

**CPR for the Environment:
Breathing New Life into the Nation's
Major Environmental Statutes**



*A Legislative Sourcebook of Progressive Ideas
for Members of Congress and Staff*

A Project of the Center for Progressive Reform

Introduction

Most of the nation's environmental and public health laws were crafted in an era when industrial and automotive pollution was largely unchecked, and other forms of environmental degradation were barely regulated. The laws were designed to prevent then-common, but nevertheless egregious practices. They have produced important successes by that measure. Through the Clean Air Act's technology-forcing provisions, new factories now install high-tech equipment to minimize their burden on air quality. The Clean Water Act's revolving loan program has helped communities upgrade outdated sewage treatment systems. The Endangered Species Act helped save the American bald eagle from near extinction.

But the nation's principal environmental statutes show their age. New problems – how to deal with climate change, endocrine disruptors, and genetically modified foods – have arisen. Industry efforts to evade the law, inconsistent or toothless federal enforcement, and in recent years, blatant efforts by the Executive Branch to undermine the laws, have all taken their toll, significantly affecting the efficacy of the laws, in some cases, effectively undercutting them.

At the same time, the past decade has seen little legislative progress on environmental matters. Each of

the nation's major environmental statutes is long past due for reauthorization, for example. But while key environmental laws have languished, polluting industries have lined up to receive congressional handouts.

The new Congress offers an opportunity for a new commitment on the environment. This sourcebook is the first of two volumes from the Center for Progressive Reform's *Next Generation Environmental Initiative*.

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**Photo on page 32 by Matthew Shutz.*

Both volumes are intended as resources for Members of Congress and their staff as they go about the business of recommitting the nation to environmental protection. This volume offers ideas for a tune-up of the nation's existing statutes, suggesting specific revisions to specific existing statutes. The second volume of our *Next Generation Environmental Initiative* will offer new and innovative ideas aimed at carrying U.S. environmental-protection efforts through the next several decades and beyond, seizing the opportunities that science, technology and new ideas offer.

The first segment of the Next Generation Initiative, this Sourcebook, tackles the more modest and immediate challenge

confronting Congress: to identify key legislative reforms that will enable existing environmental law to achieve their full potential. CPR scholars have been intimately involved in the passage and implementation of the nation's environmental statutes over the past 30-plus years. They have carefully tracked the laws' successes and failures, as well as the new environmental challenges that have arisen since the laws were enacted. They have created this Sourcebook as a tool to help the new Congress achieve the potential of existing environmental, health, and safety laws.

This Sourcebook includes a short chapter on each of nine major environmental, health, and safety laws. Each chapter is authored by

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a scholar with extensive knowledge and experience with the relevant law and policy and sets forth:

- the value of the statute
- the primary reasons the statute has not achieved its full potential
- the top recommended reforms to address these shortcomings.

In general, the proposed reforms recognize the importance of utilizing the precautionary principle in environmental regulation, empowering citizens to take a strong role in environmental protection, promoting broad dissemination of information about toxics, and ensuring that government programs work by using adaptive management techniques.¹

Some highlights from each chapter include:

The Clean Air Act: Old coal-fired power plants have had more than 30 years to upgrade their pollution control equipment to comply with the technology-forcing provisions of the CAA. Most have failed to do so. Since these plants are major sources of mercury and greenhouse gas pollution, it is time Congress ended their grandfathered protection.

The Clean Water Act: EPA needs to develop stronger programs for dealing with non-point source pollution, flow alteration, and habitat modifications. Nutrient runoff from agriculture and extensive engineering of coastlines,

and wetlands have devastating effects on water quality, yet Congress has not given EPA strong incentive or authority to ensure these activities are done in an environmentally conscious manner.

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, or "Superfund): Congress' failure to reauthorize the Superfund tax has substantially weakened EPA's ability to move forward with cleanup of our country's most contaminated sites. Government cleanups have been cut by half. Compounding these failures, the Supreme Court's recent ruling in *Aviall Services* discourages responsible parties from cleaning up on their own. Congress can resuscitate CERCLA by reinstating the Superfund tax and amending it to clarify the right to seek contribution in voluntary cleanup cases. The law needs a citizen suit provision that would allow citizens to step in and sue for cleanup when government efforts flag.

The Emergency Planning and Community Right-to-Know Act (EPCRA): EPCRA's Toxic Release Inventory program has been credited with triggering significant reductions in toxic releases to the environment,

¹ The recommended reforms and the principles undergirding them align with the principles found in CPR's first book, *A New Progressive Agenda for Public Health and the Environment* (Carolina Academic Press, 2004).

including a 57% drop in releases of 300 toxic chemicals since the Act's inception. Unfortunately, the scope of TRI is too limited – it covers less than 1% of the chemicals manufactured in the U.S. today, and excludes many pollution sources, Expanding TRI to include non-manufacturing sources, conventional pollutants like greenhouse gas emissions, and to require disclosure of chemical use as well as releases, could help promote even greater reduction in community exposure to harmful chemicals.

The Endangered Species Act: Though wildlife officials have listed 1311 species of plants and animals as “threatened” or “endangered” and in need of federal protection, only 16 species have recovered to the extent that they could be delisted. Congress should explore avenues for enhancing private citizens’ involvement in the protection of imperiled species. For instance, making the creation of recovery plans mandatory would enable the public to use citizen suits to ensure proper protection of endangered species. In addition, Congress should explicitly authorize the Safe Harbor Agreements popularized during the Clinton Administration, with a tiered system that would ensure proper protection of wildlife without overburdening small landowners.

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA): The process of approving a pesticide for manufacture, distribution, and use

in the U.S. involves a one-time nationwide assessment of the costs and benefits of that pesticide. This approach necessitates a sort of “averaging” of harms that ignores the fact that there will be hot spots of risk, like the risks posed to farm workers or to children in schools sprayed with pesticides. Congress should empower local decisionmakers to protect these vulnerable populations by crafting an adaptive management regulatory scheme that gives local governments the ability to fine-tune pesticide regulations to take account for local environmental idiosyncrasies or new scientific data.

The National Environmental Policy Act: NEPA needs teeth. Instead of merely requiring federal agencies to take a hard look at the environmental consequences of their actions, NEPA should require that the agencies take a hard look and then do what they can to mitigate any environmental damage. Moreover, NEPA should be amended to mandate post-implementation environmental monitoring of all projects for which an EIS was required.

The Occupational Safety and Health Act: Weak enforcement of the OSH Act has stymied its potential to ensure that Americans have safe and healthy workplaces. Workers should be granted a statutory right to bring their concerns about occupational safety and health before the Occupational Safety and Health Review Commission, and

the penalties imposed upon employers for failure to comply with the Act's standards and duties should be increased.

The Toxic Substances Control Act: TSCA's twin purposes are to protect the public from dangerous chemicals and to gather information about chemical toxicity as new chemicals reach the U.S. market. Unfortunately, the statute only requires manufacturers to submit to EPA whatever toxicity tests they have on hand. TSCA should be amended – at a minimum – to require manufacturers to compile a battery of basic toxicity and ecotoxicity tests for every chemical in commerce.

Over the next year, CPR will work to develop innovative approaches

to achieving health, safety, and environmental protection. CPR's scholars are committed to taking the best ideas and thinking on environmental, health, and safety law and helping to shape them into effective and workable policies and laws.

The Sourcebook is designed to be concise, easy to understand, and easy to use. It provides a short introduction to these topics and focuses on the most important reforms each author identified for the particular statute. We hope that this Sourcebook proves a valuable tool in that endeavor and welcome feedback on how to contribute to this objective.



Summary of CPR Proposals



Clean Air Act: To Do List

Near-term reforms:

- Amend §§ 111, 165 & 172-3 to impose new source pollution control requirements on all existing sources of pollution after a 5 year phase-in period
- Amend § 108 with a Congressional declaration that GHGs are to be considered criteria air pollutants
- Amend § 202 to explicitly require that GHGs be considered air pollutants “reasonably anticipated to endanger public health”
- Craft a GHG regulatory structure (e.g., cap-and-trade)
- Amend § 112(f)(2) such that the required standards for reducing residual risk must be promulgated within 1 year, or else face mandatory 20% reduction in HAP emissions in areas with excess residual risk for each year EPA delays

Mid-term reforms:

- Impose a carbon tax on fossil fuels or mandate increased fuel efficiency standards for motor vehicles (increase CAFE standards)



Clean Water Act: To Do List

Near-term reforms:

- Amend § 319 to give EPA authority to promulgate NPS pollution management plans in certain situations
- Amend § 303 to ensure impaired waters are identified not just when chemical criteria are violated, but rather whenever a body of water fails to meet its designated use
- Amend § 303 to address waters impaired by hydrological modification
- Increase federal funding for state water quality monitoring
- Set deadlines for TMDL establishment and implementation (including the setting of appropriate limitations upon non-point sources)
- Amend § 404 to set forth explicit criteria and guidance for assessing whether mitigation plans adequately compensate for wetlands loss
- Delete the word “navigable” from the Act to make clear that Congress intends the CWA to extend to isolated waters and wetlands, as well as intermittent waters
- Make clear that Congress intends for the CWA to regulate activities that drain wetlands (not just discharges into them)

Mid-term reforms:

- Amend § 303 to create watershed-level institutions that would better coordinate and manage the wide range of activities that adversely affect the biological, physical, and chemical integrity of our waters
- Provide direct federal grants to municipal treatment facilities for upgrades and/or expand funding for the SRF, but require NEPA compliance to ensure that funds will not have undesirable and avoidable environmental impacts (sprawl, harm to sensitive ecosystems)
- Fund a review by EPA of existing BAT limitations and amend § 301(b) to require BAT for conventional pollutants
 - Concurrently, amend § 304(b) to indicate that the factors used to determine BAT limitations for toxics and non-conventional pollutants will also apply to establish BAT limitations for conventional pollutants



CERCLA (Superfund): To Do List

Near-term reforms:

- Revive the Trust Fund by reinstating industry taxes, and move it “off budget”
- Amend § 113(f)(1) to clarify that the right of contribution applies even for voluntary cleanup undertaken prior to commencement of a reasonably anticipated enforcement action
- Add a citizen suit provision to the statute

Mid-term reforms:

- Ease the burden in both government and citizen enforcement proceedings by bifurcating the process to determine liability first, then order the liable parties to develop a remediation plan with EPA oversight



EPCRA: To Do List

Near-term reforms:

- Create a timetable for EPA to review existing toxicity data on all HPV chemicals for potential inclusion in TRI
- Require industrial facilities to disclose greenhouse gas emissions and emissions of conventional pollutants regulated under the CAA and CWA and hazardous wastes regulated under RCRA
- Craft a system of graduated sanctions for under-reporting, including civil penalties and flags on the TRI website
- Require EPA to make data public within 6 months of submission
- Require covered facilities to submit reports electronically

Mid-term reforms:

- Expand coverage to non-manufacturing sources (e.g., sewage treatment plants, hospitals, and service industries like dry cleaners, auto service stations, airports, and agricultural operations)
- Require report of toxics use, not just release



Endangered Species Act: To Do List

Near-term reforms:

- Amend the findings and policies sections of the Act to more clearly ground the entire statute in the Commerce Clause
 - Amend § 9 to prohibit the “take” of listed species in the course of any action that affects interstate commerce
 - Amend the Findings section to recognize the benefits of biodiversity on national welfare and the economy
- Increase funding for the ESA, creating a stable source of funds for
 - Federal agency responsibilities under the ESA
 - State activity under cooperative agreements
 - Purchasing habitat
- Clarify the role of critical habitat
- Add a section to the statute explicitly authorizing the Safe Harbor Agreement/No Surprises Policy, with clear statements about the requirements for landowners to enter into such an agreement
 - Create a tiered system so that smaller landowners are not overly burdened by bureaucratic delay
- Define recovery and make recovery plans mandatory, so that they may be enforced through citizen suits
- Amend § 7 to require mitigation in any case where an agency action will adversely affect a listed species
- Amend § 6 to encourage cooperative federalism – states need a greater role in creating Habitat Conservation Plans and enforcing the ESA on private lands

Mid-term reforms:

- Streamline the listing process by collapsing (1) the proposal to list a species, and (2) the actual listing, into one step
- Distinguish the protections afforded “threatened” and “endangered” species
- Add a third category of listed species that would be subject only to monitoring



FIFRA: To Do List

Near-term reforms:

- ❑ Registration decisions should be based on a more “open ended” cost-benefit analysis than is currently employed,
 - ❑ On the cost side: taking into account effects on endangered species and ecosystem services, environmental justice concerns, etc.
 - ❑ On the benefit side: place the burden of proof on manufacturer to demonstrate a pesticide’s efficacy and benefits relative to other (less toxic) pest control methods
- ❑ Promote adaptive management by enabling local regulatory bodies to adjust permitted uses of pesticide based on local environmental concerns and new scientific information
- ❑ Add a citizen suit provision to the statute
- ❑ Amend § 3 to allow consideration of lower-risk alternatives – including non-chemical pest control – in the decision whether to license a new pesticide

Mid-term reforms:

- ❑ Amend § 6 to require consideration of newer, less toxic alternatives in considering revocation of a registration
- ❑ Amend § 11 to require all certified applicators to obtain training in IPM and non-chemical pest management
- ❑ Amend § 17 to require prior informed consent of an importing government when a U.S. manufacturer seeks to export cancelled, suspended, or severely restricted pesticides



National Environmental Policy Act: To Do List

Near-term reforms:

- Require agencies to assess mitigation of environmental impact in every EIS
- Require agencies to implement the most effective mitigation measures (unless there is clear and convincing evidence that a less protective approach is warranted)
- Amend § 102(2)(C)
 - To bar private parties with a financial stake in a proposed federal action from substantial involvement in EIS preparation
 - To require a worst-case analysis of the possible consequences of a proposed action
 - To make NEPA applicable to all major federal actions, regardless of whether they are inside or outside U.S. borders
- Add a provision that requires post-implementation monitoring of any project for which an EIS was completed

Mid-term reforms:

- Make NEPA applicable to major projects proposed by private parties that will have a significant environmental impact
- Fully fund all work by federal agencies to comply with NEPA
- Require environmental analysis of legislative proposals (to be overseen by a nonpartisan governmental institution like GAO)
- Press the CEQ to improve the training provided to federal agency personnel with respect to the technical aspects of EIS development



Occupational Safety and Health Act: To Do List

Near-term reforms:

- Give employees the right to enforce occupational safety and health standards and the General Duty Clause through proceedings at the Occupational Safety and Health Review Commission, with the ability to appeal to federal courts
- Increase penalties for employers' non-compliance
- Provide funding to increase OSHA's inspectorate

Mid-term reforms:

- Oppose appointment of OSHA administrators hostile to the mission of protecting workers' safety and health



Toxic Substances Control Act: To Do List

Near-term reforms:

- Amend § 2(b) to declare that the precautionary principle is “the policy of the United States” with respect to toxic chemicals
- Amend §3(2) so that TSCA covers not just simple chemicals, but also dangers posed by emerging technologies (e.g., nanotechnology, GMOs)
- Replace the “substantial evidence” standard for judicial review of rulemaking by the agency with the “arbitrary, capricious, abuse of discretion, or otherwise contrary to law” standard
- Amend § 12 so that TSCA’s export controls comply with international standards (Stockholm POPs Convention, Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade)
- Provide new authority and a mandate for EPA to promulgate regulations to ensure safety at chemical and industrial facilities
- Restrict EPA’s overbroad trade secret policy by amending Section 4(c)

Mid-term reforms:

- Make TSCA a licensing statute, requiring manufacturers to submit a standard battery of toxicity and ecotoxicity studies for all new and existing chemicals
- Amend § 5(e) to empower EPA to demand toxicity data without having first to prove that the chemical in question may present an unreasonable risk
- Amend § 4 to eliminate the predicate findings that hamper EPA’s ability to collect information
- Amend § 8 to increase its breadth and reduce ambiguities
- Provide for creation of a web-based clearinghouse for information submitted to EPA by toxics manufacturers
- Amend §§ 6 and 19 to give TSCA teeth –
 - Change the “unreasonable risk” standard to clarify that EPA has the authority to regulate toxic chemicals to ensure public safety (putting safety ahead of cost)
 - Delete the requirement that regulation of toxics be the “least burdensome”
 - Require EPA to regulate persistent organic pollutants as it does PCBs (burden of proof is on EPA to justify *not* regulating to the fullest extent)

Reforming the Clean Air Act

42 U.S.C. §§ 7401 et seq.

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The Value and Importance of the Clean Air Act

In response to increasing visible pollution and rising health concerns, including “air pollution episodes” in many major metropolitan areas, the Clean Air Act was passed in 1970 with overwhelming bipartisan support. The 1970 statute essentially replaced an earlier federal statute that provided information to support state efforts to address air pollution. The 1970 statute boldly sought to eliminate the negative health effects of air pollution for all American citizens by 1975. Despite some success in addressing many of the worst pollution problems, more than 30 years after 1975, there remain large parts of the country where breathing the air still produces negative impacts on citizens’ health.

The CAA employed several pollution control strategies that were later used in other pollution control statutes. It established technological requirements for both stationary and mobile emissions sources and created a strategy to require states to ensure that its citizens were not exposed to unhealthful air, even if technological controls were not sufficient to reduce the unhealthful pollution. Through amendments in 1977 and 1990, the mix of control strategies has been altered in response to perceived shortcomings in the initial statute. Though these amendments

addressed some of the shortcomings of the initial act, some intractable problems remain. Moreover, additional problems, such as climate changing greenhouse gases, unregulated pollution of older sources, and high air toxic concentrations remain to be addressed.

The widespread use of technology-based standards as a strategy to control pollution was one of the most innovative and important parts of the CAA of 1970. The Act required all new stationary sources of common pollutants that could harm human health (the criteria pollutants) to utilize the “best available control technology” (BACT) to control those pollutants, regardless of the surrounding ambient air quality. BACT responded to the problem of long range pollution transport, recognizing that stationary sources were a national problem. Moreover, because BACT requirements were definite and easy to enforce, they also ensured that actual as opposed to theoretical reductions in pollution would occur. The success of this program in demonstrating actual reductions in pollution validated this strategy as an effective way to quickly deal with pollution, and it was utilized in later acts, such as the Clean Water Act.

In seeking to reduce emissions from new automobiles by 90 percent by 1975, the 1970 Clean Air Act also introduced the

concept of “technology forcing” – the idea that law could mandate a reduction in pollution even if current technology was not sufficient to meet that requirement. Though the automobile industry fought requirements for pollution control equipment on mobile sources, once the technology-forcing requirements were in place, it was able to achieve emissions reductions it had argued were impossible to meet. And although these requirements were weakened and extended, pollution from new mobile sources is more than 90 percent lower per unit of energy produced than at the time the Clean Air Act was passed, as a result of these standards.

The Clean Air Act was also visionary because it established that the reason to control air pollution was not just to provide a minimal level of healthful air, but also to protect other values important to the American public. The CAA amendments of 1977 established a program to protect clean air areas from getting worse (the Prevention of Significant Deterioration Program) and to restore the impaired visibility in pristine air areas, such as national parks, so that their stunning vistas and natural beauty would be preserved.

The 1990 amendments to the Clean Air Act also established a large-scale pollution trading program for the first time, and this has proven to be an important

innovation for controlling certain kinds of pollution efficiently. Originally tied to limiting total production of SO₂ to control acid rain in the United States and Canada, the program proved that at least some pollution trading regimes could effectively reduce pollution at a lower cost than originally anticipated. Although certain traits of SO₂ producers in the United States make them uniquely suited for an effective pollutant trading program, the success of the program has spawned calls for increasing the use of emissions trading to control many other kinds of pollution. Though the uncritical adoption of emissions trading for all pollutants is problematic for many reasons¹, the 1990 CAA amendments at least established this as one viable method of pollution control.

Shortcomings of the Current Statute

Although the CAA as amended has been somewhat successful in reducing pollution, many areas need improvement. One of the most important shortfalls is that its terms do not apply equally to new pollution sources and older pollution sources. When command and control

¹ Some pollutants are produced by so many sources that monitoring trades to ensure that no cheating occurs could be exorbitantly expensive, and other pollutants are so toxic that it would be dangerous and an injustice to allow the pollution to be concentrated in hot spots.

requirements were first adopted for stationary air pollution sources, Congress decided that existing sources should be exempt. Existing sources were required to apply only the same command and control requirements as new sources if they were modified or upgraded. This accommodation recognized the additional cost required to retrofit stationary sources, a cost that would not have to be borne by new sources. It also was

Many stationary sources of pollution constructed before 1970 continue in operation, producing a disproportionate quantity of unhealthful air pollution.

grounded in the belief that eventually these so called “grandfathered” sources either would have to be modified to operate efficiently, thus triggering the technology-forcing BACT requirement, or that they would eventually cease to operate altogether as they became obsolete and comparatively inefficient.

However, this has proven not to be the case. Many stationary sources of pollution constructed before 1970 continue in operation, producing a disproportionate quantity of unhealthful air pollution. The failure of the expected upgrade or shut down of these sources can be ascribed to two aspects of EPA’s implementation of this requirement. First, during the Reagan administration, EPA decided to define a “source” as the entirety of a new plant, including all of its component parts. Thus,

plant owners and operators could repair one component of a plant, even if doing so increased emissions, so long as another part of the plant decreased emissions by an equivalent amount. This concept, called “bubbling” was upheld by the courts as a legitimate exercise of the EPA’s discretion. The EPA’s interpretation has allowed grandfathered plants to extend their lifespan without installing available

technology and meeting newer, more stringent standards.

Second, the EPA has failed to rigorously enforce the requirements that plant-wide modifications that increase overall emissions trigger new source requirements. In the 1980s, the EPA administratively established a regulatory “safe harbor” from new source requirements, if the owner merely undertook “routine, repair, and maintenance.” As this safe harbor was implemented, pressure increased on the EPA to allow it to cover more and more activities. Consequently, many life-extending renovations were made without any pollution control upgrades. Under the Clinton administration, the EPA made a concerted effort to enforce the rules more strictly, and this enforcement was generally upheld by the courts. But the George W. Bush administration has backed

away from these enforcement efforts and has tried administratively to redefine the terms of the Act so as to allow many more activities to escape new source requirements. Though many of these attempts have been challenged and overturned in court, the case-by-case approach to determining what modifications must comply with new source review, the continued administrative attempts to weaken the new source program, and a general lack of enforcement zeal all remain large barriers to achieving significant reductions in certain air pollutants.

Another shortcoming of the CAA that has become apparent in the last few years is its failure to address the health effects of hazardous air pollutants in areas with high concentrations of sources (so called “hot spots”). The CAA has regulated Hazardous Air Pollutants (or HAPs) since 1970, but initially established only health-based ambient air quality standards to control sources. Unlike criteria pollutants, many of the HAPs can be harmful in extremely small doses. Thus, health-based controls might have effectively banned emissions of certain substances in widespread use by economically powerful interests. However, this did not happen. Instead, between 1970 and 1990, the EPA initiated regulation of only eight of the hundreds of hazardous air pollutants that had already been identified by state agencies, and

regulation of these was initiated only in the wake of lawsuits brought against the agency.

As a result of the EPA’s failure to act to regulate HAPs, in the 1990 amendments, Congress altered the program to focus more on a technology-based system that required most sources of 189 congressionally identified hazardous compounds to impose the Maximum Available Control Technology (“MACT”) at their facilities. This requirement has been very successful in reducing the total amount of Hazardous Air Pollutants that are released into the environment, and has increased the percentage of the overall population that is safe from HAP exposure. However, it has failed to protect those people who live near high concentrations of HAP-producing sources, because even though individual sources may all impose MACT, together they may emit HAPS in sufficient quantities to cause increased health risk. The 1990 HAP program recognized this possibility and noted that the EPA should examine any “residual risk” from HAP regulation, make recommendations to Congress about altering the law, and come up with new programs to reduce overall emissions of the HAPS that were causing residual risk. However, the “residual risk” directive is vague and the EPA has already fallen behind the statutory timetable for addressing these risks, leaving many in the population exposed to increased

risk of health impacts and premature death.

The last major area in which the Clean Air Act may be falling short is in its ability to regulate greenhouse gases (GHGs) that contribute to climate change. GHGs such as carbon dioxide are arguably “harmful” within the meaning of sections 108 and 211 of the Clean Air Act, thus requiring regulation under both mobile source controls and as a criteria pollutant. The current EPA has rejected such regulation, but the United States Supreme Court has heard a challenge to this position and will decide the case in the coming year.

A Legislative Proposal To Improve the Clean Air Act

CPR recommends Congress consider the following proposals:

End Grandfathering

The grandfathered stationary sources that continue to produce much of the unhealthy pollution Americans breathe have continued long past their expected lifetimes. Allowing them to continue in operation without modern pollution control equipment is unfair to newer sources and a continuing danger to the public health. Section 111, which requires standards of performance for new or modified stationary sources, Section 165, which requires standards of performance for all new or modified sources in attainment

areas, and Sections 172 and 173, which require standards of performance for all new or modified sources in non-attainment areas, (collectively “new source requirements”) should be amended so that all requirements applicable to new and modified sources would apply to all existing sources after a phase-in period of five years. This phase-in period would mitigate any potential production disruptions to these existing sources and allow them to upgrade with pollution control equipment or shut down, as economics dictate. This would go a long way towards reducing many of the criteria air pollutants and assist our metropolitan areas in coming into compliance and attainment.

Minimize Residual Risk

The requirements to address residual risk from Hazardous Air Pollutants should be strengthened at the federal level, and incentives should be created to keep the EPA on a timetable to take action. Section 112(f)(2) presently requires the EPA to create emissions standards to provide an ample margin of safety to protect public health. This section should be amended to require the EPA to promulgate such standards within a year, and if delayed, all sources in an area in which a residual health risk has been identified should be required to achieve a 20-percent reduction in HAP emissions for each year of

delay. This kind of non-compliance “hammer” was employed previously to ensure changes in state plans when they failed to make progress on ozone pollution control. Although, such a “hammer” system has not effectively controlled all unhealthful ozone pollution, it is widely credited with spurring both state and federal agencies to take more action to control this pollutant. Thus, a similar provision for HAPs would encourage regulated sources to assist the EPA in identifying effective measures to control the residual risk and effectively protect the public health.

Regulate Greenhouse Gases

Section 108 should be amended with a congressional declaration that Greenhouse Gases are considered to be criteria air pollutants under that chapter and should be regulated to protect human health and the environment, and specifically to minimize climate change. Similarly, Section 202 should be amended to require that GHGs be considered an air pollutant “reasonably anticipated to endanger public health” and thus subject to regulation in mobile sources.

In order to minimize confusion and increase certainty of regulation, Congress could also establish the method for controlling and reducing GHGs.

For instance, Congress could create a maximum amount of CO₂ or its greenhouse gas equivalents that can be emitted per year from stationary sources and then create a system for reaching that target. The maximum amount could be tied to internationally-recognized reduction targets. This system could include taxation, emissions trading, and incentives for conservation and non-GHG energy. The SO₂ trading system could be used as a model for this since power plants are some of the largest GHG producers in the country and the dangers associated with GHGs are diffuse and do not create hot spots. Additionally, Congress could create a system of increasing fuel efficiency standards for mobile sources which would encourage the manufacture of lighter, more fuel efficient vehicles or impose a carbon tax on fossil fuels, the proceeds of which would fund renewable energy incentives. This latter would probably be more efficient than a CAFE standard and could also apply to other forms of transportation and energy use in the commercial sector, such as railroads, trucking, shipping, and airlines. There would need to be further research on how to permit ongoing adjustments in the tax as needed to control the total amount of GHGs being produced.



Reforming the Clean Water Act

33 U.S.C §§ 1251 *et seq.*

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The Value and Importance of the Clean Water Act

Early in the 1970s, Congress turned its attention to the quality of the nation's water resources. What it found was shocking. Despite state and federal efforts, the nation's surface waters were still being used as a convenient disposal site for ever increasing amounts of waste. Industry, in fact, was discharging more than 70 percent of its water pollutants without any treatment whatsoever—and much of the rest received only rudimentary treatment. Cities and towns, meanwhile, were discharging more than nine billion gallons of raw and inadequately treated sewage each and every day. Pollution killed tens of millions of fish annually; rivers resembled cesspools; and the situation was growing worse. And, to make matters worse, more than half a million acres of wetlands were being filled each year.

Recognizing the need for a more effective federal effort to fight water pollution, Congress passed the Clean Water Act in 1972. The Act was revolutionary in many ways. It implemented a new, uniform system of technology-based effluent limitations. These limitations applied to point source dischargers throughout the country and were implemented through a massive new permit system. The Act's strategy, however, was not completely based upon national technology-

based limits. When necessary to meet water quality standards, dischargers were also required to comply with more stringent, individually crafted permit limitations. In this way, the Act combined technology-based limits and environmental quality-based standards in an innovative attempt to combat the scourge of water pollution.

The Clean Water Act was a remarkable statute in other ways as well. It set the stage for a comprehensive regulatory program to protect wetlands, and created an ambitious public works program aimed at building or upgrading thousands of municipal wastewater treatment plants. The Act also strengthened the nation's efforts to prevent oil spills and to cope with spills once they occur by establishing mandatory notice requirements, an elaborate scheme for responding to spills, and a spill prevention program.

These programs have produced tremendous progress. The discharge of organic waste from municipal waste treatment facilities has fallen 46 percent, while similar discharges from industry have dropped 98 percent. Dissolved oxygen levels have increased downstream from point source discharges all over the country, and the improvements are so substantial that they can often be seen throughout major river basins. The greatest improvements, of course, are visible in many urban waters—

precisely the resource that had suffered the most from past industrial and municipal practices. Progress has not been limited to conventional organic pollutants, but also includes heavy metals and toxic water pollutants. In addition, the rate of wetland loss was cut to approximately 60,000 acres per year, too much to be sure, but still 85 percent below the peak levels of the 1960s. And the amount of oil spilled in U.S. waters has fallen by nearly 90 percent.

Shortcomings of the Current Statute

Unfortunately, neither the design of the Act nor its implementation have been perfect, and more than a little work remains in order to meet the Clean Water Act's objective to "restore and maintain the chemical, physical, and biological integrity" of our waters. Today, approximately 40 percent of American waters are still impaired in terms of water quality, largely because of non-point source pollution—the indirect discharge of polluted runoff from fields and roads, construction sites, clear cuts, and even air pollution. Many waters also fail to meet water quality objectives due to various kinds of

habitat modifications and flow alterations. Some 60,000 acres of wetlands are still lost each year, and this number will grow in the wake of several Supreme Court decisions. In addition, more than 600,000 miles of river have been

flooded by dams, and thousands of additional miles have been de-watered, concreted, channelized, ripped and otherwise transformed in ways that severely damage aquatic habitat.

Today, approximately 40 percent of American waters are still impaired in terms of water quality, largely because of non-point source pollution—the indirect discharge of polluted runoff from fields and roads, construction sites, clear cuts, and even air pollution.

The Clean Water Act has never dealt forcefully enough with non-point pollution or with other types of activities that adversely affect waters. The current approach to non-point source pollution relies upon the states, first, to identify those waters that do not meet water quality standards due to non-point pollution, and, second, to develop management plans to reduce that pollution. The EPA, however, has permitted states to use voluntary standards and non-regulatory approaches to implement their plans. That decision, together with the lack of EPA authority to institute a federal plan in lieu of an adequate state plan, has prevented the Act from producing much progress. The states have also been reluctant to use water quality standards to fight non-

point pollution. Although states are required to set total maximum daily loads (TMDLs) for impaired waters, and while the EPA has defined TMDLs as the sum total of point and non-point source wasteloads, the states have shied away from imposing limits on non-point source discharges, and EPA has refused to require them to do so.

The water quality standard program, furthermore, has not clearly tackled the problem posed by activities that adversely affect waters and watersheds other than discharging pollutants. This is because water quality efforts have focused on controlling chemical pollutants, rather than on the goals of restoring and maintaining the biological and physical integrity of our waters. Thus, waters are often considered as impaired only when some particular chemical criteria is violated and not when the water fails to meet its designated use—such as fish and wildlife protection and propagation—due to things such as water withdrawals, the operation of hydroelectric dams, and channelization projects.

The continuing of loss of wetland habitat has been caused by a number of factors, including

Continuing of loss of wetland habitat has been caused by a number of factors, including failures in the United States Army Corps of Engineers' program to mitigate the authorized loss of wetlands and the shrinking jurisdictional reach of the program.

failures in the United States Army Corps of Engineers' program to mitigate the authorized loss of wetlands and the shrinking jurisdictional reach of the program. The point source pollution program, meanwhile, is at a critical juncture today. Many technology-based effluent limitations have not been revised

in more than two decades—despite recent improvements in technology and the fact that we now know that many of the limitations should have addressed additional pollutants. It is past time, therefore, to undertake a

serious process of review and revision for all limitations and to bring them up-to-date, requiring the use of best available technology across the board for existing industrial facilities.

Over the past 35 years, the federal government has contributed more than \$80 billion for the construction of new and upgraded sewage treatment facilities around the country. The federal contribution was more than matched by funds that came from state and local government. Although that effort has produced tremendous progress in terms of water quality, the level of the nation's investment in this critical

infrastructure has been falling for more than a decade.

Consequently, we face many unmet needs today, and the situation will only grow worse unless we act. Our existing treatment facilities (many of which were built in the 1970s) are aging and will soon need renovation. In many cases, our treatment capacity has been outstripped by population growth. In addition, the nation's wastewater collection system (much of which is more than half a century old) has deteriorated badly. As a result, thousands of rivers and streams are regularly fouled by overflows from our sanitary sewer systems. It is time, therefore, for Congress to renew its commitment to clean water by substantially increasing its investment in the nation's infrastructure for collecting and treating municipal wastewater.

A Legislative Proposal to Improve the Clean Water Act

CPR recommends Congress consider the following proposals:

Strengthen the CWA's Institutional Framework

One of the main reasons that we have been unable to successfully address all water quality problems is the lack of jurisdictional clarity. For example, while EPA and the state agencies share responsibility for regulating water pollution, wetlands regulation, dredging, and channelization work lies within

the province of the United States Army Corps of Engineers. Enforcement of the Endangered Species Act in inland waters, meanwhile, belongs to the United States Fish and Wildlife Service. To add yet another layer of complexity, water law is largely a product of state law, while land use management is primarily the domain of local government. This kind of fragmentation has led to inadequate regulation of many activities that adversely impact upon the biological and physical integrity of our nation's waters.

Section 303 of the CWA should provide, therefore, for the creation of new watershed institutions that bring together all of the relevant agencies and the public in an effort to better coordinate and manage those activities—decisions, for example, involving the use and consumption of water and decisions involving physical modifications to the aquatic system—that have too often contributed to water quality impairment. While these watershed institutions could be vested with the responsibility for managing or coordinating a whole range of activities that affect the ecological sustainability of a particular watershed, including management plans for non-point source pollution, they should be required, at the very least, to develop management plans to reduce the adverse impacts of hydrological modifications that contribute to impaired water quality conditions.

Look Beyond Point Source Pollution Control

The water quality standard program must also be substantially strengthened and broadened in scope to better deal with non-point source pollution and hydrologic modifications. Section 303 of the Act must be amended to ensure that impaired waters are identified in comprehensive fashion. In order to do so, federal funds must be made available to enable the state agencies to expand the scope and accuracy of their water quality monitoring efforts. In addition, section 303 must make it clear that a water is impaired whenever it cannot meet its existing designated use, not just when a particular chemical criterion is violated. Water quality criteria, further, should be expanded to include biological criteria, including minimum natural flows, that are necessary to protect wildlife and the aquatic ecosystem.

Total maximum daily loads must be set for all pollution-impaired waters, and appropriate pollutant wasteloads must be allocated among all of the responsible

sources, point and non-point sources alike, and implemented through discharge permits and non-point source management plans. Section 303 must also be amended to directly address waters that are impaired, in whole or in part, due to various hydrologic modifications.

Section 319 of the Clean Water Act deals with state non-point source pollution programs. This

Congress should end the efforts by developers and others to use the courts as a device for paring back the protection of our nation's remaining wetlands. To do so, Congress should delete the word "navigable" from the Clean Water Act to make it absolutely clear that the Act is intended to protect all of the waters of the United States.

provision should be strengthened by giving EPA the authority to promulgate a federal management plan, including best management practices, whenever EPA is confronted with an inadequate state plan and the state is unwilling or unable, after notice and a

reasonable period of time, to meet EPA's objections.

Protect Wetland Habitat

In order to address the continuing problems in the wetlands program, Congress should revise section 404 of the Clean Water Act to set forth explicit criteria and guidance for the United States Army Corps of Engineers to follow in assessing whether mitigation plans actually provide an adequate and verifiable level of compensation for the proposed

loss of wetlands. In addition, Congress should close the jurisdictional loopholes created by the Supreme Court and end the efforts by developers and others to use the courts as a device for paring back the protection of our nation's remaining wetlands. To do so, Congress should delete the word "navigable" from the Clean Water Act to make it absolutely clear that the Act is intended to protect all of the waters of the United States. The amendment should also set forth an explicit foundation for Congress' assertion of federal jurisdiction over isolated waters and clearly extend jurisdiction over activities that destroy wetlands by draining them, rather than just by filling them.

Improve Sewage Treatment

Title II of the Clean Water Act, dealing with federal funding of local sewage treatment facilities, should be amended to provide more capital for the construction of new wastewater treatment capacity and the replacement or upgrading of old, outdated facilities. Special efforts need to be aimed at eliminating sewer overflows and the problems posed by combined sewer systems. While this expanded program could make use of the existing State Revolving Fund Program, consideration ought to be given to the reconstitution of direct federal

grants to local treatment facilities. Those direct federal grants were subject to the assessment requirements imposed by the National Environmental Policy Act. Most states, however, lack a similar review provision, and it is essential that construction funding be reviewed vigorously in order to ensure that funding decisions do not, for instance, contribute to urban sprawl or encourage growth in sensitive areas such as barrier islands.

Strengthen End-of-Pipe Controls

Section 301(b) of the Act, which deals with technology-based effluent limitations should be revised to require the achievement of effluent limitations representing the use of best available technology (BAT) for conventional pollutants. The effluent guidelines in section 304(b) should also be amended to indicate that the factors that apply to the adoption of BAT for toxics and non-conventional, non-toxic pollutants shall also apply to conventional pollutants. EPA's appropriation bill should also contain adequate sums to permit EPA to carry out a thorough review of existing BAT limitations and to permit revisions where necessary.





**Reforming the Comprehensive
Environmental Response, Compensation,
and Liability Act**

42 U.S.C. §§ 9601 *et seq.*

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The Value and Importance of CERCLA

The last of the major federal environmental laws to be passed, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, often called “Superfund”) became law in December 1980. Congress thought it had closed the last loophole in the environmental regulatory framework four years earlier when it enacted RCRA, which regulated hazardous waste from “cradle to grave.” The events at Love Canal, however, exposed the major area left unaddressed by RCRA – abandoned hazardous waste dumps. Who would clean up these smoldering chemical stews, now that the companies who had created them (through careless dumping of millions of gallons of hazardous liquids, sludge and other industrial byproducts) had long since disappeared or gone bankrupt?

In drafting CERCLA, Congress took a visionary, multi-faceted, and progressive approach to answering this question. Rather than the general public, Congress decided, the industries that contributed to creating the sites would pay for their cleanup. This “polluter pays” principle runs throughout CERCLA’s statutory tapestry, and has been affirmed and re-affirmed by courts over the years.

The statute sets up a stringent liability scheme to hold broad

categories of parties financially responsible for cleaning up sites they helped create. Liability is retroactive, strict, joint, and several. Each of these aspects of CERCLA liability has been criticized as “unfair” by responsible parties. However, courts have made clear that Congress intended that EPA have these powerful tools to make sure it is able to recover cleanup costs from those responsible for contamination. As these courts correctly determined, Congress weighed the potential unfairness created by CERCLA’s liability scheme, and concluded that the results were preferable to the costs of cleanup being borne by the general public—or worse, to a failure to clean up sites at all.

CERCLA authorizes EPA to identify, locate and order responsible parties to cleanup sites pursuant to these liability provisions, using what is sometimes called the “lawyers first, shovels later” approach to cleanup. Alternately, CERCLA established the Hazardous Substances Trust Fund to allow EPA to conduct and pay for cleanup, and recover costs from responsible parties it is later able to identify (the “shovels first, lawyers later” approach). The Trust Fund depended upon a set of excise taxes on petroleum and chemical feedstocks, reflecting the central role played by those industries in creating the sites. Later, Congress added a broad-

based corporate environmental tax.

In the years since it was passed, CERCLA has provided the tools for EPA to facilitate full clean up at 316 of the 1,618 sites on the National Priorities List (NPL, those sites identified by EPA as being the most hazardous in the nation).

Another 1,006 sites have reached the “construction complete” milestone, when all major construction required for clean-up has been put in place. CERCLA has also been successful in encouraging

voluntary cleanup efforts, and has spurred laws encouraging voluntary cleanups in states across the country. The most difficult benefit of CERCLA to quantify may be its most important – the untold numbers of hazardous waste sites that have never been created due to the potent threat of CERCLA liability.

Shortcomings of the Current Statute

Despite CERCLA’s far-sighted financial responsibility approach to ensuring cleanup of abandoned toxic waste dumps, several shortcomings have emerged.

Taken together, they have severely compromised the Act’s goals. First, Congress has failed to

reinstate the taxes intended to feed the Trust Fund since they last expired in 1995. As the direct result of this failure, by the end of FY 2003, the Fund’s balance was zero, meaning that general revenues accounted for 100 percent of appropriations to EPA for the Superfund program by

2004. Therefore, the general public is now financing EPA’s cleanup costs, a serious blow to the statute’s “polluter pays” framework.

The empty Trust Fund also appears to have contributed to a steady decline in appropriations

for the Superfund program, capped most recently by the President’s FY 2007 Budget Request, which proposes to cut funding for Superfund by \$20 million compared to FY 2006. This decline in resources correlates with a “cleanup slowdown,” as the rate at which sites are declared “construction complete” has declined from more than 80 per year (from 1997-2000) to 40 per year (from 2003-2006).

The depleted Trust Fund and associated decline in resources also undermine EPA’s ability to pursue responsible parties under the “lawyers first” approach. Under CERCLA, EPA is responsible for conducting the expensive

As the direct result of Congress’ failure to reinstate the taxes intended to feed the Trust Fund, by the end of FY 2003, the Fund’s balance was zero, meaning that general revenues accounted for 100 percent of appropriations to EPA for the Superfund program by 2004.

process of selecting the appropriate remedial actions that responsible parties must take to clean sites up. The Superfund program's funding woes thus impact even EPA's ability to move the enforcement process to the point where responsible parties are actually conducting and paying for cleanup. Related to this problem is the fact that CERCLA lacks a critical safety net found in the other major environmental laws – a citizen suit provision. Under CERCLA, only the government may sue responsible parties to order cleanup of a contaminated site.

One of the most important accomplishments of CERCLA is the strong incentives it creates for prudent waste management, so sites are not created in the first place. Elimination of the liability scheme in favor of a large "public works" program aimed solely at cleanup would remove this critical incentive for proper waste disposal.

Finally, in 2004, the Supreme Court struck a blow to a critical component of CERCLA's ability to encourage voluntary cleanup of contaminated sites. Under CERCLA, joint and several liability is mitigated by the ability of the party (or parties) from whom the government recovers the full costs of cleanup to turn around and recover from other responsible parties their share of the total costs. Initially, courts read this right (which also accompanies joint and several liability under common law) into CERCLA as enacted in 1980.

Subsequently, when Congress passed the Superfund Amendment and Reauthorization Act (SARA) in 1986, Congress affirmed this judicial interpretation and codified the right of contribution.

Paradoxically, in *Cooper Industries v. Aviall Services*, 543 U.S. 157 (2004), the Supreme Court construed the language Congress used in affirming the right of parties to seek contribution under CERCLA to *limit* the ability of responsible parties to seek contribution in voluntary cleanup cases. The Court's ruling thus undermines the longstanding practice of

voluntary cleanup by responsible parties, who must now wait to be sued by EPA before being assured the right to seek contribution from other responsible parties for their share of cleanup costs.

A Legislative Proposal to Improve CERCLA

CPR recommends Congress consider the following proposals:

Preserve CERCLA's Liability Scheme

The defining characteristic of CERCLA is its financial responsibility approach to the cleanup of hazardous waste sites.

RCRA addresses the problem of hazardous waste from a traditional regulatory standpoint, mandating appropriate techniques for treatment, storage and disposal of hazardous wastes. The specter of unlimited cleanup liability under Section 107 of CERCLA provides a powerful incentive for companies not only to meet RCRA's requirements, but to exceed them where necessary and to avoid exploiting loopholes in RCRA. Thus, one of the most important accomplishments of the statute is the strong incentives it creates for prudent waste management, so sites are not created in the first place. Elimination of the liability scheme in favor of a large "public works" program aimed solely at cleanup would remove this critical incentive for proper waste disposal.

Revive the Dormant Half of the 'Polluter Pays' Framework

Congress should reinstate the Superfund taxes to restore the 'polluter pays' principle to its full meaning under CERCLA. While polluters continue to pay for

cleanup at sites where they can be identified and are capable of paying, the general public now shoulders the cleanup burden at orphan sites. In addition, Congress should move the Trust Fund "off budget." Currently, the Trust Fund is an "on-budget" trust

Congress should add a citizen suit provision to CERCLA, which would empower citizens to sue responsible parties to prove liability for site contamination. Once citizen plaintiffs prevail in the liability proceeding, the case would proceed to the second phase, where the responsible parties conduct the site investigation and develop the remedial plan, subject to EPA approval.

fund, meaning two things: 1) the Trust Fund is subject to discretionary spending caps; and 2) money in the Fund may be retained there instead of appropriated to EPA in order to help obscure the true magnitude of the budget deficit. So, even though revenue that is raised by the Superfund taxes

and deposited in the Trust Fund may only be spent on the purposes spelled out in CERCLA, EPA may not be able to access enough of the money in the Trust Fund to operate an optimal Superfund program. Moving the Trust Fund off-budget would eliminate this counter-intuitive result and ensure the money gets where it belongs.

Increase Cleanups by Appointing Citizen Attorneys General

Congress should further amend CERCLA in order to harness the

knowledge of citizens living near hazardous waste sites, and provide a way for them to participate directly in ensuring that site cleanups are commenced. This reform should be accomplished by adding a citizen suit provision to CERCLA. Under such a provision, citizens would be empowered to sue responsible parties to prove liability for site contamination. Once citizen plaintiffs prevail in the liability proceeding, the case would proceed to the second phase described above, where the responsible parties conduct the site investigation and develop the remedial plan, subject to EPA approval. Citizens should have the ability to collect attorneys and technical expert fees and the statute should award a bounty for successful plaintiffs. The bounty would be used for programs to improve the environment, with no other strings attached, and would be subject to approval by the courts.

Speed Cleanups by Easing Plaintiff's Burden in Enforcement Proceedings

Before the government can ask a court to order responsible parties to commence cleanup, it must develop a proposal for addressing the site, which involves time-

consuming and expensive investigative and technical work. The statute should be amended to instead provide for a bifurcated proceeding. The first phase of the proceeding would focus on establishing the liability of the responsible parties for the site's contamination. Provided the government or a private party establishes liability, a court would then be authorized to order the responsible parties to conduct the site investigation *and* develop the remedial plan, which would be subject to EPA's approval.

Clarify the Right of Contribution in Voluntary Cleanups

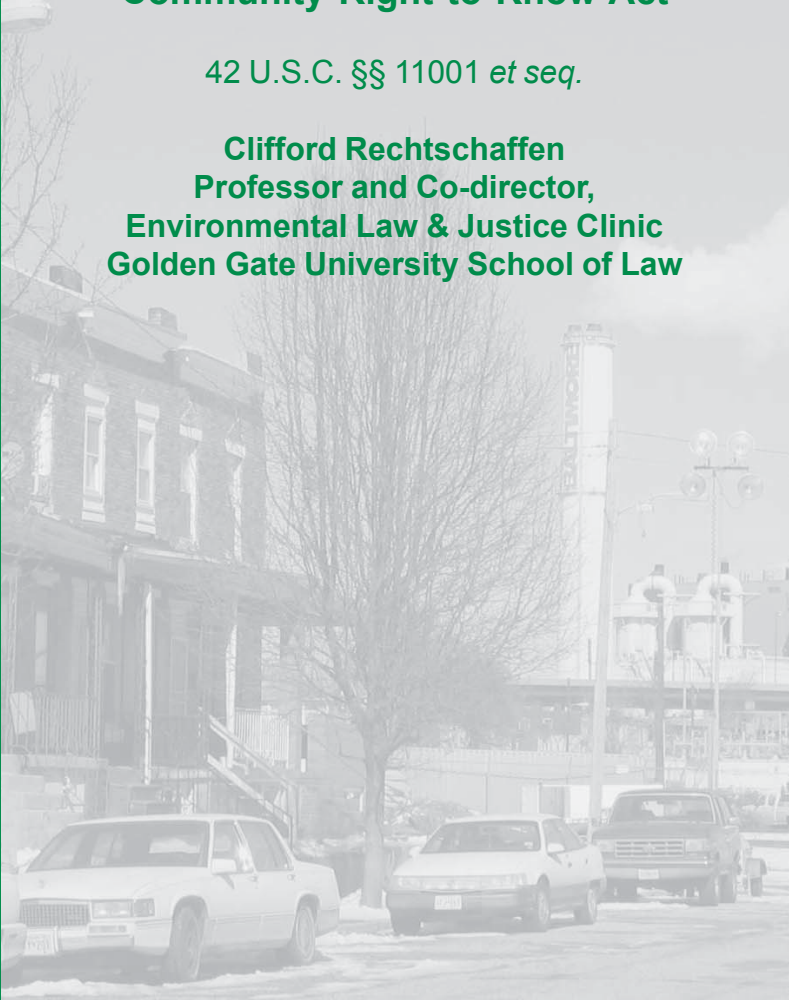
Finally, Congress must amend Section 113(f)(1) of CERCLA, the provision interpreted by the Supreme Court to deny the right of contribution to those parties who had not been sued under Section 106 or 107(a). Congress must expand the right of contribution to include not only those parties who have already been sued, but also those parties who reasonably anticipate commencement of such an action absent voluntary cleanup.



Reforming the Emergency Planning and Community Right to Know Act

42 U.S.C. §§ 11001 *et seq.*

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The Value and Importance of EPCRA

Congress passed the Emergency Planning and Community Right to Know Act (EPCRA) in 1986 in response to the disastrous accident at a chemical plant in Bhopal, India in 1984 that killed more than 3,000 people and injured thousands others, as well as other chemical spills in the United States. In part, the statute requires industrial firms to report to local emergency planning authorities information about the amounts and location of certain hazardous chemicals used at their facilities. More significantly, the statute also requires that industrial facilities report their annual releases and transfers of 654 specified toxic chemicals as part of a program known as the Toxic Release Inventory, or TRI. The TRI information is provided on standardized reporting forms, submitted to EPA and state officials. EPA is required to make the information available to the public through a national computerized database accessible through personal computers.

EPCRA and other right to know laws serve a variety of important goals. They help improve the efficient functioning of the market, by allowing consumers to make more informed decisions, workers to negotiate for less toxic working conditions, and investors in securities markets to act more knowledgeably. They serve fundamental autonomy interests,

by providing individuals with knowledge of the risks involved in their choices and allowing them to decide whether or not to encounter these risks. They promote democratic decision-making, enabling citizens to participate on a more equal footing with regulated entities in permitting, land use, and other political decisions. Right to know laws also can improve health and safety, by facilitating emergency planning, avoiding accidents, and helping the government determine areas in need of additional regulation. Finally, they provide strong incentives for firms to undertake self-regulation and reduce risky activities: when companies face a choice between, say, disclosing harmful substances in their products and reformulating the products to eliminate the harmful substances, often they choose to eliminate the substances.

The TRI program has been highly effective. From 1988 to 2004, releases of chemicals subject to TRI reporting dropped by a remarkable 57 per cent, or 1.71 billion pounds. (This figure covers the roughly 300 chemicals that have been on the list for this entire period; more chemicals have been added during this period.) EPA officials, as well as environmentalists and regulated entities, regularly tout TRI as one of the nation's most effective environmental laws. Some company executives credit the TRI program with providing them, for

the first time, information about the volume of toxics they generate.

Shortcomings of the Current Statute

The TRI program, while effective, is too limited in its reach. The right to know concept should be expanded to include disclosure of a broader range of environmentally damaging activities. In recent years, moreover, industry-backed groups have sought to scale back the TRI program, and the Bush Administration in 2006 adopted changes that will weaken the program.

The TRI program currently covers a mere 654 toxic chemicals, which represent less than 1 percent of the more than 75,000 chemicals manufactured in the United States. EPA has the authority to add more toxic chemicals to the program, but has done so sluggishly.

The program currently covers a mere 654 toxic chemicals, which represent less than 1 percent of the more than 75,000 chemicals manufactured in the United States. EPA has the authority to add more toxic chemicals to the program, but has done so sluggishly. Moreover, TRI should not be limited to chemicals with “toxic” characteristics, since these releases represent only a small fraction of the ecological footprint left by industrial activities. TRI should be expanded to mandate disclosure of environmental releases of greenhouse gases, air and water pollutants, and hazardous waste.

In addition, as a result of TRI’s statutory exemptions (for non-manufacturing facilities, small businesses, and facilities manufacturing or using chemicals below certain thresholds), releases from exempted sources are greater than releases from covered facilities. EPA has the authority to change reporting thresholds for chemicals, but in 2006 it *increased* the volume of toxics a firm can release and still use shorter, less informative reporting forms – a step in the wrong direction that will mean less public disclosure.

Moreover, TRI does not require

facilities to report information about their chemical use or the amount of chemicals that remain in products, data that would be extremely helpful for identifying pollution prevention opportunities and creating incentives to reduce the use of toxic chemicals. EPA itself has noted that collecting such additional chemical use information “would provide a more detailed and comprehensive picture to the public about environmental performance and about toxic chemicals in communities.” While TRI has prompted reductions in toxic releases, the quantity of toxic

chemicals *generated and used* by facilities has declined far more slowly. By contrast, the Massachusetts Toxics Use Reduction Act (TURA) requires industrial facilities to publicly report on the quantities of toxic chemicals they use and generate as waste (as well as to prepare a toxics use reduction plan). From the law's inception in 1990 to 2004, facilities subject to the reporting requirements of Massachusetts' TURA have decreased their toxic chemical use by 41 percent, reduced their generation of waste by 65 percent per unit of product, and slashed their releases of toxic chemicals by 91 percent.

Under TRI, facilities can use "any readily available data," including "reasonable estimates" of the amounts involved, in calculating their reported releases. There is substantial evidence that a sizeable number of facilities are under-reporting their releases, in some cases quite significantly. Inspections by several state agencies in the 1990's found widespread under-reporting of releases by facilities. While flexibility in compliance is an important benefit of TRI, it nonetheless is critical that the data reported by facilities is accurate.

Another recent threat to the TRI program was EPA's announced, but subsequently abandoned, intention to reduce the frequency of required reporting from every year to once every two years. The Agency argued that switching to biannual reporting could save the

agency \$2 million every other year in administrative costs. But the TRI program already is extremely cost-effective. It runs on a budget of approximately \$7 million, less than 1/10th of 1 percent of EPA's annual budget. Switching to less frequent reporting would directly undermine one of the driving engines of the statute's success—the ongoing glare of a public spotlight and the resulting incentives to continually reduce emissions—and also deny communities up to date information about local sources of pollution.

Finally, there has been a one-and-a-half- to two-year delay between the close of the calendar year in which releases occur, and the time when these releases are disclosed to the public by EPA. These delays mean that the data provided to the public is less timely and useful. Such delays could be avoided simply by requiring firms to file reports with EPA and the states electronically.

A Legislative Proposal to Improve EPCRA

CPR recommends Congress consider the following proposals:

The Right to Know More

First, the scope of TRI should be expanded. EPA has the authority to add chemicals to the TRI program, but it has never systematically reviewed existing data about chemicals to determine if they meet the statutory criteria for inclusion in the program.

Congress should mandate a timetable by which EPA must review toxicity data about all “high production volume toxic chemicals” (chemicals produced in the United States in amounts of one million pounds or more annually) to determine if they meet the criteria for listing under Section 313(d)(2).

Congress should amend the TRI program to require industrial facilities to disclose the extent to which their facilities release greenhouse gas emissions, conventional air and water pollutants regulated by the Clean Air Act and Clean Water Act, and hazardous wastes regulated by the Resource Conservation and Recovery Act.

Congress also should amend the TRI program to cover non-manufacturing sources of toxic releases such as sewage treatment plants, hospitals, service businesses like dry cleaners and auto service stations, airports, and agricultural operations resulting in pesticide runoff.

Congress should require that covered facilities report on their use, not just their releases, of toxic chemicals.

The Right to Know the Truth

It is essential that firms reporting under TRI provide accurate data.

At the same time, there may be drawbacks to prescribing a single methodology that firms must use in calculating their releases.

Congress should create a system of graduated sanctions for firms that grossly under-report their off-site releases or transfers. Where EPA determines that the releases or transfers reported by a covered facility were under-reported by 50 percent or more for a calendar year, the facility should be subject to civil penalties, and the firm’s erroneous reporting should be “spotlighted” on EPA’s TRI website.

The Right to Know, Now

Congress should not permit EPA to lower the requirement that reporting for TRI releases occur at least every year. Congress should require that EPA provide the public with information about reported releases within six months of the close of the calendar year in which the releases occurred. To ensure that EPA receives the data in time to meet this deadline, Congress should mandate that covered facilities file their TRI reports with EPA electronically.



Reforming the Endangered Species Act

16 U.S.C. §§ 1531 *et seq.*

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The Value and Importance of the Endangered Species Act

When Congress passed the ESA, it recognized that economic growth and development untempered by a concern for conservation had rendered various species of fish, wildlife, and plants extinct and that other species were in danger of extinction. These species, Congress found, were of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation. These findings are as true today as they were in 1973. In addition, Congress recognized that the United States had entered into various treaties for the protection of various species. The ESA was one statute designed to fulfill those international obligations. Finally, Congress believed a key to the ESA's success was encouraging states and other interested parties, through federal financial assistance and a system of incentives, to develop and maintain conservation programs consistent with the ESA.

In light of these findings, Congress declared that the purposes of the ESA were to provide a means by which threatened and endangered species and the ecosystems upon which they depend might be conserved, and to achieve the goals of the various treaties. These purposes in turn were to be accomplished by establishing the policy that "all federal departments and agencies shall seek to conserve endangered species and threatened species and

shall utilize their authorities in furtherance of the purposes of [the ESA]."

Notably, despite the statement of policy's limitation to federal agencies seeking to preserve listed species, the ESA extends more broadly to prohibit certain private conduct on private land that may harm listed fish or wildlife. This extension is critical, because more than 80 percent of listed species are found on private lands for some or all of their lives.

Currently, 1,132 fish and wildlife species are listed as threatened or endangered worldwide – 567 of them in the United States, and 747 endangered plant species are listed as threatened worldwide – all but three of which are found in the United States. Three species are currently proposed for listing, and 278 species have been qualified as candidate species for listing.

Shortcomings of the Current Statute

In the past five years, only 44 U.S. species have been listed – an average of less than nine a year – leaving huge and growing backlogs of listing decisions. Moreover, of the 1,311 species listed in the United States only 1,063 have recovery plans, and critical habitat has been established for only 475 species. Since passage of the ESA in 1973, only 16 species have been recovered to the extent that they could be delisted, while 9 species

have been delisted because they became extinct.

At the same time, nothing has decreased the developmental pressures on the habitat of wild species or the adverse effect of agricultural activities on species – in particular the use of pesticides. (See Chapter on FIFRA). In addition, reduced jurisdictional coverage of waters and wetlands under the Clean Water Act has lessened protections for species dependent upon those ecosystems for habitat. The ESA is the only federal statute designed to protect the national resource of biological diversity by protecting the species that constitute that diversity, and it is only a statute of last resort – the final safety net for many species and a safety net with a number of holes, at that.

One fundamental problem is that the ESA has been under attack as beyond the constitutional authority of Congress. While certain aspects of the ESA have solid constitutional foundations – those relating to the importation of listed species, the enforcement of international conventions and treaties, and the regulation of federal agency activities or private activities on federal property – other aspects arguably do not neatly fit within Commerce Clause authority, which ultimately must be the basis of the ESA prohibitions on harming listed species on private land. So far, every challenge has failed at the court of appeals level, and the

Supreme Court has not granted *certiorari*. Nevertheless, the inability of the courts of appeals to adopt a consistent rationale for the constitutional authority of the ESA in the hard cases does not instill confidence. This is especially true because Congress did not articulate any connection between the ESA's protections and the Commerce Clause at the time of its enactment, much less a connection that would be supportable after *United States v. Lopez*, in which the Supreme Court rejected a claim of Commerce Clause power to regulate non-economic activity based on the aggregated effects of that activity.

Constant pressure by special interest groups is another problem. Ever since *TVA v. Hill* established that the ESA's protections for listed species had real teeth, forces have been deployed to challenge decisions by the Fish and Wildlife and National Marine Fisheries Service (the "listing agencies"), with those in favor of conservation petitioning for listing and suing to enforce statutory deadlines for decisions and those protecting their developmental, agricultural, and mining interests intervening and bringing suit to slow the process and to require multiple reviews of the science. Similar battles arise over the designation of critical habitat, which is generally required when a species is listed.

The ESA primarily protects only those species that fall into one of

two categories: “threatened” and “endangered” species. The latter are in danger of extinction, while “threatened” species are those species likely to become endangered in the foreseeable future. Although one provision of the Act (Section 7) treats both categories of listed species equally, Section 9 by its terms only protects “endangered” fish and wildlife. The statute does authorize the Secretary of the Interior to extend Section 9 prohibitions to any “threatened” species, and historically, all “threatened” species have been extended this protection. The net result is that, despite the categorical distinction created under the statute, the protections afforded to each category have been largely identical.

Another shortcoming of the Act arises from the consultation process that occurs between any federal agency proposing an action that may affect a listed species (an “action agency”) and the relevant listing agency. This consultation concludes with a formal Biological Opinion (BO) by the listing agency that reaches one of three possible conclusions with respect to the agency’s proposed action:

- the action may jeopardize the species or adversely affect its critical habitat,
- the action may jeopardize the species or adversely affect its critical habitat, but there are prudent and feasible alternatives that would achieve the same purpose without jeopardizing the species or adversely affecting its critical habitat, or
- the action will not jeopardize the species or adversely affect its critical habitat.

Because a jeopardy determination effectively precludes the agency from taking its proposed action or granting a permit for a proposed

private action, the listing agencies have been reluctant to issue such determinations. However, environmental groups wishing to stop the action are then likely to challenge that determination in court, and these challenges are

Congress has regularly failed to appropriate sufficient funds for the FWS and NMFS to carry out their duties under the ESA, and in one year prohibited any funds for listing species, resulting in a growing backlog of candidate species and a systemic underenforcement of the Act’s provisions.

frequently successful. Moreover, the BO may include an “incidental take” authorization, authorizing the agency or permittee to harm the affected listed species to some extent, but not to the extent of jeopardy. Thus, despite the ESA, a species in danger of extinction can be further harmed, without any

requirement for mitigation to offset the harm.

How the ESA affects individual landowners is another area of concern. Section 9 of the ESA generally precludes private persons from actions that harm listed fish or wildlife species, including actions that modify habitat. While few prosecutions have been brought under this section, concern with this provision has galvanized landowners who feel they may come under the threat of prosecution. It provides the perverse incentive for landowners to destroy potential habitat for listed species before it becomes actual habitat and the actual habitat of candidate species before they become listed species. During the Clinton Administration, in an attempt to respond to these concerns, the Fish & Wildlife Service instituted its so-called Safe Harbor Agreements (sometimes called the No Surprises Policy) and Candidate Conservation Agreements with Assurances, both of which enable landowners to receive assurances that they will not be subject to additional restrictions if they take certain agreed upon actions now. Nevertheless, obtaining approval of these agreements can be a long and expensive process that may not be feasible for many landowners. In addition, some have challenged the legality of the agencies granting such assurances for the future.

Congress should also be concerned about the cost of protecting our nation's biodiversity, and who is bearing those costs. Although Section 6 of the ESA provides for cooperative agreements with states, which includes some federal funding for habitat conservation planning and land acquisition, the funding is minimal, and the cooperative agreements do not include the type of cooperative federalism delegation to state agencies in the form of the Clean Air Act, Clean Water Act, or the Resource Conservation and Recovery Act.

Finally, and perhaps most importantly, Congress has regularly failed to appropriate sufficient funds for the FWS and NMFS to carry out their duties under the ESA, and in one year prohibited any funds for listing species, resulting in a growing backlog of candidate species and a systemic underenforcement of the Act's provisions.

A Legislative Proposal to Improve the ESA

CPR recommends Congress consider the following proposals:

Clear up the Jurisdictional Questions

Congress should enact findings and policies that more solidly ground the Act in the Commerce Clause of the Constitution. This could be done, first, by amending Section 9 to prohibit additionally the "take" of listed species in the

course of actions that affect commerce and, second, by amending the Findings provision of the ESA to recognize the benefits of biodiversity to the national welfare and the national economy and to state that the existence of a species in the United States is a natural resource, the protection of which is necessary for furthering the national economy.

Strengthen Existing Protections

The ESA, its implementing regulations, and existing policies provide a strong foundation for protecting endangered species. Congress should look to shore up this foundation. To begin, Congress should establish a stable source of funds adequate to administer the ESA, to fund state activity under cooperative agreements, and to purchase more habitat to reduce threats to species. Furthermore, Congress should amend the ESA to collapse the process for proposing to list a species with the actual listing process. In this way, the listing process could be streamlined, yet the process could be made more transparent without bypassing any of the necessary scientific studies and determinations. Congress should also amend the ESA to clarify the role of critical habitat under the statute. Additionally, Congress should amend the ESA to provide explicit authorization for the “no surprises” policies and specify the requirements to be satisfied before

they may be applied, with the processes applicable to obtaining an agreement tiered to the extent of the potential threat, so as to provide smaller landowners a less daunting undertaking. Lastly, Congress should amend the ESA to define “recovery” and make recovery plans mandatory, so that they may be enforced through citizen suits.

Expand the ESA’s Protections

Congress should also look at ways the ESA can be expanded to better protect threatened and endangered species. For instance, lawmakers should amend Section 7 of the ESA to require mitigation in any case in which the action taken by the agency will have an adverse effect upon a listed species. Congress should also amend Section 6 of the ESA to enable states to play a more significant role in the granting of Habitat Conservation Plans and the enforcement of the ESA on private lands. Finally, Congress should amend the ESA to distinguish between the protections afforded threatened and endangered species and to adopt a third category of listed species that would be subject only to monitoring. This change would enable the protections to be more appropriately tailored to the threat to the species and to provide an early warning system for other species.



Reforming the Federal Insecticide, Fungicide, and Rodenticide Act

7 U.S.C. §§ 136 *et seq.*

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KEEP OUT OF REACH OF CHILDREN
CAUTION: FLAMMABLE MIXTURE
DO NOT USE NEAR FIRE OR

DANGER  **POISON**

Contains Methanol (67-56-1), Ethylene Glycol, and Carbon Dioxide (124-38-9). Contains Methanol vapor. Avoid eye and skin contact. Do not breathe vapor. Use in well ventilated area. If swallowed, drink one or two glasses of water. If inhaled, move to emergency room or poison control center. Follow instructions to induce vomiting. If medical attention is not available, induce vomiting with ipecac.

The Value and Importance of FIFRA

Beginning with the 1962 publication of Rachel Carson's revolutionary book, *Silent Spring*, the environmental impact of pesticide use became one of the most significant issues fueling the environmental movement of the 1960s and early 1970s. Concerns over the devastating environmental impacts of the pesticide DDT were a driving force behind the formation of the Environmental Protection Agency (EPA) and the passage of one of the earliest environmental statutes, the Federal Insecticide, Fungicide, and Rodenticide Act of 1972. For the first time, the human health and environmental risks of pesticide use played a prominent role in the federal registration of pesticides. Some of EPA's earliest environmental successes included canceling the registration of DDT and several other highly persistent and bioaccumulating pesticides, such as aldrin, deildrin, heptachlor and chlordane. The successful recovery of the American bald eagle and other raptor populations in the United States is credited largely to the cancellation of these products under FIFRA. More recent FIFRA successes include improved worker protection standards, improved consideration of risks to children under the 1996 Food Quality Protection Act, and greater emphasis on regulatory streamlining to encourage the

development of lower-risk pesticides.

Shortcomings of the Current Statute

Despite the early environmental successes under FIFRA, many high risk pesticides continue to be used and numerous serious environmental problems caused by pesticide use continue to occur. Approximately 1 billion pounds of conventional chemical pesticides are used in the United States each year. Several recent studies suggest that the nation's pesticides problems are on the rise. For example, the United States Department of Interior, U.S. Geological Survey 2006 report entitled *The Quality of Our Nation's Waters: Pesticides in the Nation's Streams and Ground Water, 1992-2001*, found pesticides or their degradates in every one of 186 sampled streams, including undeveloped streams, and in more than half of the shallow groundwater wells sampled in agricultural and urban areas throughout the United States. In addition, the National Audubon Society's alarming 2004 *State of the Birds* report concluded that despite all of the environmental laws, regulations, policies, and programs implemented in the past 30 years, a large percentage of avian species found in the continental United States are in a significant state of decline. Depending on the habitats used by the species, the declines range from 13 to 70 percent. The report

identifies pesticides as one of the many causes implicated in the bird population declines. In addition, the Center for Biological Diversity recently reported that EPA has approved registrations for pesticides that put more than 375 Endangered Species Act (ESA) listed species at risk. Significant data now support a conclusion that certain pesticides, such as the herbicide atrazine, may be contributing to the world-wide decline in

amphibian populations. Recent studies also show that newborn babies have far greater variability in susceptibility to pesticides than previously shown, with some babies being up to 130 times more sensitive to certain pesticides than are adults. Finally, studies on farm workers and the children of farm workers demonstrate that these populations are exposed to dangerously high levels of pesticides on a regular basis.

Pesticide regulation is unique in that, unlike other areas of environmental protection where environmental laws can seek to eliminate or minimize hazardous releases – because they are unintended consequences of manufacturing or other processes – pesticides are *intentionally* released into the environment for

the express purpose of killing, injuring, or disrupting the behavior of living organisms in the environment. In other words, by definition pesticides are substances released into the

environment at levels sufficient to cause significant environmental harms.

Accordingly, regulating pesticides to protect human health and the environment involves many difficult challenges.

Unlike most other federal environmental statutes that rely on feasibility standards, under FIFRA, the EPA relies on a cost/benefit balancing as the ultimate standard for deciding whether to register a pesticide in the first place or whether to cancel the registration of a previously-registered pesticide.

FIFRA contains a number of shortcomings and roadblocks to effective human health and environmental protection. One of the most significant is that, unlike most other federal environmental statutes that rely on feasibility standards, under FIFRA, the EPA relies on a cost/benefit balancing as the ultimate standard for deciding whether to register a pesticide in the first place or whether to cancel the registration of a previously-registered pesticide. Using cost-benefit balancing in making decisions to protect human health and the environment is a fatally flawed approach.

These flaws are compounded with a one-size-fits-all nationwide registration process for pesticides.

One of the most serious limitations of this approach is its inability to consider local environmental conditions. Because FIFRA regulates through national registration of products, risks are assessed on a one-time nationwide basis. Accordingly, even when, overall, the cost/benefit analysis weighs in favor of allowing a pesticide to be used, approving the pesticide registration may produce risk hot spots in a particular geographic area or disproportionately high risks for a particular species or ecosystem. These risk hot spots may cause disproportionate harm to low-income or minority populations, engendering environmental justice concerns. Or they may affect sensitive species, including threatened or endangered species, or ecosystems with low resistance and/or low resilience.

One example of such a risk hot spot is the global amphibian crisis in which pesticides are implicated. Although the cost/benefit analysis for a particular pesticide may reflect that the benefits of the pesticide outweigh the costs overall, this does nothing to protect the highly sensitive and highly vulnerable amphibian populations that may be disproportionately impacted by that pesticide. Likewise, the

To obtain a registration, there is no requirement to demonstrate that a pesticide is essential. Moreover, the availability of alternative pesticides for the same use does not preclude registration.

substantially higher risks faced by farm workers and their children from exposure to high levels of pesticides on a regular basis may be “balanced away” in a nationwide cost/benefit balancing. FIFRA does not provide for consideration of local ecological or human health impacts that may result from the use of a particular pesticide in a particular geographic locations. Ironically, however, FIFRA section 24(c) authorizes states to take into consideration

“special local needs” to issue state registrations for pesticide uses that are not federally registered. Accordingly, local considerations may result in additional pesticide usage, but not in additional pesticide restrictions.

Moreover, although FIFRA utilizes a cost/benefit balancing standard, in fact, several provisions of the Act enable or require EPA to “assume” the benefits of the pesticides rather than requiring the manufacturer of the pesticide to demonstrate such benefits. Specifically, section 3(c)(5) of FIFRA expressly states that EPA shall not make any lack of essentiality a criterion for denying registration of any pesticide and that, where two pesticides meet the requirements for registration, one should not be registered in

preference to the other. Thus, to obtain a registration, there is no requirement to demonstrate that a pesticide is essential. Moreover, the availability of alternative pesticides for the same use does not preclude registration. Further, FIFRA expressly authorizes EPA to waive all data requirements pertaining to efficacy, and EPA has done so by rule.

In addition to the problems caused by FIFRA's cost/benefit balancing standard and its failure to allow EPA to adequately consider local conditions, FIFRA falls short in the areas of opportunities for citizen participation and lack of technology-forcing standards to encourage development of state-of-the-art technology. FIFRA is one of a very few environmental statutes that does not contain a citizen suit provision. Consequently, citizens do not have a right under FIFRA to bring lawsuits to force EPA to enforce FIFRA or to force regulated industry to comply with the law. With regard to FIFRA's lack of technology-forcing mechanisms, FIFRA contains express language that not only fails to urge the development of state-of-the-art technology (i.e., lower risk means of pest control), but in some cases, actually *prohibits* measures that could lead to better technologies.

As noted above, FIFRA prohibits the consideration of alternative pest control substances or techniques in the registration determination. Thus, far from forcing the use of state-of-the-art technology, FIFRA encourages the registration of any and all pesticides regardless of the level of relative risk created.

Moreover, although FIFRA section 11 requires EPA and states to make available to certified applicators (trained individuals who are

Certified applicators are not required to know about less risky pest control techniques, let alone to consider them in making decisions regarding which options to choose to control a particular pest.

certified to apply or supervise the application of "restricted use" pesticides) instructional materials concerning integrated pest management (IPM), the statute expressly states

that certified applicators are not required to receive instruction on IPM and are not required to demonstrate competence with respect to such techniques. Thus, certified applicators are not required to know about less risky pest control techniques, let alone to consider them in making decisions regarding which options to choose to control a particular pest. In fact, a certified applicator's job is not to decide what approach to take to control a pest but is merely to ensure that once a particular pesticide is chosen, it is applied properly in accordance with label instructions.

Finally, a significant flaw in FIFRA is its failure to address risks posed by the export of pesticides that are banned or severely restricted in the United States to other countries. It is important for the United States to acknowledge the sovereignty of other countries and to recognize that agricultural and human health pest concerns in other parts of the world may be very different from those of the United States. Nevertheless, pesticides that have been found to be high risk enough to warrant a ban in the United States should not be allowed to be exported to other countries without the importing country's prior informed consent.

Moreover, in what has come to be known as "the circle of poison," pesticides banned in the United States and exported for use in other countries, find their way back into the United States as residues on imported food crops or in other imported products. Currently, FIFRA does not address this circle of poison, nor require prior informed consent. In fact, section 17(b) of FIFRA merely requires a one-time notice to foreign governments when a pesticide is cancelled or suspended. Notice is not required at the time canceled or suspended pesticides are exported to the foreign country and prior informed consent is not required at all.

A Legislative Proposal to Improve FIFRA

CPR recommends Congress consider the following proposals:

Utilize Open-Ended Balancing

To reform FIFRA to better address human health and environmental risks, a number of changes are needed. First, in light of the prevailing interpretation of FIFRA's "unreasonable adverse effects standard" as mandating strict cost/benefit balancing, the statutory standard should be revisited and adjusted to mandate a more open-ended balancing. Such a standard would both represent sounder policy and better comport with what the drafters of the statute contemplated. An open-ended balancing would allow factors such as effects on listed species and sensitive ecosystems, as well as environmental justice concerns to be considered in registration decisions. While economic and social costs would be factors to be considered, they would not be the ultimate deciding factors. Related to this idea, EPA's approach to evaluating whether a particular pesticide poses an unreasonable adverse effect on the environment should be modified so that registrants are required to demonstrate the true benefits of a pesticide by demonstrating efficacy and by evaluating the benefits of the pesticide relative to the benefits provided by other available pest control methods,

including lower-risk chemical pesticides as well as non-chemical pest control methods.

Require Adaptive Management

Second, in addition to the modification of the cost/benefit standard described above, FIFRA should be amended to include a mechanism that would allow for the consideration of local environmental factors and would include an adaptive management approach to allow flexibility and adjustments to the choice of pest control method appropriate for a given situation. An adaptive management mechanism could take the form of a mandatory permitting system for large-scale pesticide application or a medical “prescription” model, which would allow for fine-tuning and adjustment as circumstances change over time or as new information becomes available. Such approaches would allow localized decision-making regarding the best pesticide for a given situation considering local environmental factors, thus optimizing the level of environmental protection for any given situation.

Give the Public the Tools to Enforce FIFRA

Third, FIFRA should be amended to include a citizen suit provision similar to those of the *Clean Air Act*, *Clean Water Act*, and *Resource Conservation and Recovery Act*.

Make FIFRA Technology-Forcing

Fourth, FIFRA should be amended to incorporate technology-forcing provisions that encourage the development and use of state-of-the-art technology. Section 3 should be amended to allow consideration of lower-risk alternatives including non-chemical pest management approaches in the decision of whether to register a pesticide in the first place. Similarly, Section 6 should be amended to require the consideration of such alternatives in deciding whether to cancel the registration of a previously registered pesticide. Moreover, Section 11 should be modified to require all certified applicators to obtain training on IPM and non-chemical pest management.

Improve International Notification Requirements

Fifth, Section 17 of FIFRA should be amended to require that prior informed consent of the importing government be obtained before U.S. companies export cancelled, suspended, or severely restricted pesticides to foreign countries.





**Reforming the National Environmental
Policy Act**

42 U.S.C. §§ 4321 *et seq.*

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NEPA's Importance and Value

The National Environmental Policy Act of 1969 (NEPA) was the first significant piece of environmental legislation enacted by the United States Congress in the modern period of environmental law. Passed with overwhelming bipartisan support, amidst an outpouring of public enthusiasm for federal environmental protection, NEPA was hailed by its congressional proponents as "the most important and far-reaching conservation measure ever enacted," a piece of "landmark legislation."

A relatively brief statute, NEPA's ongoing importance stems from several of its critical provisions. In Section 101 of the Act, Congress established a broad national policy to "encourage productive and enjoyable harmony between man and his environment; to promote or eliminate damage to the environment and biosphere and stimulate the health and welfare of men."

The Act also declared a new national environmental policy:

The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, . . . and recognizing further the critical importance of restoring and maintaining environmental quality to the

overall welfare and development of man, declares that it is the continuing policy of the federal government . . . to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans.

42 U.S.C. §4331.

As bold and visionary as these broad policy statements were, in Section 101(2), a little noticed and rarely cited provision, Congress further mandated that "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter."

A second critical aspect of NEPA is Section 102(2)(C), the statute's primary action-forcing provision. The Act directs all federal agencies and departments to prepare a detailed environmental impact statement (EIS) respecting any "major federal action that significantly affects the quality of the human environment" (including recommendations or reports on proposals for new legislation). In addition to considering the environmental impact of the proposed action, and

any adverse environmental effects which cannot be avoided if it is implemented, the EIS must identify and evaluate alternatives to the proposed action, the relationship between short-term uses of the environment and the enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources that will occur if the proposed action is implemented.

NEPA and its accompanying regulations also broke new ground by creating numerous opportunities for ordinary citizens to participate in government decision-making that affects their environment. The public – broadly defined to include businesses, state and local governments, Indian tribes and charities, along with concerned individuals and conservation organizations – may participate in various facets of the NEPA process: helping to define the issues to be studied in an EIS in “scoping meetings,” proposing additional alternatives to the proposed action to be considered, and commenting on flaws in an agency’s draft EIS. Moreover, as a last resort, citizens may seek federal judicial review under the Administrative Procedure Act of any aspects of an EIS that are arbitrary, capricious or not in accordance with the law.

As a result of these features, NEPA has produced more environmentally sensitive federal agency decision-making. The Act has succeeded in compelling

federal agencies at least to *consider* environmentally preferable alternatives to their proposed actions that meet agency objectives without sacrificing environmental values. Moreover, NEPA has certainly deterred some agencies from sponsoring environmentally weak project proposals that would not be able to withstand public criticism; and it has allowed citizens to engage with environmental decision-making in ways that strengthen democratic values while also providing valuable additional information to decision-makers themselves.

Shortcomings of the Current Statute

NEPA is a vital and visionary statute that has functioned quite well for more than three decades. Nonetheless, as interpreted by some courts and implemented by some federal agencies and departments, the statute has fallen short of its potential as a mechanism for environmental protection. In recent months, NEPA has been criticized by certain industries and their political allies who have contended, without merit, that the NEPA process is a needless paper exercise that fails to inform agency decision-making, and that NEPA is burdensome, time-consuming, and the basis for wasteful litigation against government agencies. While responding to these mistaken, misinformed arguments is beyond the scope of this essay, it

does bear mention that if those ill founded contentions are accepted as a basis for statutory amendment they would very significantly undermine the continued efficacy of NEPA.

NEPA's primary shortcoming is the statute's failure to mandate that, as federal agencies and departments plan and implement projects, they engage in environmentally sound practices, at least by taking concrete, substantive steps to protect natural resources

and public health. Two Supreme Court cases, *Stryker's Bay Neighborhood Council v. Karlen* and *Robertson v. Methow Valley Citizens Council*, were pivotal in dulling NEPA's teeth.

Notwithstanding NEPA's stirring but nonbinding language, in *Stryker's Bay*, the Supreme Court made clear that NEPA should be interpreted as "essentially procedural." That is, courts need only ensure that federal agencies consider environmental consequences of their actions; in reviewing those considerations, courts cannot require agencies to choose a specific course of action. Later, in *Robertson*, the Supreme Court not only reversed the Ninth Circuit's interpretation of NEPA that would

have required federal agencies to "mitigate" (i.e. lessen) adverse environmental impacts of major federal actions, it also ruled that NEPA did not require agencies to incorporate a worst-case analysis into EIS's. Thus in evaluating the impacts of proposed actions, federal agencies can avoid analyzing the potential consequences for a project of significant but uncertain events – such as a Hurricane Katrina or other similar natural disasters

that cannot be predicted with certainty but will yield disastrous environmental results if they occur.

NEPA's purposes have also been thwarted by uneven implementation of the statute's requirements. Despite a clear direction to the

contrary in the legislation itself, in practice major *legislative* proposals that would affect the extraction or use of natural resources or that would have other significant environmental impacts are almost never the subject of an environmental impact analysis. Additionally, in some instances, draft (and even final) EIS's are prepared by private parties who have a financial stake in the outcome of an agency's decision-making. Where that occurs, it

NEPA's primary shortcoming is the statute's failure to mandate that, as federal agencies and departments plan and implement projects, they engage in environmentally sound practices, at least by taking concrete, substantive steps to protect natural resources and public health.

undermines the credibility of the resulting EIS as an objective, scientific study and may call into question the integrity of the NEPA process itself.

Beyond these difficulties, federal agencies and departments sometimes lack adequate staff and budgetary resources to carry out their responsibilities under NEPA. To make matters worse, the Council on Environmental Quality (CEQ) – the agency charged with responsibility for overseeing NEPA’s implementation by action agencies – generally provides those agencies little assistance. The CEQ, for its part, lacks both the funding and the will to provide adequate training to federal agencies on technical aspects of NEPA implementation. The realization of NEPA’s purposes has been further hampered by the fact that the statute does not require any after-the-fact environmental monitoring of projects that have been approved and funded for implementation.

Finally, despite the grand sweep of the statute’s stated purposes, NEPA’s legal scope is unduly narrow. Even though many U.S. owned and operated facilities abroad (from hospitals to laboratories to embassies to military bases) may have highly significant environmental impacts, they are typically exempted from the NEPA EIS requirement. In addition, NEPA’s mandates are limited to environmentally significant

proposals and actions of *government* agencies. However, no logical reason exists why the Act’s principal provisions should not be expanded so as to cover U.S. governmental projects abroad and planned actions of *private* institutions that may do even greater damage to the human environment. The latter approach has already been adopted in other nations, most notably Costa Rica, with some beneficial results.

A Legislative Proposal to Improve NEPA

CPR recommends Congress consider the following proposals:

The fundamental goals and policies of NEPA are balanced, visionary, and sensible. However, several aspects of the statute as currently implemented or construed fall well short of NEPA’s stated ideal of fostering productive harmony between humans and nature. A principal objective of any progressive reform of the Act must be to make NEPA’s action-forcing requirements more consistent with its far-reaching opening declarations.

Require Analysis and Implementation of Mitigation Techniques

One useful first step would be to add a provision that unambiguously requires all federal agencies to discuss available approaches to mitigating environmental impacts in every EIS. Moreover, the statute should

go beyond mere analysis and study of mitigation measures to directly require agencies to implement whatever mitigation alternative will yield the most environmentally beneficial result, unless the agency is able to demonstrate by clear and convincing evidence that strongly compelling, countervailing reasons require a less environmentally protective approach.

Improve Environmental Impact Statements

NEPA should also be strengthened by amendments to Section 102(2)(C) with respect to the scope and preparation of environmental impact statements. In particular, that provision should be amended so as to 1) bar any private party (or its agent, employee, contractor or consultant) that has a financial stake in a proposed federal action or activity that is the subject of an EIS from substantial involvement in or responsibility for EIS preparation; 2) require a worst-case analysis of the possible consequences of all proposed actions; and 3) apply the EIS requirement to *all* major federal actions that significantly affect the quality of the human environment, whether these actions affect the environment within or outside of the United States. Additionally, NEPA should

be extended so as to apply its reformed EIS requirements to major projects proposed by private parties (as well as government agencies) that will significantly affect environmental quality.

Require Monitoring to Ensure Success

NEPA should be further amended to require careful, systematic post-implementation environmental monitoring of all projects for which EIS's have been required.

Use Appropriations Powers to Leverage Improvement

Finally, Congress should exercise its powers of appropriation and oversight to improve NEPA's implementation by: 1) fully funding work by federal agencies and departments to comply with NEPA's mandates; 2) requiring that environmental analysis of major legislative proposals be overseen by an independent, nonpartisan governmental institution (such as the Government Accountability Office); and 3) pressing the Council on Environmental Quality to expand and improve the training it provides to federal agency personnel with respect to the technical aspects of EIS preparation.





Reforming the Occupational Safety and Health Act

29 U.S.C. §§ 651 *et seq.*

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The Value and Importance of the OSH Act

In passing the Occupational Safety and Health Act (OSH Act), Congress gave the Occupational Safety and Health Administration (OSHA) the mandate to make every American workplace safe and healthful. OSHA has made considerable progress in accomplishing this ambitious goal. Under the OSH Act, employers are obligated to obey any safety or health standard regulation promulgated by OSHA, which are called standards, and to obey the General Duty Clause, which requires employers to protect workers from serious and recognized workplace hazards even where there is no standard. Congress created the Occupational Safety and Health Review Commission (OSHRC) to adjudicate whether or not an employer has violated a standard or the General Duty Clause. According to the Bureau of Labor Statistics (BLS), the average number of cases of workplace injuries and illnesses fell from 10.4 to 4.8 per 100 full-time workers between 1974 and 2004. BLS also reports that the fatality rate from workplace injuries in 2004 dipped

The costs imposed on society by workplace accidents and illnesses are roughly five times the costs for AIDS, three times the costs for Alzheimer's disease, more than the costs of arthritis, nearly as great as the costs for cancer, and roughly 82 percent of the costs of all circulatory (heart and stroke) diseases.

to 4.1 fatal work injuries per 100,000 workers – the second lowest rate since 1992, the earliest date for comparison.

Experts agree, however, that BLS statistics understate the number of workplace injuries and illnesses. A book published in 2000 by the University of Michigan Press

offers a more complete picture. Using 1992 data, the authors, four leading occupational safety and health academics, indicate that we are nowhere near achieving the objective of the OSH Act of safe and healthful workplaces. The experts found there were 6,371

job-related deaths due to injuries, 13.3 million nonfatal injuries, 60,300 disease deaths, and 1,184,000 illnesses, and that these illnesses and injuries had direct and indirect costs of about \$155.5 billion, nearly 3 percent of Gross Domestic Product. This means that the costs imposed on society by workplace accidents and illnesses are roughly five times the costs for AIDS, three times the costs for Alzheimer's disease, more than the costs of arthritis, nearly as great as the costs for cancer, and roughly 82 percent of the costs of all circulatory (heart and stroke) diseases.

Shortcomings of the Current Statute

The failure to better protect American workers results from a number of factors. By universal agreement, OSHA's inspectorate is pitifully small when measured against the task of inspecting all of the workplaces subject to OSHA's jurisdiction. With today's OSHA staffing levels, a typical employer can expect to be the subject of an OSHA inspection only extremely rarely, absent a complaint or serious accident. OSHA attempts to send its few inspectors to the most dangerous workplaces, but even this limited strategy has been increasingly stymied by years of budget cuts.

Even if OSHA finds that violations by employers have caused worker injuries or fatalities, employers often pay only small fines for their lack of compliance. For a serious violation, the maximum penalty under the OSH Act is \$7,000. The maximum penalty for a willful or repeat violation is only \$70,000, with a minimum penalty as low as \$5,000. The actual fines levied by OSHA, however, are usually much less than these amounts. Consider, for example, what a

By universal agreement, OSHA's inspectorate is pitifully small when measured against the task of inspecting all of the workplaces subject to OSHA's jurisdiction. With today's OSHA staffing levels, a typical employer can expect to be the subject of an OSHA inspection only extremely rarely, absent a complaint or serious accident.

Kansas City Star investigative report in December, 2005 found. In July, 2000, Les James, a 25-year-old father of three was working on a window-cleaning crew. He died on his first day on the job when his window-washing rig fell off the roof of Research Medical Center in Kansas City, catapulting James to his death 84 feet below. Two other window washers were seriously injured. OSHA cited the Holden, Missouri window-cleaning company — which had had another fatal accident only four years earlier — for serious safety violations in James' accident, but then levied only a \$2,700 fine.

According to the *Star's* investigation, one-half of all fines OSHA assessed Kansas City area employers for fatal and injury accidents amount to \$3,000 or less. Furthermore, one-half of all employers across the country paid fines or \$2,500 or less in fatal and injury accidents involving at least one serious violation of health or safety standards.

An investigation by the *New York Times* and Frontline found a similar pattern. The investigation focused on McWane Inc. of Birmingham, Alabama, which is one of America's largest privately owned

corporations. McWane companies manufacture cast iron pipes and various components for municipal, commercial and residential water and waste-disposal services. Their operating revenues are estimated to be between \$1.5 and \$2 billion a year. Since 1995, McWane has been guilty of more than 400 health and safety violations in workplaces they own in ten states. Since 1995, more than 4,600 workers have been injured in company foundries, and nine workers have been killed. According to the *Times*:

McWane has persisted largely unchecked by taking full advantage of a regulatory system that has often proven itself incapable of thwarting flagrant and continual safety and environmental violations by major corporations In plant after plant, year after year, McWane workers have been maimed, burned, sickened and killed by the same safety and health failures Yet regulators and law enforcement officials have never joined forces to piece this record together, never taken a coordinated approach to

end patterns of transgression. Their responses, piecemeal and disjointed, bring into sharp relief weaknesses in government's ability to take on corporations with operations spread far and wide.

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Beyond its lack of resources, poor coordination and ineptitude, OSHA also has failed when the administrators running OSHA are hostile to its mission, which has been the situation since the George W. Bush administration has taken office.

OSHA also has failed when the administrators running OSHA are hostile to its mission, which has been the situation since the George W. Bush administration has taken office. For example, the *Washington Post*

reported in August, 2004, that under President Bush:

OSHA has altered its regulatory mission to embrace a more business-friendly posture. In the past 3 1/2 years, OSHA, the branch of the Labor Department in charge of workers' well-being, has eliminated nearly five times as many pending standards as it has completed. It has not started any major new health or safety rules, setting Bush apart from the previous three presidents, including Ronald Reagan.

A Legislative Proposal to Improve the OSH Act

CPR recommends Congress consider the following proposals:

Give the Public the Tools to Enforce the OSH Act

In the early 1970s, Congress recognized that inspectors at the Environmental Protection Agency (EPA) would never be up to the task of enforcing the environmental laws for the hundreds of thousands of sources of air and water pollution. Congress therefore included “citizen enforcement” provisions in all but one of the major environmental protection statutes. These provisions generally permit any affected citizen to sue in federal district court to enforce environmental permits and emission limitations.

Congress should draw on this environmental model to empower workers to enforce OSHA safety and health regulations in court if OSHA fails to do so. Specifically, Congress should amend the OSH Act to provide that any worker could enforce occupational safety and health standards or the General Duty Clause through a proceeding in the Occupational

Safety and Health Review Commission. As in the environmental laws, Congress should require a worker to give OSHA 60 days notice to give OSHA an opportunity to bring and diligently prosecute the action. This provision gives the agency the unqualified right to take control of the litigation, thereby preserving the agency’s prerogative to control enforcement of its regulations. A worker should be able to sue for statutory penalties and injunctive relief. If a worker does not prevail before the Commission, the worker should have the option of appealing to the federal courts.

Amending the Act in this manner would mean that workers would no longer have to rely on OSHA to protect them when it lacks the resources or political will to do so. While this option poses some challenges, it has worked successfully in the environmental area, and the authorizing legislation can be crafted to anticipate and minimize potential problems.





Reforming the Toxic Substances Control Act

15 U.S.C. §§ 2601 *et seq.*

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The Value and Importance of TSCA

Congress passed the Toxic Substances Control Act (TSCA) in 1976 as a gap-filling measure, because the major air and water pollution and waste disposal statutes fail to address the problem of human and environmental exposure to potentially dangerous chemicals in productive use. The federal pesticide statute, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), regulates only a small fraction of the tens of thousands of chemicals used in ordinary commerce, and the Occupational Safety and Health Act (OSHA) is limited to “workplace” protections.

TSCA has two main environmental objectives. First, TSCA was intended to protect humans and the environment from risks posed by industrial chemicals and other substances. Second, the drafters of TSCA were prescient in understanding that lack of environmental and health information (the “data gap”) would present the biggest hurdle for regulation of industrial chemicals, and so TSCA also contains several provisions to require the manufacturers of covered chemicals to generate and report such data to EPA. Since 1976, TSCA has been amended only a few times, adding new titles to address specific concerns like asbestos in school buildings, radon in the home, and lead-based paint.

TSCA is a critically important element of a comprehensive program for environmental protection for at least four reasons:

- The volume of industrial chemicals continues to grow worldwide, and so human exposure increases. Moreover, we are learning that even low-level exposure to these chemicals can cause serious adverse health effects. TSCA offers the opportunity to take a strongly preventive approach to avoid health and environmental harm in accordance with the Precautionary Principle (“Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”);
- The data gap for health and environmental effects of industrial chemicals remains as wide as ever;
- With the advent of new technologies like genetic modification and nanotechnology, only a non-specific, forward-looking regulatory framework can protect the public from unintended health and environmental consequences;
- TSCA creates the potential for cross-media regulation, which scientists and policy makers increasingly cite as an

antidote to inefficient and ineffective piecemeal regulation.

In sum, TSCA should play a major role in environmental, safety, and health protection.

Shortcomings of the Current Statute

Unfortunately, TSCA has fallen far short of its potential, largely because of compromises built into the statute to enable its passage over vociferous industry opposition.

Licensing

As originally proposed, TSCA was a licensing statute, like FIFRA. As enacted, it merely subjects new (not existing) chemicals to pre-manufacture notification (PMN), for which the manufacturer only needs to provide *available* information. No baseline “safety case” or data set must be produced. The burden of going forward then shifts to EPA to demonstrate a hazard, and the decision to delay or halt production is placed in the hands of a court in an injunction action, rather than with the expert agency. The PMN authority has utility when used aggressively, but it has been used sparingly and appears to have generated only a limited amount of new data about chemical safety. And of course it

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only applies to new chemicals and new uses of existing chemicals.

Regulatory Powers

TSCA’s potential regulatory powers include, among other things, prohibitions and restrictions on manufacturing, distribution, use, and disposal; warnings and directions; record retention; substantial risk reporting; and quality control measures. However, these regulatory powers are highly qualified.

The core standard of the statute is very general – “unreasonable risk of injury to health or the environment” – and EPA must balance health effects with cost. It is further required to adopt the “least burdensome requirements.”

The “reasonable basis to conclude” language in Section 6, and the findings and “substantial evidence” requirements of judicial review in Section 19, leave little doubt that

the burden of proof is placed firmly on EPA to demonstrate the need for regulatory action.

The limitations on EPA’s regulatory authority were exacerbated by the Fifth Circuit’s questionable interpretation of the statute in *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991). The case involved bans and

restrictions on a broad range of uses of asbestos and asbestos-containing products. Despite the well known causal relationship between asbestos and fatal cancers, the court invalidated much of the rule by interpreting TSCA's language to require a level of detail and precision that went far beyond the agency's scientific abilities or available resources. The court questioned the basis for EPA's estimates of the scale of health effects, and it required that EPA analyze the comparative costs and benefits of *each regulatory alternative* that EPA did or should have considered. It is widely agreed that *Corrosion Proof Fittings* essentially disabled TSCA, and EPA has in fact taken no substantial regulatory action *at all* under Section 6 since the decision.

Information Gathering

The nearly universal international acceptance of the Precautionary Principle reflects a widespread understanding that the primary obstacle to effective regulation is the remarkably wide data gap for actually available information about chemicals' characteristics, health effects, and fate and transport. Since a 1984 National Academy of Sciences study first highlighted the problem, environmental groups, independent experts, government agencies, and the chemical industry itself have confirmed that most of the needed safety information simply does not exist, even for the most common ("high

production volume" or HPV) industrial chemicals.

In addition to the PMN process, TSCA authorizes EPA to issue "test rules" that require chemical manufacturers to undertake (at their own expense) testing of their products, and to require manufacturers to report a very wide range of existing data on their products' health effects. However, TSCA's Section 4 test rules are constrained by a Catch-22 of predicate findings, logically incoherent burdens of proof, and judicial review. Before issuing a test rule, EPA must prove that it needs additional information because a chemical "may present an unreasonable risk," but it cannot meet this burden of proof without some of the information that the test rule would produce. Similarly, the provisions for reporting under Section 8 are often vague and limited in their requirements, and they provide no affirmative requirements (as a licensing system would) for manufacturers to produce new information.

Export Controls

Finally, TSCA offers very little to protect other countries from the export of chemicals from the United States. It requires notice to the importing country of the shipment and relevant data, but only if the importing country requires such data or the chemical is subject to a TSCA-based restriction. Section 12 requires neither a determination of the

appropriateness of export (for example, the importers' capacity to handle the material safely), nor the importing country's consent to importation.

A Legislative Proposal to Improve TSCA

CPR recommends Congress consider the following seven specific revisions to TSCA to address the problems and shortcomings identified above and to enable the statute to reach its full potential for protecting human health and the environment.

Adopt an Explicitly Precautionary Approach

Because manufacturers enjoy the best access to information regarding both the toxicity and the social benefits of their chemicals, the overall objective of legislative reform of TSCA must be the adoption of a precautionary approach to force the production and sharing of this superior information as a condition to marketing chemicals. Section 2(b), which declares "the policy of the United States," should be amended explicitly to adopt the Precautionary Principle, quoted above. This would place Congress' formal imprimatur on

the precautionary approach, and it would harmonize the United States approach with international environmental law in general and European environmental law in particular.

Create a True Licensing System

Contrary to the statute's noble aspirations at Section 2(b)(1), pre-manufacture notice (PMN) neither erects a substantial barrier to the manufacture and distribution of dangerous chemicals, nor generates the data set that an effective licensing system should. At a *minimum*, TSCA should conform to the pre-clearance provisions of the new European REACH (Registration, Evaluation, and Assessment of

Because manufacturers enjoy the best access to information regarding both the toxicity and the social benefits of their chemicals, the overall objective of legislative reform of TSCA must be the adoption of a precautionary approach to force the production and sharing of this superior information as a condition to marketing chemicals.

Chemicals) legislation for new *and existing* chemicals. REACH is far from perfect, but it is a strong start, and U.S. chemical companies will eventually need to comply, in any event. In particular, Congress should require EPA to develop a thorough baseline set of data that is required of all chemical registrations, based on the FIFRA model. Congress should also replace Section 5(e) with a provision more like FIFRA's data call-in, to permit EPA to demand safety information without resorting to elaborate and

uncertain procedures that only serve to encourage delay and obfuscation by regulated entities.

Put Safety First in Controlling Toxic Substances

The portions of Sections 6 and 19 that allowed the Corrosion Proof Fittings court to enfeeble TSCA must be revised to ensure that EPA can resume its regulation of toxic chemicals. First, the vague “unreasonable risk” standard should be replaced with a legal standard that makes it absolutely clear that protection of public health and the environment is the first priority and that private costs borne by manufacturers are a secondary consideration.

Second, when there is some risk posed by a chemical, the manufacturer must be required to establish the benefits of the chemical as part of its rebuttal to an “unreasonable risk” finding. Chemicals that present no significant benefits, or for which less hazardous substitutes are available, must be regulated more stringently if they present risks to health and the environment. Manufacturers must bear the burden of making the case for their chemicals, and TSCA should encourage the development and use of safer substitute products.

Third, the “least burdensome” requirement should be scrapped, since there is no real evidence that EPA, under *any* program, gratuitously chooses the most burdensome regulatory option. At

a minimum, it must be made clear that “least burdensome” serves only to define the choice among those options which are, as a threshold matter, already protective of human health and the environment.

Fourth, the “substantial evidence” standard of judicial review (Section 19(c)), which invites aggressive and skeptical review by the courts, should be replaced by the more common and more appropriate “arbitrary, capricious” standard of review. As the Supreme Court has made clear, “arbitrary, capricious” review is hardly superficial, but it does permit the agency some latitude in taking preventive action when full scientific certainty is not yet available. Express incorporation of the Precautionary Principle in Section 6 (as well as in Section 2(b)) would further help to clarify the preventive goals of TSCA.

Fifth, as Section 6(e) does with regard to PCBs, TSCA should take explicit notice of the rest of the “dirty dozen” persistent organic pollutants (POPs) that are the subject of the Stockholm Convention on Persistent Organic Pollutants, which the United States has signed but not yet ratified. Under Section 6(e), the burden of proof is on EPA to justify not regulating PCBs to the fullest extent; the dirty dozen should receive the same statutory treatment.

Simplify Data Gathering

An effective licensing system is the most effective way to gather better data about chemicals, because it would give chemical manufacturers the strongest possible incentive to do so. In addition, the predicate findings for Section 4 test rules should be eliminated or drastically simplified, because elaborate and circular predicate findings, as well as intrusive judicial review, have no place in the information-gathering phase of the regulatory process. Section 8 should be amended to broaden current reporting and recordkeeping requirements and to eliminate unnecessary ambiguities introduced by EPA during the last three decades of implementation.

Finally, TSCA should expressly provide for the creation of readily accessible (i.e., Web-based) clearinghouses, libraries, and databases to collect in one or a few places all of the chemical information that is gathered under TSCA, and to combine it with data collected under other statutes and authorities. TSCA should be a repository of reliable information which other environmental, safety, and health programs, in the United States and throughout the world, can access.

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Reform Overbroad Trade Secret Classifications

Currently EPA employs an overbroad trade secret policy that allows regulated parties to classify a great deal of scientifically relevant information generated under TSCA as “trade secret protected” without any substantiation or justification.

This classification deprives health professionals, other regulators, and the public of critical information regarding the safety of chemicals in commerce. EPA’s generous trade secret policy

should be reformed by amending Section 14(c) to require, at the very least, upfront substantiation from manufacturers before they are allowed to classify information as protected, and a limit on trade secret claims to a period of no more than three to five years without a strong case for renewal by the manufacturer.

Conform Export Controls to International Standards

The United States has signed but not yet ratified both the Stockholm POPs convention and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. These requirements, which

go well beyond the limited notification requirements of the present Section 12, are embodied in legislation already proposed by the Bush Administration, and these changes should be adopted immediately.

Clarify TSCA's Ability to Address New Technologies

TSCA should not only fill gaps in the existing regulatory scheme, it should also provide authority for EPA to address the potential dangers of emerging technologies. TSCA's application to GMOs has been problematic, though this is also due to the United States government's general reluctance to regulate GMOs aggressively. The current crisis with MTBE groundwater pollution is at least in part the result of EPA's reluctance to take regulatory action under TSCA, and nanotechnology issues are on the immediate horizon. The slow and uncertain response to emerging technologies can be attributed in part to the definition of "chemical substance" in TSCA (Section 3(2)), and the definition should therefore

be made more explicitly expansive.

Ensure Chemical Plant Safety

Finally, TSCA is a logical location for mandatory regulations to ensure the safety of industrial chemical plants. Following the horrific accident at Bhopal, India, and a near miss in Institute, West Virginia, Congress passed the Emergency Planning and Community Right-to-Know Act (EPCRA), which required local planning and the public reporting of releases of specified dangerous chemicals. These are valuable requirements, but they are a far cry from actual safety regulation that requires the chemical industry to protect its facilities from deliberate attacks and accidents, and to protect the general public – and especially those who are located in the immediate vicinity of the facilities – from the worst effects of such an incident.



About the Center for Progressive Reform

Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation and improved public access to information. The Center for Progressive Reform is grateful to the Bauman Foundation, the Beldon Fund, the Deer Creek Foundation, and to anonymous and individual donors for their generous support of CPR's work.

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