the bill would have required dischargers of large quantities of toxic substances to reduce their use of such substances and would have required EPA to develop a plan for reducing total discharges of chemicals that significantly threaten animal and human health and development by at least 85 percent over seven years.¹⁰⁹

On May 10, the Committee filed its report on the bill, renumbered S. 2093.¹¹⁰ The bill, however, faced serious opposition from farm, industry, and state groups, which objected to its unfunded mandates and its wetlands and nonpoint source provisions. And environmentalists suggested that the bill represented the bottom line that they would accept. A bipartisan group of senators was reportedly formed to prevent opponents of the bill from introducing amendments to weaken it.¹¹¹ On June 10, Senator Baucus announced that Senate floor consideration of the bill would await completion of the House Public Works and Transportation Committee's work on a reauthorization bill.¹¹² Baucus apparently believed that the Senate should not invest time in considering FWPCA reauthorization unless it was sure the House would act.¹¹³ The House, however, did not act.

On March 3, 1994, Representative Mineta, chairman of the House Public Works and Transportation Committee, introduced H.R. 3948.¹¹⁴ The bill would have required each state to develop its own enforceable nonpoint source pollution plan and would have directed that such plans cover both rural and urban watershed runoff.¹¹⁵ The bill would

107. John H. Cushman Jr., *Democrats Detail Clean Water Plan*, N.Y. TIMES, Feb. 2, 1994, at A1.

108. Steve Daniels, *Senate Panel Moves Clean Water Rewrite*, ENVTL. & ENERGY STUDY CONF., WKLY. BULL., Feb. 28, 1994, at B12.

109. *Id.* at B12-B14.

110. 140 CONG. REC. S5449 (daily ed. May 10, 1994).

111. Steve Cook, *Clean Water Act Reauthorization*, ENVTL. & ENERGY STUDY CONF., WKLY. BULL., June 6, 1994, at A4, A5; *see also* *Delays, Industry Opposition Hobble Clean Water Act Rewrite Efforts*, INSIDE EPA WKLY. REP., May 6, 1994, at 8; Steve Cook, *Clean Water Act Reauthorization*, ENVTL. & ENERGY STUDY CONF., WKLY. BULL., June 13, 1994, at A1, A2.

112. *Senate Will Postpone CWA Consideration Until House Committee Marks Up Its Bill*, Daily Env't Rep. (BNA), June 13, 1994, at A-3.

113. Steve Cook, *Clean Water Act Reauthorization*, ENVTL. & ENERGY STUDY CONF., WKLY. BULL., June 13, 1994, at A1, A2.

114. H.R. 3948, 103d Cong., 2d Sess. (1994).

115. *House Clean Water Act Reauthorization Bill (HR 3948) Introduced March 3 by Rep. Norman Mineta*, Daily Env't Rep. (BNA), Mar. 7, 1994, at E-16.

100. 130 CONG. REC. S9722 (daily ed. July 28, 1993) (statement of Senator Baucus).

101. *Graham Offers CWA Revamp Plan That Panel Will Use a Mark-Up Vehicle*, Daily Env't Rep. (BNA), Jan. 25, 1994, at AA-1.

102. Steve Daniels, *Senate Panel to Act on Clean Water Bill*, ENVTL. & ENERGY STUDY CONF., WKLY. BULL., Jan. 31, 1994, at B5.

103. *See supra* note 11 and accompanying text.

104. Daniels, *supra* note 102, at B5, B6.

105. Daniels, *supra* note 102, at B5, B6.

106. Daniels, *supra* note 102, at B5.

have increased federal funding for state revolving loan funds to \$3 billion in fiscal year 1995 and by \$500 million per year thereafter through the year 2000.¹¹⁶ The bill would have removed the current 20 percent restriction on the use of fund loans for combined sewer overflows and collector sewers,¹¹⁷ and would have provided that when a community's wastewater treatment costs exceed 1.25 percent of the median family income in a community, the maximum allowed term of the loan would be extended from 20 to 30 years, and the interest rate could be a negative number.¹¹⁸ The bill also would have allowed EPA to authorize state watershed management programs. The bill lacked a wetlands title, which Representative Mineta added in a substitute to H.R. 3948 he released on April 20, 1994.¹¹⁹ The substitute would have required modifications to FWPCA §404(b)(1)'s "sequencing" guidelines¹²⁰ to require "that the review of alternatives to the activity proposed by an applicant for a permit . . . be commensurate with the severity of impact of the activity on the environment."¹²¹ The review would consider the wetland's function and relative importance to the watershed.¹²²

Both Republicans and Democrats on the House Public Works and Transportation Committee opposed the bill. Republicans, led by the committee's ranking Republican, Rep. Bud Shuster (R-Pa.), suggested that they would offer amendments addressing unfunded mandates and other issues. Some Democrats complained that they had been excluded from the development of the bill and raised concerns over the bill's wetlands provisions.¹²³ For months the bill languished in committee. Representative Mineta repeatedly postponed markup after committee Democrats indicated that too many issues remained. He also expressed concern over the possible Republican amendments that could weaken the bill.¹²⁴ As a result, the committee turned its attention to Superfund reform.

In August 1994, Representative Mineta raised the possibility of moving a reauthorization bill that would only address funding.¹²⁵ Ultimately, Mineta gave up any hope of moving an FWPCA reauthorization bill before the 103d Congress adjourned. He vowed to renew the fight for

reauthorization in 1995. Senator Chafee, however, declared that he did not expect reauthorization even then.¹²⁶

SDWA Reauthorization

Of the three environmental statutes that received the most attention during the 103d Congress—Superfund, the FWPCA, and the SDWA—the SDWA came closest to being reauthorized. Both houses of Congress passed SDWA reauthorization bills, and Senate and House supporters sought to facilitate ultimate enactment by negotiating a compromise bill without going to conference committee. But in the end they failed to reconcile the differences between the Senate and House bills—a blow to the states, which had sought federal funding to offset the cost of SDWA compliance.

From the start, the state push for federal funding drove the attempt to reauthorize the Act during the 103d Congress.¹²⁷ On April 5, 1993, Rep. Henry Waxman (D-Cal.), chairman of the House Energy and Commerce Committee's Subcommittee on Health and the Environment, introduced H.R. 1701,¹²⁸ which would have authorized EPA to make revolving loans to states for capital expenditures incurred by government or nonprofit drinking water treatment facilities. On April 27, 1993, Representative Mineta introduced H.R. 1865,¹²⁹ which would have directed EPA to make grants to states for the construction, rehabilitation, and improvement of water supply systems. The Energy and Commerce Committee approved H.R. 1701 on April 26, 1993, and the Public Works and Transportation Committee approved H.R. 1865 on April 28, 1993. But a jurisdictional dispute between the two committees stalled further action on the bills.¹³⁰

Attention focused on comprehensive SDWA reform. On October 14, 1993, Senator Baucus introduced a comprehensive reform bill, S. 1547.¹³¹ The bill would have directed EPA to review, within three years of the bill's enactment, the health effects of not less than 15 unregulated drinking water contaminants that present the greatest public health concern based on their adverse health effects and occurrence in public water systems. The bill would have required EPA to review at least an additional seven contaminants every three years thereafter.¹³² The 1986 amendments to the SDWA required EPA to determine drinking water standards for 83 chemicals in three years.¹³³

The bill also would have established state revolving loan funds and authorized \$600 million in fiscal year 1994 and

116. *Id.* at E-32.

117. *Bipartisan CWA Rewrite Proposal Introduced by Mineta, Boehlert*, Daily Env't Rep. (BNA), Mar. 7, 1994, at A-5.

118. *House Clean Water Act Reauthorization Bill (HR 3948) Introduced March 3 by Rep. Norman Mineta*, *supra* note 115, at E-32.

119. *Environmentalists, EPA Take Issue With New House Wetlands Proposal*, INSIDE EPA'S WKLY. REP., Apr. 29, 1994, at 8.

120. "Sequencing" refers to the requirement that persons proposing to convert wetlands must first seek to avoid converting the wetlands, then must minimize wetland loss if conversion is unavoidable, before they may proceed with compensatory mitigation. See ENVIRONMENTAL LAW INST., WETLAND MITIGATION BANKING 9 (1993); see also *Environmentalists, EPA Take Issue With New House Wetlands Proposal*, INSIDE EPA WKLY. REP., Apr. 29, 1994, at 8.

121. *Environmentalists, EPA Take Issue With New House Wetlands Proposal*, *supra* note 119, at 8, 9.

122. *Environmentalists, EPA Take Issue With New House Wetlands Proposal*, *supra* note 119, at 8, 9.

123. *Divisive Markup of House Clean Water Bill Looms, May Face Delay*, INSIDE EPA WKLY. REP., Apr. 29, 1994, at 8.

124. Steve Daniels, *Clean Water Bill's Prospects Dimming*, ENVTL. & ENERGY STUDY CONF., WKLY. REP., Aug. 1, 1994, at B1.

125. *Mineta Says He Plans to Introduce Funding-Only CWA Rewrite in September*, Daily Env't Rep. (BNA), Aug. 19, 1994, at AA-1.

126. *Mineta Abandons Efforts to Rewrite CWA in 1994, Retains Hope for Action in 1995*, Daily Env't Rep. (BNA), Sept. 28, 1994, at A-10.

127. *SDWA Reauthorization Effort Seen Likely as Pressure on Congress Mounts*, INSIDE EPA WKLY. REP., Jan. 15, 1993, at 1.

128. H.R. 1701, 103d Cong., 1st Sess. (1993).

129. H.R. 1865, 103d Cong., 1st Sess. (1993).

130. Erin McNeill, *State Revolving Loan Bill Gets Stalled in House*, ENVTL. & ENERGY STUDY CONF., SPECIAL REP., Aug. 10, 1993, at 2.

131. S. 1547, 103d Cong., 1st Sess. (1993).

132. *Id.* §4(a).

133. Erin McNeill, *Drinking Water Legislation Is a Possibility for 103d*, ENVTL. & ENERGY STUDY CONF., SPECIAL REP., Jan. 28, 1993, at 8, 9.

\$1 billion annually thereafter for EPA capitalization grants to these funds.¹³⁴ It would have reduced the monitoring requirements for many small water systems that do not detect contaminants.¹³⁵ And it would have set two standards for radon in drinking water—one as close to the no-health effect as possible, the other equivalent to exposure from outside air—and allowed a state drinking water system to choose to meet the second standard if it implemented a program to reduce radon in the air.¹³⁶

On October 27, 1993, Reps. Jim Slattery (D-Kan.) and Thomas Bliley (R-Va.) introduced H.R. 3392,¹³⁷ which took a significantly different approach from S. 1547 on drinking water standards. The Slattery-Bliley bill would have required EPA to establish new procedures for setting drinking water standards based on risk reduction and cost-benefit analyses.¹³⁸ The bill would have required EPA to set different "best technology" standards for public water systems serving 1,000 or fewer persons than for systems serving between 1,001 and 10,000 persons or for systems serving more than 10,000 persons. The bill would have required EPA to eliminate monitoring, compliance, and enforcement requirements for regulated contaminants not occurring at levels that pose public health concerns. And it would have authorized the issuance of variances to small systems that are financially unable to install recommended technology to remove pollutants.¹³⁹

On March 10, 1994, Sen. Pete Domenici (R-N.M.) introduced S. 1920,¹⁴⁰ the Senate version of H.R. 3392. Water suppliers, state and local government representatives, and five Republicans on the Senate Environment and Public Works Committee supported the bill.¹⁴¹ In an attempt to win the support of Committee Republicans, Senator Baucus revised S. 1547 to include different technology-based requirements for small systems, flexibility in costly monitoring requirements, and elimination of some enforcement provisions.¹⁴² The Senate Environment and Public Works Committee unanimously approved the revised bill on March 24, 1994. But state and local governments continued to oppose the bill, calling it too restrictive and expensive.¹⁴³

In an effort to forge a compromise, Senator Baucus introduced S. 2019,¹⁴⁴ which the Senate Environment and Public Works Committee approved on April 14, 1994.¹⁴⁵ The bill would have required EPA, within three years, to evaluate for possible regulation 15 unregulated contaminants that pose the greatest danger to human health. The

bill would have directed EPA to study an additional 7 contaminants every 3 years. It would have required EPA to set standards for 7 carcinogenic pollutants at a level that would result in no more than 1 additional cancer case per million people, and would have allowed EPA to set standards lower than the bill's best-technology standard if the lower standards would result in substantial cost savings and be nearly as protective of public health. In addition, the bill would have authorized a state revolving loan program, with \$600 million in federal funding for fiscal year 1994 and \$1 billion per year for fiscal years 1995 through 2000.¹⁴⁶

Nevertheless, the Safe Drinking Water Act Coalition, a group representing water suppliers and state and local governments, charged that the bill did not go far enough in allowing EPA to consider risk in setting drinking water standards. Many environmentalists believed that the bill went too far in introducing risk analysis into the standard-setting process. And several Republicans on the Senate Environment and Public Works Committee objected to the bill's standard-setting and monitoring provisions.¹⁴⁷

The Senate, however, passed S. 2019 on May 19. The bill the Senate passed was conspicuously different from the bill the Senate Environment and Public Works Committee had approved. It included an amendment that Sen. Robert Dole (R-Kan.) had offered that would have required federal agencies to prepare analyses of regulations that may constitute "takings" of private property. It included an amendment that Sen. J. Bennett Johnston (D-La.) had offered that would have required EPA to perform cost-benefit and comparative-risk analyses for regulations whose potential annual impact on the economy is \$100 million or more. And it included an amendment that Sen. John Glenn (D-Ohio) had offered that would have elevated EPA to a cabinet-level department.¹⁴⁸ The amendments did not bode well for reconciliation with the House SDWA reauthorization bill.

On September 27, 1994, the House passed H.R. 3392 under a suspension of the rules.¹⁴⁹ The House Energy and Commerce Committee had approved the bill on September 20, after Representative Waxman produced a consensus bill and his Subcommittee on Health and the Environment approved it. The Subcommittee had debated the bill off and on since April 1994.¹⁵⁰ Representative Waxman had adamantly resisted efforts to include risk-assessment language in the provisions governing EPA's methods for setting drinking water standards.¹⁵¹ But in September 1994, environmentalists and members of the Safe Drinking Water Act Coalition reached a compromise that laid the foundation for the bill the Subcommittee and full Committee reported.¹⁵²

134. S. 1547, 103d Cong., 1st Sess. §3(a) (1993).

135. *Id.* §4(c).

136. *Id.* §8.

137. H.R. 3392, 103d Cong., 1st Sess. (1993).

138. *Widely Supported Drinking Water Bill Sets Risk-Based Standards*, INSIDE EPA WKLY. REP., Oct. 29, 1993, at 1.

139. *Id.* at 6.

140. S. 1920, 103d Cong., 2d Sess. (1994).

141. *Baucus Rewrite Could Forge Drinking Water Accord, Some Hope*, INSIDE EPA WKLY. REP., Mar. 25, 1994, at 10.

142. *Id.*

143. *Senate Committee OKs SDWA Rewrite Despite State, Local Government Concerns*, Daily Env't Rep. (BNA), Mar. 25, 1994, at A-5, A-6.

144. S. 2019, 103d Cong., 2d Sess. (1994).

145. *Safe Drinking Water Act Amendments of 1994—S 2019*, ENVTL. & ENERGY STUDY CONF., SPECIAL REP., Apr. 25, 1994, at 1.

146. *Id.* at 2, 3.

147. *Id.* at 1, 2.

148. Erin McNeill, *Senate Approves Tap Water Reform*, ENVTL. & ENERGY STUDY CONF., WKLY. REP., May 23, 1994, at A2.

149. Erin McNeill, *Drinking Water Reform Founders at Last Minute*, ENVTL. & ENERGY STUDY CONF., SPECIAL REP., Oct. 13, 1994, at 6.

150. *House SDWA Measure Sent to Floor After Speedy Action by Two Panels*, Daily Env't Rep. (BNA), Sept. 21, 1994, at AA-1; *House Republican Leaders Called Possible Obstacle to Drinking Water Bill*, INSIDE EPA WKLY. REP., Sept. 23, 1994, at 6.

151. McNeill, *supra* note 149, at 6.

152. *House SDWA Measure Sent to Floor After Speedy Action by Two Panels*, *supra* note 150, at AA-1.

The bill would have required EPA to consider incremental cost increases and resulting health risk reductions in regulating carcinogens. EPA also could consider cost in issuing regulations for other pollutants, but could not use cost-benefit analysis to weaken existing regulations.¹⁵³ The bill would have directed EPA, in the first year after the bill's enactment, to evaluate for possible regulation 15 unregulated contaminants that appear to pose the greatest threat to public health. The bill would have required EPA to review an additional 12 contaminants every four years thereafter and to set standards for only those contaminants it determined merited regulation.¹⁵⁴ The bill would have required EPA to identify alternative, affordable technologies for water systems serving 3,300 or fewer people. States would have been authorized to allow water systems to reduce their monitoring schedules for contaminants not discovered in an initial test or found at low levels the state believed would not increase. Also, the bill would have authorized \$600 million in federal "seed" money for revolving state loan funds for fiscal year 1994 and \$1 billion annually for three years thereafter.¹⁵⁵

Senate and House negotiators, however, were unable to resolve the differences between S. 2019 and H.R. 3392. Senator Baucus proposed a bill without the Senate bill's Johnston and Dole amendments, but several senators opposed deleting the provisions. And backers of the House bill refused to support a bill that included them.¹⁵⁶

EPA Elevation

At the beginning of 1993, Congress seemed poised to make EPA into a cabinet-level department. In January 1993, Sen. John Glenn, chairman of the Senate Governmental Affairs Committee, and Rep. Sherwood Boehlert (R-N.Y.) introduced EPA-elevation bills similar to those they had introduced in the 102d Congress.¹⁵⁷ In addition, the White House strongly supported EPA elevation to cabinet status.¹⁵⁸ In early May 1993, the Senate passed Senator Glenn's bill, S. 171,¹⁵⁹ but the House was still struggling to resolve divisive issues. On November 4, 1993, the House Government Operations Committee finally approved an elevation bill, H.R. 3425,¹⁶⁰ which the Committee's chairman, Rep. John Conyers (D-Mich.), had introduced,¹⁶¹ but the bill never reached the House floor. A component of the triple threat, the issue of required risk assessments, killed it.

Representative Boehlert introduced H.R. 109¹⁶² on Janu-

ary 6, 1993, and Senator Glenn introduced S. 171 on January 21, 1993. Both bills would have created a Department of the Environment and provided for a Bureau of Environmental Statistics and a Presidential Commission on Improving Environmental Protection. The bills also would have prohibited EPA from contracting out "inherently governmental" functions.¹⁶³ On February 4, 1993, Rep. William Clinger (R-Pa.), ranking Republican member of the House Government Operations Committee, introduced H.R. 824,¹⁶⁴ a bare-bones elevation bill. Sen. William Roth (R-Del.), ranking Republican on the Senate Governmental Affairs Committee, introduced a companion bill, S. 380,¹⁶⁵ on February 17.

Republicans on the Senate Governmental Affairs Committee supported the Roth bill, arguing that S. 171 contained unnecessary provisions that would slow passage.¹⁶⁶ Nevertheless, on March 24, 1993, the Committee approved S. 171,¹⁶⁷ and the Senate passed it on May 4, 1993.

But the bill that the Senate passed contained two provisions that created major problems when the House considered EPA elevation. Before approving the bill, the Committee had added an amendment, which the White House supported, to abolish the Council on Environmental Quality (CEQ) and to transfer its responsibilities for supervising federal agency compliance with the National Environmental Policy Act (NEPA) to the new Department of the Environment.¹⁶⁸ In addition, the Senate had added to the bill an amendment that would have required federal agencies to perform comparative-risk and cost-benefit analyses for new environmental regulations.¹⁶⁹

Representative Dingell opposed the provision to abolish CEQ. Dingell had been one of the original supporters of NEPA.¹⁷⁰ He opposed moving NEPA oversight out of the White House.¹⁷¹ To resolve this dispute, Representatives Dingell and Studds, after consultations with the White House, introduced H.R. 3512,¹⁷² which would have created a new Office of NEPA Compliance.¹⁷³ The House passed it on November 20, 1993.¹⁷⁴

Dingell also supported a move to reform EPA's contracting practices. He was concerned about excessive EPA delegation of responsibilities and insufficient EPA supervision of contractors and supported including contracting reform language in the House's EPA-elevation bill.¹⁷⁵ Industry lobbyists argued that such language would make it hard for

153. Erin McNeill, *Safe Drinking Water Act*, ENVTL. & ENERGY STUDY CONF., WKLY. BULL., Sept. 26, 1994, at A20, A21.

154. *Id.* at A21.

155. *Id.* at A22.

156. McNeill, *supra* note 149, at 6.

157. See 139 CONG. REC. H103 (daily ed. Jan. 6, 1993) (Representative Boehlert introduces H.R. 109); 139 CONG. REC. S194 (daily ed. Jan. 21, 1993) (Senator Glenn introduces S. 171); Satterfield, *supra* note 5, at 10023.

158. Steve Gorman, *EPA-to-Cabinet Gets Off to Early Start*, ENVTL. & ENERGY STUDY CONF., SPECIAL REP., Jan. 28, 1993, at 4; Glenn *Reintroduces Bill, Slates Hearing to Elevate EPA to Cabinet-Level Department*, 23 Env't Rep. (BNA) 2587 (Jan. 29, 1993).

159. 139 CONG. REC. S5357 (daily ed. May 4, 1993).

160. H.R. 3425, 103d Cong., 1st Sess. (1993).

161. Steve Cook, *Stage Set for House Action on EPA-to-Cabinet Bill*, ENVTL. & ENERGY STUDY CONF., SPECIAL REP., Jan. 21, 1994, at 5.

162. H.R. 109, 103d Cong., 1st Sess. (1993).

163. See S. 171, 103d Cong., 1st Sess. (1993); H.R. 109, 103d Cong., 1st Sess. (1993).

164. H.R. 824, 103d Cong., 1st Sess. (1993).

165. S. 380, 103d Cong., 1st Sess. (1993).

166. *Senate Committee Clears EPA Cabinet Bill, But Rejects "Straight Up" Approach*, INSIDE EPA WKLY. REP., Mar. 26, 1993, at 1, 12.

167. *Id.* at 1.

168. Steve Cook, *EPA Elevation Bill Passes in Senate, Stalls in House*, ENVTL. & ENERGY STUDY CONF., SPECIAL REP., Nov. 30, 1993, at 3.

169. Cook, *supra* note 161, at 5.

170. Cook, *supra* note 168, at 3.

171. Cook, *supra* note 168, at 3.

172. H.R. 3512, 103d Cong., 1st Sess. (1993).

173. Cook, *supra* note 168, at 3.

174. 139 CONG. REC. H10382 (daily ed. Nov. 20, 1993).

175. Cook, *supra* note 168, at 3.

the Agency to get high-quality contractors, and some in EPA argued that the requirements would make it difficult for the Agency to perform its duties.¹⁷⁶

An additional problem was Republican support for an amendment to add to the bill risk-assessment and cost-benefit analysis language, which Representative Waxman, chairman of the House Energy and Commerce Committee's Subcommittee on Health and the Environment, opposed.¹⁷⁷ On August 31, 1993, President Clinton sent a letter to Representative Waxman expressing his opposition to amendments not focusing on the organization and structure of the proposed new department.¹⁷⁸ And House Speaker Thomas Foley (D-Wash.) met with members of the House Government Operations, Energy and Commerce, and Merchant Marine and Fisheries Committees to determine the jurisdiction over the bill's different provisions.¹⁷⁹

Finally, on November 4, 1993, the House Government Operations Committee approved H.R. 3425. The bill would have created a Department of Environmental Protection that would have included a Bureau of Environmental Statistics and an Office of Environmental Justice. The bill would have set guidelines for "umbrella" contracting and specified the functions only government officials could perform. On November 17, the House Rules Committee adopted a rule to allow nine amendments to the bill. It barred a proposed amendment offered by Reps. John Mica (R-Fla.) and Karen Thurman (D-Fla.) to require comparative-risk and cost-benefit analyses for new regulations.¹⁸⁰

But the illness of Representative Clinger¹⁸¹ and Republican opposition to a floor debate rule that would not allow consideration of risk and cost-benefit analysis amendments stalled efforts to bring the bill to the House floor before the end of 1993.¹⁸² Then, on February 2, 1994, the House voted down a rule to limit consideration of amendments to the bill.¹⁸³ With the door open for risk and cost-benefit analysis amendments and House members unable to negotiate a compromise,¹⁸⁴ the bill died.¹⁸⁵

176. *Industry Lobbies House to Drop Contracting Provision From EPA Cabinet Bill*, INSIDE EPA WKLY. REP., June 11, 1993, at 17, 18.

177. Cook, *supra* note 168, at 3, 4. One EPA official even suggested that the bill could be a vehicle for action on wetlands, private-property rights, pesticide registration, and Superfund. *Cabinet Elevation for EPA Seen as Vehicle for Legislative Initiatives on Other Issues*, 24 ENV'T REP. (BNA) 1140 (Oct. 15, 1993).

178. *Cabinet Elevation for EPA Seen as Vehicle for Legislative Initiatives on Other Issues*, *supra* note 177, at 1141.

179. *House Set to Mark Up EPA Cabinet Elevation Bill Next Week*, INSIDE EPA WKLY. REP., Oct. 29, 1993, at 3.

180. Cook, *supra* note 168, at 3, 4.

181. House Republicans persuaded House Democratic leaders that Representative Clinger, who had intended to offer a bare-bones elevation proposal in a substitute amendment, should be allowed to make the case for his amendment on the House floor. *See Some Fear EPA Cabinet Bill Delay May Let Support Build for Add-Ons*, INSIDE EPA WKLY. REP., Nov. 25, 1993, at 3.

182. Cook, *supra* note 161, at 5.

183. *Direction Unclear as House, Administration Assess Damage From Vote on Cabinet Bill*, Daily ENV'T REP. (BNA), Feb. 7, 1994, at A-3 to -4.

184. *Risk Assessment Proposal Could Lead to Compromise on EPA Cabinet Bill*, INSIDE EPA WKLY. REP., Oct. 3, 1994, at 1.

185. The Senate added EPA elevation language to its SDWA reauthorization bill. *See supra* note 148 and accompanying text.

Federal Mining Law Reform

Of all the environmental bills that almost made it in the 103d Congress, bills to reform federal mining law came the closest to enactment. On May 25, 1993, the Senate passed S. 775,¹⁸⁶ a pro-industry bill that Senator Johnston, chairman of the Senate Energy and Natural Resources Committee, called merely a "ticket to conference."¹⁸⁷ He reasoned that any bill the Senate passed would ultimately face a grueling battle in conference committee, so he persuaded senators to refrain from amending the bill and let conferees resolve contentious issues.¹⁸⁸ On November 18, 1993, the House passed its own bill,¹⁸⁹ H.R. 322,¹⁹⁰ which Rep. Nick Rahall (D-W. Va.) had introduced.

S. 775 would have required holders of hard-rock mining claims to pay an annual holding fee of \$100 per claim, but would have exempted holders of 10 or fewer claims and would have imposed a reduced fee on holders of more than 10 but fewer than 50 claims. The bill also would have required hard-rock miners to pay a 2 percent royalty on the value of minerals produced, and would have required claim holders seeking to patent their claims to pay the federal government an amount based on the fair market value of the surface estate.¹⁹¹

H.R. 322 would have eliminated patenting and required present and future miners on federal land to pay an 8 percent royalty based on the gross value of minerals they produced. The bill would have required miners to restore mined land so that it could either support the same activities it could support before mining occurred or could be used in accordance with existing land use plans.¹⁹²

For almost one year, Senate and House conferees tried to resolve the differences between the two bills. But on September 29, 1994, they declared themselves hopelessly deadlocked. Some House conferees accused the mining industry of sabotaging a compromise. Industry asserted that there was no compromise to sabotage. Although the 103d Congress, in effect, enacted a one-year moratorium on patenting land for mining,¹⁹³ few believe that the 104th Congress will be more successful in reforming mining law in 1995.¹⁹⁴

Other Failures: Solid Waste Flow Control, ESA Reauthorization, Pesticides, Grazing, and Indoor Air and Radon

The 103d Congress' failure to enact environmental legis-

186. S. 775, 103d Cong., 1st Sess. (1993).

187. 139 CONG. REC. S6479 (daily ed. May 25, 1993); Steve Daniels, *Mining Law Conference Likely to Start Next Month*, ENVTL. & ENERGY STUDY CONF., SPECIAL REP., Jan. 21, 1994, at 17.

188. Daniels, *supra* note 187, at 17.

189. 139 CONG. REC. H10054 (daily ed. Nov. 18, 1993).

190. H.R. 322, 103d Cong., 1st Sess. (1993).

191. 139 CONG. REC. S6479, S6480 (daily ed. May 25, 1993).

192. Daniels, *supra* note 187, at 17.

193. Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, §112, 108 Stat. 2499, 2519 (1994) (Section 112 prohibits the expenditure of fiscal year 1995 funds on processing patent applications.).

194. John H. Cushman Jr., *Congress Drops Effort to Curb Public-Land Mining*, N.Y. TIMES, Sept. 30, 1994, at A1.

lation did not end with Superfund, the FWPCA, the SDWA, EPA elevation, or mining law reform. Congress also tried and failed to enact legislation on solid waste flow control, ESA reauthorization, minor-use pesticides, grazing, and indoor air and radon.

Solid Waste Flow Control

Beginning in early 1993, legislators began preparing bills to allow states to ban imports of out-of-state waste, but the major impetus for this kind of legislation occurred on May 16, 1994. On that date, the U.S. Supreme Court issued its opinion in *C&A Carbone, Inc. v. Town of Clarkstown*.¹⁹⁵ In *Carbone*, the Court held that a municipal ordinance that required all solid waste leaving a New York town to be processed at a specified transfer station violated the Commerce Clause of the U.S. Constitution.¹⁹⁶

Members of Congress responded by introducing a slew of flow control bills.¹⁹⁷ On September 30, 1994, the Senate passed S. 2345, which would have allowed governors to freeze imports of solid waste into their states at 1993 levels and ban future increases of wastes entering their states.¹⁹⁸ On October 7, the House passed its version of S. 2345, which included a compromise between legislators who favored giving flow control authority to state governors and legislators who favored giving the authority to local governments.¹⁹⁹ But, reportedly, Sen. John Chafee, the ranking Republican on the Senate Environment and Public Works Committee, objected to the House version, and the bill died.²⁰⁰

ESA Reauthorization

It is an open question whether ESA reauthorization ever stood a chance in the 103d Congress. The forces behind the private-property leg of the triple threat had targeted the statute.²⁰¹ The heated debate over species preservation versus job preservation and economic development that killed ESA reauthorization in the 102d Congress continued to prevent reauthorization during the 103d Congress.²⁰² With a full agenda of environmental and nonenvironmental bills, legislators devoted little time to an issue that required a great

deal of time. Legislators introduced several ESA bills,²⁰³ but not one was even reported out of committee.²⁰⁴

Pesticides

The move to reform federal pesticide law was never the Clinton Administration's top priority. In 1993, the Administration released an outline of its reform proposal, but waited until April 1994 to release its final proposal.²⁰⁵ By the end of the 103d Congress' second session, legislators were considering a bill to streamline procedures for registering "minor-use" pesticides. The House passed the bill, H.R. 967,²⁰⁶ on October 4, 1994,²⁰⁷ but the Senate failed to act on it.²⁰⁸

Grazing

The issue of private grazing on federal lands has been hotly contested for years. On August 9, 1993, Secretary of the Interior Bruce Babbitt released a proposed rule that would have more than doubled grazing fees over three years. The proposal also would have included new environmental regulations and enforcement provisions and terminated the practice of allowing holders of grazing permits to claim water rights.²⁰⁹ Congressional legislators sought to incorporate a modified version of the proposal in the fiscal year 1994 appropriations bill for the U.S. Department of the Interior (DOI), H.R. 2520. On October 14, 1993, Senate and House conferees approved a compromise that would have increased grazing fees by only 85 percent over three years.²¹⁰ But when the Senate considered the conference report, western senators staged a filibuster that lasted for weeks, and Congress passed the bill without the grazing fee provision. The final bill also did not include a moratorium, which the Senate had included in the version it originally passed, to prevent the DOI from pursuing the Babbitt proposal. This leaves the door open for the DOI to pursue regulatory changes to the current fee structure.²¹¹

Indoor Air and Radon

The 103d Congress also failed to enact bills addressing indoor air pollution and radon. Although the Senate passed an indoor air bill, S. 656,²¹² on October 29, 1993,²¹³ and

195. 114 S. Ct. 1677, 24 ELR 20815 (U.S. 1994); see Edward B. Sears, *The U.S. Supreme Court's 1993-1994 Term*, 24 ELR 10719, 10724 (Dec. 1994).

196. 114 S. Ct. at 1681, 24 ELR at 20817.

197. See, e.g., S. 2126, 103d Cong., 2d Sess. (1994); S. 2227, 103d Cong., 2d Sess. (1994); H.R. 4661, 103d Cong., 2d Sess. (1994); H.R. 4662, 103d Cong., 2d Sess. (1994); H.R. 4683, 103d Cong., 2d Sess. (1994); H.R. 4779, 103d Cong., 2d Sess. (1994).

198. 140 CONG. REC. S13802 (daily ed. Sept. 30, 1994).

199. *Chafee Objections Kill Last-Minute Deal on Flow Control, Interstate Waste*, Daily Env't Rep. (BNA), Oct. 12, 1994, at AA-1.

200. *Id.* Reportedly, Senator Chafee believed that flow control was "anti-consumer." *Id.*

201. Leslie Ann Duncan, "Takings" Issue Remains Potent in Species Debate, ENVTL. & ENERGY STUDY CONF., SPECIAL REP., Oct. 13, 1994, at 23.

202. See Satterfield, *supra* note 5, at 10022.

203. See, e.g., S. 921, 103d Cong., 1st Sess. (1993); S. 1521, 103d Cong., 1st Sess. (1993); H.R. 1490, 103d Cong., 1st Sess. (1993); H.R. 2043, 103d Cong., 1st Sess. (1993).

204. See *Status of Major Legislation*, ENVTL. & ENERGY STUDY CONF., WKLY. REP., Oct. 3, 1994, at C1, C3-C4.

205. Steve Cook, *Last-Minute House Effort Not Enough on Pesticide Reform*, ENVTL. & ENERGY STUDY CONF., SPECIAL REP., Oct. 13, 1994, at 12, 13.

206. H.R. 967, 103d Cong., 1st Sess. (1993).

207. 140 CONG. REC. H10733 (daily ed. Oct. 4, 1994).

208. Cook, *supra* note 205, at 12.

209. Leslie Ann Duncan, *Westerners Stymie Grazing Deal; Few Lands Bills Move*, ENVTL. & ENERGY STUDY CONF., SPECIAL REP., Nov. 30, 1993, at 15.

210. Leslie Ann Duncan, *Conference Report on Fiscal 1994 Appropriations for the Interior Department and Related Agencies—HR 2520*, ENVTL. & ENERGY STUDY CONF., WKLY. BULL., Oct. 25, 1993, at A3.

211. Leslie Ann Duncan, *Time Runs Out on Various Land Bills*, ENVTL. & ENERGY STUDY CONF., SPECIAL REP., Oct. 13, 1994, at 20, 21.

212. S. 656, 103d Cong., 1st Sess. (1993).

213. 139 CONG. REC. S14673 (daily ed. Oct. 29, 1993).

the House passed an indoor air bill, H.R. 2919,²¹⁴ on October 94,²¹⁵ the Senate failed to address the House's request for a conference to reconcile the bills.²¹⁶ The House passed a radon bill, H.R. 2448,²¹⁷ on July 28, 1994,²¹⁸ but Senator Johnston blocked floor consideration of a radon bill, S. 657,²¹⁹ which the Senate Environment and Public Works Committee had approved on November 10, 1993.²²⁰ Reportedly, he believed that the bill did not adequately reflect the actual risk that radon poses.²²¹

Appropriations

As it must, Congress passed a slew of bills to authorize appropriations for fiscal year 1995. Most environmental agencies received either nominal increases or cuts. Congress did, however, appropriate \$7.241 billion for EPA, over \$600 million more than for fiscal year 1994. But fiscal year 1995 appropriations for the National Park Service were \$1.415 billion, virtually the same as the previous year; the U.S. Fish and Wildlife Service's 1995 budget—\$674 million—was down \$6 million from fiscal year 1994; and fiscal year 1995 appropriations for the U.S. Department of Agriculture's conservation programs were only \$2.645 billion, more than \$300 million below fiscal year 1994's appropriations. Congress also reduced appropriations for the U.S. Department of Energy's environmental restoration and waste management activities by almost \$50 million to \$6.138 billion. Nevertheless, Congress increased appropriations for the National Oceanic and Atmospheric Administration by over \$130 million to \$1.829 billion.²²²

Notable Successes: California Desert Protection, Energy Tax, Marine Mammal Protection Act Reauthorization, and Hazardous Materials Transportation Act Reauthorization

Despite its failures, the 103d Congress did have some successes. It passed a bill to designate over 7.5 million acres of California desert as wilderness. It passed a bill to impose a tax on transportation fuels as part of a five-year deficit reduction plan. It passed a bill to reauthorize the Marine Mammal Protection Act (MMPA).²²³ And it passed a bill to reauthorize the Hazardous Materials Transportation Act.²²⁴

Congress passed the California desert bill, S. 21,²²⁵ only

after senators defeated a Republican filibuster and approved the bill's conference report on the last day of the last regular session.²²⁶ The bill creates the largest land withdrawal since the Alaska National Interest Lands Conservation Act of 1980²²⁷ and is only one of two wilderness designation bills passed during the 103d Congress.²²⁸

The energy tax bill, H.R. 2264,²²⁹ passed the House on August 5, 1993, by only two votes, and passed the Senate the next day after Vice President Al Gore cast a tie-breaking vote. The bill raised the federal excise tax on most transportation fuels by 4.3 cents per gallon, effective October 1, 1993.²³⁰

On April 26, 1994, the House and Senate approved S. 1636,²³¹ which reauthorizes the MMPA through fiscal year 1999. The new law embodies a compromise between environmentalists and commercial fishers that bans the intentional killing of marine mammals, except when a fisher's life is in danger, but allows incidental harm to marine mammals in the normal course of harvesting. The new law, however, also requires fishers to reduce their contact with marine mammals whose numbers, according to the National Marine Fisheries Service, are declining.²³²

Finally, Congress reauthorized the Hazardous Materials Transportation Act. The new law,²³³ which President Clinton signed on August 26, 1994, extends the Act for four years. It also requires the Secretary of Transportation to issue new rail tank car safety regulations within one year, to issue new regulations on drivers' history checks, and to amend regulations on driving vehicles carrying hazardous materials across railroad crossings. In addition, the new law requires the Secretary to conduct studies on establishing a computerized system for tracking hazardous materials shipments.²³⁴

The Triple Threat: Winners and Losers

The triple threat plagued environmental bills throughout much of the 103d Congress, eventually killing—or, at least, facilitating the death of—several of them. The triple threat's

226. Katharine Q. Seelye, *Senate Breaks Republican Filibuster by One Vote and Passes Bill to Protect California Desert*, N.Y. TIMES, Oct. 9, 1994, at 28.

227. Pub. L. No. 96-487, 94 Stat. 2371.

228. Leslie Ann Duncan, *Feinstein Victorious on Desert Bill; Colo. Only Other Measure Enacted*, ENVTL. & ENERGY STUDY CONF., SPECIAL REP., Oct. 13, 1994, at 3. The other bill designated over 600,000 acres in Colorado as wilderness. Colorado Wilderness Act of 1993, Pub. L. No. 103-77, 107 Stat. 756.

229. H.R. 2264, 103d Cong., 1st Sess. (1993) (enacted as the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312).

230. Steve Cook, *Budget Boosts Taxes, Fees; House Votes More Cuts*, ENVTL. & ENERGY STUDY CONF., SPECIAL REP., Nov. 30, 1993, at 22.

231. S. 1636, 103d Cong., 1st Sess. (1993) (enacted as the Marine Mammal Protection Act Amendments of 1994, Pub. L. No. 103-238, 108 Stat. 532).

232. Steve Daniels, *Fishery Conservation Bill Dies; Marine Mammal Law Extended*, ENVTL. & ENERGY STUDY CONF., SPECIAL REP., Oct. 13, 1994, at 14, 15.

233. Hazardous Materials Transportation Authorization Act of 1994, Pub. L. No. 103-311, 108 Stat. 1673.

234. Erin McNeill, *Congress Reauthorizes Act on Hazardous Materials Transport*, ENVTL. & ENERGY STUDY CONF., SPECIAL REP., Oct. 13, 1994, at 13, 14.

214. H.R. 2919, 103d Cong., 1st Sess. (1993).

215. 140 CONG. REC. H10593 (daily ed. Oct. 3, 1994).

216. Steve Cook, *Indoor Air Pollution Bills Die in Closing Days of Congress*, ENVTL. & ENERGY STUDY CONF., SPECIAL REP., Oct. 13, 1994, at 10.

217. H.R. 2448, 103d Cong., 1st Sess. (1993).

218. 140 CONG. REC. H6393 (daily ed. July 28, 1994).

219. S. 657, 103d Cong., 1st Sess. (1993).

220. 139 CONG. REC. S15600 (daily ed. Nov. 10, 1993).

221. Cook, *supra* note 216, at 10, 11.

222. *Environment, Energy Programs Face Fiscal 1995 Spending Cuts*, ENVTL. & ENERGY STUDY CONF., SPECIAL REP., Oct. 13, 1994, at 26, 29.

223. 16 U.S.C. §§1361-1421h, ELR STAT. MMPA §§2-409.

224. Pub. L. No. 93-633, 88 Stat. 2156 (1975) (codified as amended in scattered sections of 46 U.S.C. and 49 U.S.C.).

225. S. 21, 103d Cong., 1st Sess. (1993) (enacted as Pub. L. No. 103-433, 108 Stat. 4471 (1994)).

opponents, however, can claim victory because Congress failed to pass bills that would have prohibited Congress from imposing mandates on states without funding for compliance, would have greatly expanded the scope of federal action requiring payment to private-property owners, and would have required agencies to perform risk assessments before promulgating environmental regulations.

The House Committee on Science, Space, and Technology approved a bill, H.R. 4306,²³⁵ that would have required EPA to comply with certain risk assessment procedures, but the full House never considered it. And the House passed an environmental technologies bill, H.R. 3870,²³⁶ that included risk assessment provisions, but it was never reconciled with the Senate's environmental technologies bill, S. 978.²³⁷

Committees in both houses of Congress reported unfunded mandates bills. But neither house acted on them.²³⁸ And Senator Dole and Rep. Gerald Solomon (R-N.Y.) introduced bills, S. 177²³⁹ and H.R. 385,²⁴⁰ which would have prohibited any federal regulation from becoming effective unless the U.S. Attorney General certifies that it complies with procedures that assess a regulation's potential for taking private property and seek to minimize such takings where possible.²⁴¹ But neither bill was reported out of committee.²⁴²

What Went Wrong?

The finger pointing began almost as soon as the 103d Congress ended its last regular session. Sources, both inside and outside the Administration, said that the Administration's environmental agenda was too ambitious and that the Administration did not lobby hard enough for the bills it backed. They also acknowledged that partisan politics was a major factor in blocking legislation.²⁴³ Claudia McMurray, minority counsel for the Senate Environment and Public

Works Committee, asserted that the Administration set its priorities too late and took too long to develop legislation.²⁴⁴ The Administration vowed that during the 104th Congress it would consult more with members of Congress and narrow its legislative agenda.²⁴⁵ Kathleen McGinty, director of the White House Office of Environmental Policy, said that the Administration should select two or three environmental items to support during 1995-1996 and that Superfund and SDWA reauthorization were the most likely choices.²⁴⁶

The 1994 Congressional Elections: What Does the Future Bode?

Predictions on the prospects for passage of environmental legislation in the 104th Congress changed significantly after November 8, 1994. For the first time in 40 years, Republicans gained majorities in both houses of Congress.

Triple threat bills will most likely appear early in the 104th Congress. The new Senate majority leader is Senator Dole, the sponsor of a "takings" amendment to the Senate's failed SDWA reauthorization bill.²⁴⁷ Addressing unfunded mandates is part of the "Contract With America," which sets forth the legislative agenda for the House Republicans in the first 100 days of the 104th Congress.²⁴⁸ And risk assessment proposals, which played a major role in the 103d Congress, will no doubt also play a major role in the 104th Congress.²⁴⁹

For Superfund reform, the Republican electoral victories will probably mean a renewed debate over the stringency of cleanup standards and the retention of retroactive liability.²⁵⁰ Natural resource damages are also a likely subject of debate.²⁵¹ In addition, the NCS, which produced a consensus Superfund reform package²⁵² may be dead, but its death is hard to confirm. Some analysts say that industry sees a more favorable political climate now and will back away from the compromises it made in 1993-1994.²⁵³ Others say that everyone wants Superfund reform and consensus is the only way to achieve it.²⁵⁴

FWPCA reauthorization is a likely candidate for legislative action in 1995-1996. Rep. Bud Shuster (R-Pa.), who

235. H.R. 4306, 103d Cong., 2d Sess. (1994).

236. H.R. 3870, 103d Cong., 2d Sess. (1994).

237. S. 978, 103d Cong., 1st Sess. (1993); Steve Cook, *Property, Risk and Mandates Embroil Environmental Policy*, ENVTL. & ENERGY STUDY CONF., SPECIAL REP., Oct. 13, 1994, at 7.

238. On August 10, 1994, the Senate Committee on Governmental Affairs reported S. 993. 140 CONG. REC. S11169 (daily ed. Aug. 10, 1994). On October 5, 1994, the House Government Operations Committee approved H.R. 5128. Cook, *supra* note 237, at 7. Both bills would have required the Congressional Budget Office to analyze new laws that impose net costs over \$50 million on state and local governments. The bills also would have established points of order against consideration by either house of unfunded federal mandates—other than civil rights, emergency, or national security mandates—exceeding \$50 million unless a majority of the members waive the rule. In addition, the bills would have required federal agencies to publish cost analyses for new regulations that impose costs exceeding \$100 million annually. Cook, *supra* note 237, at 7; see also H.R. 140, 103d Cong., 1st Sess. (1993); H.R. 369, 103d Cong., 1st Sess. (1993).

239. S. 177, 103d Cong., 1st Sess. (1993).

240. H.R. 385, 103d Cong., 1st Sess. (1993).

241. See 139 CONG. REC. S611 (daily ed. Jan. 21, 1993).

242. See Cook, *supra* note 237, at 7; see also H.R. 561, 103d Cong., 1st Sess. (1993).

243. *Administration Plans Narrow Agenda for Environmental Bills*, Daily Env't Rep. (BNA), Oct. 21, 1994, at B-1; see also John H. Cushman Jr., *Few Environmental Laws Emerge From 103d Congress*, N.Y. TIMES, Oct. 3, 1994, at B12.

244. *Administration Plans to Narrow Agenda for Environmental Bills in Next Congress*, 25 Env't Rep. (BNA) 1259 (Oct. 28, 1994).

245. *Administration Plans Narrow Agenda for Environmental Bills*, *supra* note 243, at B-1; *Administration Plans to Narrow Agenda for Environmental Bills in Next Congress*, *supra* note 244, at 1259.

246. *Administration Plans Narrow Agenda for Environmental Bills*, *supra* note 243, at B-1.

247. See *supra* note 148 and accompanying text; see also *Property Rights Advocates Predict Victory in Next Congress*, INSIDE EPA WKLY. REP., Nov. 18, 1994, at 7.

248. *House GOP to Move Legislation Apart From "Contract" in Nod to Dole*, Daily Env't Rep. (BNA), Dec. 2, 1994, at A-2.

249. See *supra* note 148 and accompanying text; see also *New Majority's Agenda: Substantial Changes May Be Ahead*, N.Y. TIMES, Nov. 11, 1994, at A26.

250. *Reauthorization Issues Could Be Revisited by GOP-Controlled Congress*, INSIDE EPA'S SUPERFUND REP., Nov. 16, 1994, at 1.

251. *Natural Resource Damage Liability Called Likely Topic in Next Reform Debate*, Daily Env't Rep. (BNA), Nov. 30, 1994, at A-7.

252. See *supra* notes 30-34 and accompanying text.

253. *Environmentalism-Industry Coalition Behind Superfund Bill Appears Dead*, INSIDE EPA WKLY. REP., Nov. 18, 1994, at 10.

254. See Steinzor, *supra* note 10, at 10033-34.

is expected to become the new chairman of the House Public Works and Transportation Committee, was one of the sponsors of a bipartisan alternative to H.R. 3948.²⁵⁵

Congress is virtually certain to consider SDWA reform. In December 1994, the Safe Drinking Water Act Coalition was working on a reform proposal reportedly similar to the compromise bill introduced by Representatives Slattery and Bliley in the 103d Congress.²⁵⁶ State and local governments see SDWA reform as crucial. But the Republican electoral victories mean that the debate over risk assessment and cost-benefit analyses will resume. Although Republicans hold majorities in both houses, this is not equivalent to control, as the Democrats discovered in the 103d Congress. By emboldening the Republicans, the election may only make the debate over SDWA issues more strident, making reform even less likely in the 104th Congress.

And the 104th Congress is unlikely to reform federal mining law because pro-industry legislators are likely to head the congressional committees with jurisdiction over mining. Sen. Frank Murkowski (R-Alaska) is likely to chair

the Senate Energy and Natural Resources Committee, and Rep. Don Young (R-Alaska) is likely to chair the House Natural Resources Committee.²⁵⁷

Conclusion

It is unlikely that anyone will look back fondly on the 103d Congress. Even in areas, such as Superfund reform, where it seemed that everyone wanted Congress to act and all sides were willing to make significant compromises to achieve that end, Congress was unable to pass legislation. But it would be a mistake to say that Congress did nothing. It passed some environmental legislation, and it considered numerous ways to address some of the most difficult environmental problems facing the nation. Certainly resolving the partisan gridlock that blocked so much legislation during the 103d Congress may be the keystone in fashioning solutions for troubled environmental programs. But if solving that problem sets the keystone, then the 103d Congress—in laboring to develop compromise legislation—may have constructed the rest of the arch.

255. *House Committee Will Consider CWA Rewrite in 1995*, *GOP Aide Says*, *Daily Env't Rep. (BNA)*, Dec. 5, 1994, at A-7.

256. *Coalition Gearing Up for SDWA Legislation; Draft Bill to Be Offered in Early December*, *Daily Env't Rep. (BNA)*, Nov. 23, 1994, at A-8.

257. *See GOP Chairmen in Senate*, *WASH. POST*, Nov. 9, 1994, at A22; *Industry Sees New Law From GOP Congress, Environmentalists Warn of "Sham Reform,"* *Daily Env't Rep. (BNA)*, Nov. 25, 1994, at A13.