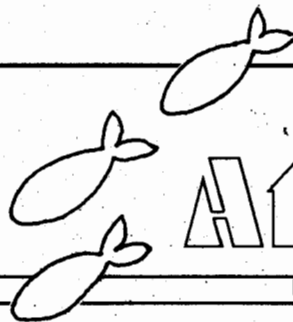


Habitat Hotline



Atlantic

Issues of Concern For Atlantic Marine Fish Habitat

December 1994, Issue No. 5

Property Rights and Cost/Benefit Analysis:

The way Congress handles these issues may have far-reaching implications for the environment, public health, civil rights, and the economy.

The environmental issues facing the new Congress will be as trying as they were for the last Congress, and no doubt will be just as contentious. The Clean Water Act, Magnuson Act, Coastal Zone Management Act, and Endangered Species Act are all up for reauthorization.

The new Congressional majority of 1995 has heard the call of the American public and pledged to downsize government. This reduction in government will most likely ease regulations which American businesses find restricting. Two related issues, including cost/benefit analysis and property rights or "takings", are specifically addressed by the "Contract with America" and are intricately entwined with environmental and other legislation. Depending upon how these issues are addressed in the next Congress, there may be far reaching implications for the environment, public health, civil rights and the economy.

Takings or Property Rights - The "Takings" or "Property Rights" movement is based on the reasoning that government regulations limiting the use of private property should be covered under the Fifth Amendment, which states: "...nor shall private property be taken for public use without just compensation." A good fish habitat example of this is as follows: a developer wants to build a waterfront condominium on 20 acres of salt marsh he owns (which just happens to be prime juvenile fish habitat). The required permits may be denied because of current regulations which protect wetlands. The developer might then argue that since he cannot develop his land and he is losing potential profits, the government has actually taken it from him, and he should be compensated for his lost profits. Although this may sound logical, the other side of the coin is that wetlands regulations are in place to protect public welfare. Wetlands buffer areas

from flooding, filter water borne toxins and are important to wildlife and fisheries resources. Should a property owner be reimbursed for not harming resources important to the public?

In most cases, laws which regulate the use of private property or govern business procedures are for the welfare and in the interest of the general public. Such regulations include those which protect public health and the environment, ensure worker safety, and provide low income housing. Here is another example: say your neighbor, who owns a large tract of land, decides he wants to build a manufacturing plant which will house a toxic gas releasing smokestack. If government regulations keep him from building the structure, he might claim a "taking" since the regulations have prevented him from making the most "profitable" use of his land. But these regulations have also protected the property rights and health of you and others living near the proposed plant. Should individuals be reimbursed with tax dollars for not polluting the air or endangering the health of others? Property rights proponents argue, "Yes!"

For many years it was not clear whether the Fifth Amendment even applied in such situations. In 1922, the Supreme Court found, "the general rule, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." But when does regulation go too far? The Supreme Court laid out a number of guidelines for lower courts to follow. In general, the greater the "public purpose" such as protecting public health, the less likely a court is to find that a regulation resulted in a taking. The Court has repeatedly held that mere
(continued on p. 2)



diminution in value (except in very rare cases) is not sufficient to establish that a regulatory taking has occurred.

The Supreme Court has also frequently stated that takings challenges must be decided on a case-by-case basis, because they entail a balancing of the specific private and public interests involved. Unfortunately, with little courtroom success, the property rights movement is now focusing on state and federal legislatures.

A number of bills were introduced during 1994 which included property rights amendments. The amendments proposed were broad in their takings definitions and extremely expensive (remember - the reimbursement money has to come from somewhere). Some of the proposed legislation could intimidate public agencies from performing their duties by requiring them to compensate property owners out of their own budgets. Because of the extreme expense of takings legislation and the need for case by case review, the issue of takings is better left to the courts system.

Cost/Benefit Analysis - Cost/benefit analysis refers to the comparison of costs for imposing a law or regulation with the financial benefits of the law or regulation. This analysis is an important tool for evaluating regulations, and is currently used in conjunction with other analyses, as designated by the appropriate legislation. However, there are a number of problems with cost/benefit analysis. First of all, determining the monetary value of things that don't have anything to do with money is very subjective. Secondly, when it is used without other evaluation techniques, it does not give a representative picture of all the issues involved. Finally, long-term benefits are frequently undervalued and sometimes totally ignored.

Cost/benefit analyses assume scientific and economic tools and data that often do not exist, or that cannot give us answers that are complete enough or precise enough to support reasonable conclusions. For example, in a recent cost/benefit analysis on water pollution rules for oil and gas drilling wastes, the Environmental Protection Agency (EPA) evaluated that the benefits of reducing lead poisoning in children was represented by the present value of lost earnings which was calculated to be \$4,588 per lost IQ point. Would any reasonable parent view any payments as adequate compensation for compromising the intelligence and future of their child? What about the larger societal impacts? Would a parent allow that an increased risk of lead poisoning to a child

from oil and gas drilling activities was acceptable because there was a similar risk of lead poisoning from other, less preventable sources?

Another concern about this analysis is that it can be extremely costly and time consuming, and if based on subjective issues, may not be of any value. How can you objectively quantify the benefits of living in a healthy, beautiful environment or the value of a person's life? The burden of such analyses could effectively grind regulatory programs to a halt, to the detriment of public health and the environment.

In the past, Congress has taken the time to craft environmental laws that require economic, technical and health issues to be addressed during the development of regulations. An overall, far-reaching bill on cost/benefit could have broad and extreme financial implications, and effectively impede the development of government regulations protecting the environment and human health.

Broadbased Concern

Broadbased concern about cost/benefit analysis and takings legislation exists. In Arizona, a takings bill was passed by the state legislature and repealed in November when the public voted against it by a margin of 20%. As evident in the Arizona example, elected officials may not always choose the option the majority of people favor. During the last Congress, a number of good bills, including the bill raising EPA to cabinet level status, were defeated because of amendments addressing the two issues described above.

The issues of cost/benefit analysis and takings are complex and not easily understood by the general public. Even though the bills and amendments that address these issues may not mention fish, habitat, or the environment, they may be extremely far-reaching and may affect the environment and public health and safety, as well as civil rights. Americans may want to limit the taxes and the involvement of government in certain aspects of their lives, but do they favor an approach which severely impacts environmental and public health legislation?

To find out more about cost/benefit analysis and property rights, contact Dianne Stephan at (202) 452-8700 or write to the address on the back of this newsletter.

The Job Creation and Wage Enhancement Act of 1995: Concerns about gutting worker safety, public health and environmental laws.

One of the first bills expected to be introduced into the House of Representatives under the "Contract with America" is the **Job Creation and Wage Enhancement Act of 1995**. Although the title certainly sounds good, and some of its provisions are widely

supported, titles III - XI of the bill may weaken environmental and other laws which protect public health and safety. Cost/benefit analyses, risk assessment, and takings are all addressed in ways which may make it easier to pollute our air and water.

The Clean Water Network has developed a packet with information on the bill. For a copy, contact Robyn Roberts at (202) 624-9357.

PCBs Lethal to Oyster Larvae

Polychlorinated biphenyls (PCBs) have been shown to be capable of harming early life stages - from fertilized egg to larvae -- of the eastern oyster. Researchers for the National Marine Fisheries Service (NMFS) at the Milford, Connecticut lab found that varying concentrations of the contaminant had varying effects, with medium

concentrations causing reduction in growth with some mortality, and high concentrations causing mortality up to 100%.

The medium concentration of contaminants used in the experiments is considered to be the same concentration that would be found at sources of chronic PCB discharges which are present in the marine environment today. A high concentration scenario would occur after a catastrophic event such as a spill of PCB laden oil or gas. For

further information on this study, contact NMFS researcher Sheila Stiles at (203) 783-4224.

The "Mussel Watch" program of the National Oceanic and Atmospheric Administration (NOAA) Status and Trends Program records PCB levels in mussels at many coastal locations. For more information on this program, write Tom O'Conner, Coastal Monitoring Branch, NOAA, 6001 Executive Boulevard, Rockville, MD, 20852.

EPA Dioxin Reassessment Confirms Already Bad Reputation

According to the Draft Dioxin Reassessment released by the Environmental Protection Agency (EPA) this September, dioxin is indeed the public health threat it was once considered. Recent allegations that the toxicity of dioxin had been overstated led to this comprehensive reassessment. The science has shown that dioxin is the most carcinogenic substance ever tested.

Dioxins and related compounds have the ability to disrupt the hormonal system and thereby cause serious health effects in several bodily systems, which may result in improperly formed reproductive organs, impaired immune systems, and learning and behavioral disorders. The evidence strongly suggests that even those body burdens (amount of contaminant retained in the body) of dioxin now found in the general population may cause low sperm counts, testicular and breast cancer, and endometriosis.

Dioxin bioaccumulates, which means as an organism eats food items that have been previously contaminated, the organism retains the contaminant. The level of contaminant increases as you go up the food chain. Humans and animals who eat at the top of the food chain end up receiving the highest doses. Nearly everyone

Dioxins have the ability to disrupt the hormonal system, and cause serious health effects.

living in industrial society has been exposed to dioxin, and carries the toxin in their body. We ingest 90% of this poison through the food we eat, especially fatty foods such as meat or cheeses.

Incinerators are the largest identified sources of dioxin. Dioxins are generated largely as a result of burning PVC plastics and other chlorine based products. The manufacture of PVC plastics and the bleaching of paper by pulp and paper plants generates dioxin as well.

Dioxins are of concern to fishermen for the human health issues described above, and for impacts to fish health as well. Toxic industrial discharges into rivers and estuaries may directly harm fish or be stored in a fish's body. When dioxin contaminated sediments are dredged from ports, harbors, or other waterways, the dioxins are resuspended and more available to marine life. Frequently, contaminated sediments are dumped offshore, which again exposes marine life. Fishermen are exposed when they catch and eat fish carrying body burdens of dioxin.

The EPA will be holding public hearings during the month of December to gather public comments on the dioxin reassessment. They need to hear about your concerns. Written comments will be accepted through January 13, 1994, and should be addressed to: Carol Browner, EPA Administrator, EPA Headquarters, 401 M Street, SW, Washington, D.C., 20460. Ask that your comments be entered onto the official record for the Reassessment. For a sample letter, contact Dianne Stephan at (202) 452-8700.

Action Items

- ☛ *Have a wonderful holiday season!*
- ☛ *Write to EPA Administrator Carol Browner with your concerns about dioxin (p.3) and send in the attached postcard.*
- ☛ *Get your information packet on the "Contract with America" (p. 2).*

*Atlantic States Marine Fisheries Commission
1776 Massachusetts Ave., NW, Suite 600
Washington, DC 20036*

Habitat Hotline
Atlantic

Dianne Stephan,
Editor

Funded by

