

# ENVIRONMENTAL REGULATION: HOW IT EVOLVED AND WHERE IT IS HEADED

by Jane S. Shaw

The Republican sweep of the House and Senate in November 1994 was partly a backlash against growing federal regulation in the areas of health, safety and the environment. This backlash explains why during the first 100 days of the reconfigured Congress, the House of Representatives declared a moratorium on many new regulations, passed a bill requiring agencies to conduct a risk assessment and cost/benefit study before issuing major regulations and proposed a bill to ease the Clean Water Act. While that reform movement has slowed, we can expect to see a resurgence of regulatory reform in the months ahead.

The reasons for the backlash are not hard to find. Increasing regulation has hurt a wide swathe of businesses and individuals. Writing for the Center for the Study of American Business, Murray Weidenbaum and Melinda Warren point out that the Federal Register, which records regulatory actions by the federal government, reached 87,000 pages in 1980, fell to 53,000 in 1988 and was back up to 69,684 in 1993. They also report that in real terms, the budget for federal regulatory agencies is about 35 percent higher now than it was during the last year of the Carter Administration.<sup>1</sup> Just the cost of compliance with federal environmental regulations is now about \$150 billion annually, reports Thomas D. Hopkins of the Rochester Institute of Technology.<sup>2</sup>

## Environmental Laws—Logical Or Ludicrous?

For the real estate business, several laws have been particularly onerous in recent years.

- The Superfund's expensive and unpredictable liability provisions have discouraged the redevelopment of urban sites that may have had hazardous waste. These brownfields, which otherwise might be attractive, are being ignored in favor of the greenfields where there is no Superfund liability.
- Regulation of wetlands under the Clean Water Act has forced developers to pay mitigation fees if they drain or fill land that the Environmental Protection Agency (or the Army Corps of Engineers) deems a wetland. If developers drain or fill without a permit, they can be prosecuted as criminals. A number of people have gone to prison for filling land under these rules. William Ellen was creating a hunting area for waterfowl in eastern Maryland just as the federal government changed its definition of wetlands. Frustrated with bureaucratic red tape, Ellen placed two truckloads of dirt on land that, under the

*Jane S. Shaw is a senior associate of PERC (Political Economy Research Center) in Bozeman, Montana.*

new definition, might be a wetland. He went to jail even though he was adding wetlands to the property.<sup>13</sup>

- Zealous administration of the Endangered Species Act has also put development of private property on hold. The Fish and Wildlife Service interprets the Endangered Species Act to mean that habitat cannot be modified if it will cause the death of an endangered species. Although most of the public discussion on endangered species has focused on logging (because protection of such birds as the northern spotted owl and the red-cockaded woodpecker affect forests), a number of developments have been thwarted or slowed by the ability of the Fish and Wildlife Service to control how people use the land.

For example, Beth Morian has been unable to develop homesites on her property west of Austin, Texas, because the area is habitat for the black-capped vireo, a bird on the endangered species list.<sup>4</sup> The act does allow development if a landowner creates a habitat conservation plan, but such plans are costly and must be worked out, step by step, with the Fish and Wildlife Service. According to one estimate, a habitat conservation plan proposed by The Nature Conservancy for a 34,000-acre area around Austin will cost \$173 million over 30 years.<sup>5</sup>

While these obtrusive regulations have hampered real estate development, what probably changed the mood in Washington was that they were beginning to border on the absurd. For example: an EPA rule requires municipal sewage treatment plants to remove 30 percent of organic materials in sewage that is discharged into the ocean. In Anchorage, Alaska, sewage is so diluted with snow or rain that it practically has no organic material by the time it reaches the ocean. Yet Anchorage still must meet the EPA's requirement. To do so, fish processors are *adding* 5,000 pounds per day of fish waste into the system, so that it can be cleaned up to EPA standards.<sup>16</sup>

And then there are Superfund rules. To decide what kind of cleanup should be undertaken, the EPA considers site contamination based on the following assumptions: a site will be turned into a residential mobile home park; children living there will eat between 100 and 200 milligrams of contaminated dirt per day; and residents will drink water solely from wells on the site.<sup>7</sup> In sum, Congressman Robert S. Walker (R-Pa.), an author of one reform bill, says that with today's environmental laws, "people are seeing too much of the absurdity and not enough of the benefits."

These rules, which sometimes seem ludicrous, might be forgiven if the programs they belonged to were viewed as effective. But EPA administrator Carol Browner has criticized the Superfund

program (which she supervises) as one that "frequently moves too slowly, cleans up too little, has an unfair liability scheme and costs too much."<sup>8</sup> The Endangered Species Act isn't just burdensome; it's having perverse effects. By penalizing people who find endangered species on their property, the act creates an incentive to manage one's property so species are kept out or removed if found. Michael Bean, often informally credited with writing the Endangered Species Act, recently told a group that some private landowners are "actively managing their land to avoid potential endangered species problems" simply because they want to avoid "potentially significant economic constraints."<sup>9</sup> Indeed, few species have been taken off the endangered species list and some of the highly touted recoveries, such as the gray whale and the peregrine falcon, are due to factors other than the act itself.

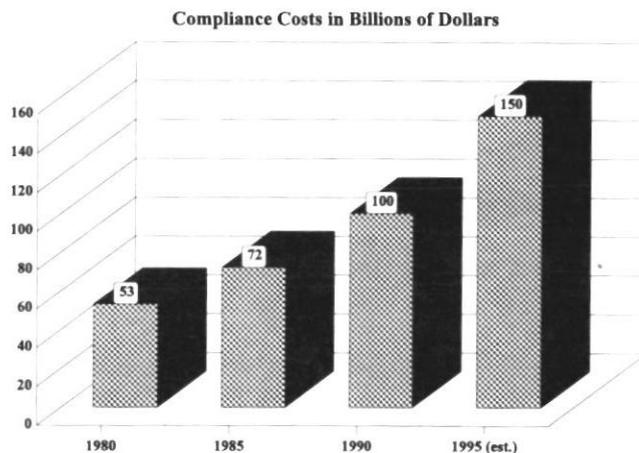
In defense of current regulations, environmentalists have argued that the anecdotes are unrepresentative of federal rules. The National Wildlife Federation issued a series of refutations of the horror stories.<sup>10</sup> These refutations (each is only a few paragraphs long) dispute some aspects of each story but offer no proof that their interpretations are more accurate than the proponents' versions.

Environmental activists in Washington are on the defensive, and there is a clear move toward regulatory reform. However, to put the nation on a more reasonable track, it is necessary to understand how the nation got on this one.

### How Environmental Regulation Grew

Three factors lie behind the regulatory juggernaut of the past two-and-a-half decades: a growing concern about the environment (reflecting both greater affluence and fear generated by apocalyptic forecasts); overconfidence in the federal government; and the tunnel vision that comes with regulatory territory.

### Environmental Regulations Keep Climbing



Source: *Cost of Federal Regulation* by Thomas D. Hopkins, Rochester Institute of Technology, 1992.

### *Growing Concern About The Environment*

Most people date the start of the modern environmental movement with the 1962 publication of *Silent Spring*.<sup>11</sup> This eloquent book by Rachel Carson aroused fears that the natural world was being damaged, perhaps destroyed, by human technology. Carson focused on pesticides, especially DDT, and what followed was the Environmental Protection Agency's 1972 ban on the use of DDT.

In 1972, another book, *The Limits to Growth*<sup>12</sup> raised fears of famine, overpopulation and resource depletion. Basing their views on computer models developed at MIT, the authors predicted that "the limits to growth on this planet will be reached sometime within the next 100 years. The probable result will be a rather sudden and uncontrollable decline in both population and industrial capacity."<sup>13</sup> When the OPEC oil embargo occurred in 1973 and prices of energy began to climb, the book's fearful predictions looked credible, although they have since been shown to be completely unrealistic.

At the same time, Americans looked around and saw environmental problems. In many cities the air was dirty and rivers were polluted and full of debris. The Cuyahoga River actually caught fire in 1969, and the event became a symbol of the severity of pollution, galvanizing many people to do something.

What they did was pass federal laws. From the National Environmental Policy Act, which became law in 1969, to the creation of Superfund<sup>14</sup> in 1980, Congress enacted a steady progression of laws designed to correct what seemed to be wrong. These included the Clean Air Act, the Clean Water Act and the Endangered Species Act, among others.<sup>15</sup>

But was the environment really getting worse in the years preceding the enactment of these laws? Probably not. Robert Crandall, an economist with the Brookings Institution, has studied evidence of air pollution during the 1960s and 1970s. He concludes that the nation's air was improving steadily for decades before 1970 and, in fact, was improving *faster* in the 1960s, before the passage of the Clean Air Act, than in the 1970s after it was passed.<sup>16</sup>

How can this be? Air pollution is usually unburnt fuel. Losing fuel through the smokestack is costly and burning it more efficiently saves the company money. Other kinds of pollution, too, such as heavy metal pollution in water, represent wasted resources, so reducing waste through technology improves the bottom line. Thus, even though in the short run it is convenient to emit pollutants into the air or water, over the long run, profit-making companies have an incentive to clean up their waste.

But something else also was happening. People's attitudes were changing as their incomes rose. The factory smokestack that once symbolized progress now was viewed as an unpleasant nuisance for those living nearby. "Postwar affluence had produced a generation reared in relative comfort, one now in search of post material values long deferred by their elders," writes Christopher Bosso to explain the rise of environmentalism in the 1960s. "Once-dominant economic concerns gave way to 'superior' goods, those not necessary to human survival but increasingly regarded as essential to the overall quality of life."<sup>17</sup>

Subsequent studies have confirmed the link between rising income and environmental protection. A study by Gene Grossman and Alan Krueger of Princeton University<sup>18</sup> suggests that at low levels of income, economic growth puts initial stress on the environment, but after a certain level of wealth is reached, the environment begins to improve. Using World Health Organization data, the authors compared levels of particulate and sulfur dioxide pollution with levels of income. They found that pollution began to decline when per capita income reached between \$4,000 and \$5,000 (in 1985 dollars).

Rising incomes affect both the demand for environmental quality and the ability to supply it. People have to know they have food on the table before they care about streams and lakes. And as income rises, they have the discretionary funds to pay for environmental quality through higher taxes or their own economic choices.

There are numerous indications of the correlation between income and concern for the environment. For example, members of environmental organizations tend to be among the more affluent Americans. Readers of *Sierra*, the magazine of the Sierra Club, have incomes twice as high as those of the average American.<sup>19</sup> And a study for the Park Service indicates that in 1980 the average visitor to Bryce Canyon National Park had an annual household income of \$30,000, compared with the national average of about \$18,000.<sup>20</sup>

The latest round of environmental activism, starting visibly in 1988, is probably linked to the nation's strong economic growth after 1983, kicked off by a hot summer and fear about global warming. From 1983 to 1990, the United States experienced what the *Economic Report of the President* called "the longest peacetime expansion on record and the second longest expansion in U.S. history."<sup>21</sup> This expansion spurred people to increase their interest in environmental amenities and gave them the income to do something about it.

### *Elevation Of Local Problems To The National Level*

As awareness of the environment emerged in the late 1960s, Americans looked to the federal government for solutions. Confidence in government, especially the federal government, was strong; the nation had just embarked on the War on Poverty, and the Apollo program to land a man on the moon was nearing its objective.

Furthermore, state and local governments were sending mixed signals about protecting the environment. Thomas Tietenberg, writing in his textbook on economics and the environment, describes how the federal government tried to “cajole the states into action” on controlling air pollution. State governments resisted.

But the mood of the late 1960s was activist, and environmental activists were impatient. They considered the attitudes of state and local governments as parochial, unenlightened and political. To force the states to act, they sought more control at the federal level, and they got it. Pollution control went off in a “bold new direction,” says Tietenberg, with a “massive attempt to control the injection of substances into our air.”<sup>22</sup> That federal attempt still is ongoing.

Resistance by state officials stemmed from the fact that strict controls would place their state at a competitive disadvantage as they tried to attract jobs and industry. Politically, they would face problems with company officials whose profits would go down and to employees who could lose their jobs. Even though concern about pollution was rising, residents did not necessarily want cleaner air and streams to override other goals.

The nationalization of pollution control did not eliminate environmental politics but changed its chief location to Washington, D.C., rather than states or municipalities. Today, local and state governments find themselves in battles with the Environmental Protection Agency as it insists they meet national ambient air standards and threatens to cut off funds if they don't. Furthermore, congressmen from one state pit themselves against those of other states. Robert Crandall of Brookings studied the voting patterns that led to the passage of the 1977 amendments to the Clean Air Act. He found that representatives of the industrialized rustbelt states in the Northeast and Midwest had banded together, voting to impose heavier controls on new plants built in pristine areas such as the growing sunbelt. By insisting on tougher controls for the sunbelt states, these congressmen reduced the competitive advantages of the southern states,<sup>23</sup> which had lower production costs.

### *The Effects Of Tunnel Vision*

By elevating pollution control and environmental protection to the level of the national government, faster cleanup seemed possible. But in many cases these hopes have not been realized. One reason federal regulation has not lived up to expectations is that government officials have tunnel vision, a term adopted by Supreme Court Justice Stephen Breyer. This “classic administrative disease,” explains Breyer, “arises when an agency so organizes or subdivides its tasks that each employee's individual conscientious performance effectively carries single-minded pursuit of a single goal too far, to the point where it brings about more harm than good.”<sup>24</sup>

The Superfund program illustrates this tunnel vision. People in towns like Aspen, Colorado and Triumph, Idaho have been battling with the EPA over whether they should have Superfund sites. These are mining towns that have areas with significant mine tailings. In Aspen, for example, a mobile home park located right on top of the tailings has been in existence for years. Because of the way that the EPA calculates contamination by small quantities of heavy metals, the EPA contends these sites are extremely dangerous to residents and must be completely cleaned up for people to live there safely.<sup>25</sup> But residents counter by pointing out there are no epidemiological signs of harm and, in fact, there is no elevation of lead in the residents' blood among people who have lived for years on or near the affected areas. However, the EPA persists in pressing for “zero risk” even though the trucks that would haul away the waste may well pose a greater risk to the health and safety of the residents.

This tunnel vision explains why the nation is spending millions of dollars to clean up Superfund sites that may pose a one-in-a-million risk of cancer while far greater risks are ignored. Experts have calculated the costs of lives saved by regulation. By one estimate, it costs \$31,000 to avert a death by upgrading traffic signs; in contrast, the EPA's ban on the production and use of asbestos costs \$110.7 million per life saved.<sup>26</sup>

### **Reforms Currently Underway**

With regulation so out of kilter, the effort to reduce regulatory burdens is not surprising. Congress has taken the initiative in some ways, but ideas for reform are also circulating in state and local governments, in think tanks, among interest groups and within businesses. Even the executive branch recognizes that some change is needed. It is too soon to know how everything will sort out. No one knows just how strong the momentum is to repeal, reform and reinvent.

### *Congressional Action*

As noted at the beginning of this article, the House passed rules requiring federal agencies to conduct risk assessment and cost/benefit analysis before issuing upcoming regulations. However, these have not become law. A number of congressmen are trying to change specific environmental laws, e.g., the Endangered Species Act, the Clean Water Act and Superfund, to make them less burdensome and, in some cases, more effective. However, the battles over these laws are likely to be contentious, and at this point no one can predict the outcome.

Another step taken by the House was an effort to force the federal government to compensate owners whose property values are reduced unfairly through regulation controlling land use. This takings legislation has been championed by the property rights movement, a loose grassroots network of people, primarily property owners, who are upset by the encroachment of the federal government. These owners contend that when regulation to produce a public good (rather than to stop damaging pollution) reduces the value of property, the property owner must be compensated, just as if the property had been taken under eminent domain.

The House of Representatives passed a bill requiring that when 20 percent of the value of property is taken by a regulation, the property owner must be compensated. Since this legislation is hotly debated and since it could be costly to the federal government, its enactment by the full Congress (and its endorsement by the White House) is highly uncertain. On the other hand, the property rights movement shows no signs of slackening its pressure.

### *State And Local Action*

The push for takings legislation is not limited to Congress. According to Defenders of Property Rights (a Washington, D.C. group that monitors property rights issues), by May 1995, 18 state legislatures had passed property rights legislation and bills had been introduced into at least 45 state legislatures.<sup>27</sup>

Most of the successful state laws are less ambitious than the federal counterpart passed by the House. They simply require that the state consider the financial implications of regulations under consideration in light of their potential as takings. When contemplating a regulation, the state government must formally consider whether a court will rule that the regulation is a taking and require compensation to the property owner. Complicating this task is the fact that the takings law in the courts is "unsettled constitutional law."<sup>28</sup> Some courts,

including the Supreme Court, have found that regulations in some instances are uncompensated takings, but so far these occasions have been rare. (The *Dolan vs. Tigard* case, decided by the Supreme Court in 1994, is an example where the Court ruled a regulation was an uncompensated taking.)

Another area of potential regulatory reform is through devolution. The term, which surfaced initially in the debate over welfare reform, refers to returning responsibilities to the states. So far, not a great deal has happened in the environmental area, but devolution is a concept that is likely to spread. Most pollution is local and can be handled locally. Jerry Taylor, director of natural resource studies at the increasingly influential Cato Institute, urges such an approach. If Superfund, for example, were a local responsibility, he told *National Journal*, "it might well be that a community would fence off the site and spend its money on something else."<sup>29</sup>

Local handling of environmental issues would not be a panacea. In Michigan, for example, a tough law patterned after the federal Superfund law has made commercial development in cities such as Detroit extremely costly, because it applies liability for any contamination from hazardous waste to purchasers of property. The good news, however, is that local pressure from those who felt the impact led to its repeal. This happened long before anything was done about the federal law on which it is based. While local regulation can be harsh, it offers greater opportunity for correcting mistakes.

### **Conclusion**

For property owners concerned about excessive regulation, the future looks better than the recent past. The buildup of regulation over the past two-and-a-half decades has resulted in so many problems that some change is inevitable. What shape that change will take is not yet clear, but two directions are likely: Federal laws will be revised to be less costly and burdensome and some regulatory activity may devolve to state and local communities.

### **NOTES**

1. Murray Weidenbaum and Melinda Warren, "It's Time to Cut Government Regulations," Contemporary Issues Series 70, (St. Louis: Center for the Study of American Business) February 1995.
2. Thomas D. Hopkins, ed., *Regulatory Policy in Canada and the United States* (Rochester, NY: Rochester Institute of Technology, 1992), Table 1.
3. Warren Brookes, "The Strange Case of the Glancing Geese," *Forbes*, September 2, 1991, p. 108.
4. Randy Fitzgerald, "When a Law Goes Haywire," *Reader's Digest*, September 1993, p. 52.
5. Betsy Carpenter, "The Best-Laid Plans," *U.S. News and World Report*, October 4, 1993, p. 89.

6. Ann Reilly Dowd, "Environmentalists Are on the Run," *Fortune*, September 19, 1994, p. 98.
7. Richard L. Stroup and Sandra L. Goodman: "Rights vs. Regulation: How to Reform Superfund" (PERC Working Paper 94-13, September 1994), p. 32.
8. Quoted in Peter B. Prestley, "Superfund in Limbo," *ABA Journal*, June 1995, p. 58.
9. Transcript of a talk by Michael Bean, senior attorney of the Environmental Defense Fund, at a U.S. Fish and Wildlife Service seminar, November 3, 1994, Marymount University, Arlington, VA.
10. National Wildlife Federation, "Fairy Tales & Facts About Environmental Protection," (Washington, DC: National Wildlife Federation), February 1994.
11. Rachel Carson, *Silent Spring* (Boston: Houghton Mifflin Company, 1962).
12. Donella H. Meadows, et al., *The Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind* (New York: Universe Books, 1972).
13. Meadows et al, p. 23.
14. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980.
15. *National Journal* says there are now 16 major environmental laws on the books (March 18, 1995, p. 662).
16. Robert W. Crandall, *Controlling Industrial Pollution: The Economics and Politics of Clean Air* (Washington, D.C.: The Brookings Institution, 1983), p. 19.
17. Christopher J. Bosso, *Pesticides and Politics: The Life Cycle of a Public Issue* (Pittsburgh: University of Pittsburgh, 1987), p. 111.
18. Gene M. Grossman and Alan B. Krueger, "Environmental Impacts of a North American Free Trade Agreement" (Discussion Paper in Economics, Woodrow Wilson School of Public and International Affairs, Princeton University, Princeton NJ, Feb. 1992), p. 5.
19. 1992 "MRI Reader Survey" (San Francisco: Sierra Club, 1992), p. 1.
20. Economic Staff, Office of Policy Analysis, U.S. Dept. of the Interior, *Descriptive Analysis of the Data from the Bryce Canyon National Park Visitor Survey (Summer 1980)*. Washington, D.C.: U.S. Department of the Interior, October 1980, p. 26.
21. *The Annual Report of the Council of Economic Advisers* (Washington, D.C.: February 1990), p. 19.
22. Thomas Tietenberg, *Environmental and Natural Resource Economics* (Glenview IL: Scott, Foresman and Company, 1984), pp. 293-4.
23. Crandall, p. 129-130.
24. Stephen Breyer, *Breaking the Vicious Circle* (Cambridge: Harvard University Press, 1993), p. 11.
25. Stroup and Goodman, p. 12.
26. Joseph L. Bast, Peter J. Hill, Richard C. Rue, *Eco-Sanity: A Common-Sense Guide to Environmentalism* (Lanham, MD: Madison Books, 1994), p. 163.
27. *Land Rights Letter*, May 1995, p. 7 (quoting Defenders of Property Rights).
28. Hertha L. Lund, "Property Rights Legislation in the States: A Review" (Bozeman, MT: PERC, January 1995), p. 7.
29. Margaret Kriz, "A New Shade of Green," *National Journal*, March 18, 1995, pp. 661-665.

# JEROME HAIMS REALTY, INC.

369 LEXINGTON AVE., NEW YORK 10017/212-687-0154



THE COMPLETE REAL ESTATE APPRAISAL AND  
CONSULTATION ORGANIZATION

CONSULTATION—VALUATION / FEASIBILITY STUDIES  
CASH FLOW AND INVESTMENT ANALYSIS  
RECOGNIZED EXPERT TESTIMONY



The primary objective of J.R. Kimball, Inc., is to provide real estate services that enable clients to make well-informed decisions concerning the purchase, sale, development, underwriting, and management of their real estate assets.

## J.R. KIMBALL, INC.

Realtors, Appraisers and Consultants

J.R. Kimball, CRE, MAI  
Lori Forrest, MAI  
Mary Jo Thomas, SRA

1201 West Freeway  
Fort Worth, TX 76102-6074  
telephone 817.332.7872  
fax 817.332.2940