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THE NEXT STEP IN REGULATORY REFORM

by Murray L. Weidenbaum, Director
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An Address to the American Mining Congress,
St. Louis, Missouri

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HIGHLIGHTS

- Laws that "mandate unrealistic goals or unreasonable methods for social regulation need to be revised. Such onerous regulation ranges from the 'zero discharge' goal of the Clean Water Act to the 'zero risk' provision of the Delaney Amendment of the Food, Drug and Cosmetic Act. The expiration of the Clean Air Act and Clean Water Act provides striking opportunities for incorporating desirable changes along these lines.... The present time is ripe for embarking on a second phase of regulatory reform: the review and revision of the substantive laws governing the regulatory process."
- "The major obstacles to further substantial improvement in the regulatory process cannot be eliminated by executive action. Those obstacles are the rigid requirements and limitations in the basic statutes governing regulatory activities. After all, every regulation is issued pursuant to an act of Congress."
- "The leadership of regulatory agencies...should understand that good policymaking means a careful balancing of a variety of important considerations -- such as clean air and high employment, healthier working conditions and greater productivity. Today, however, the most urgent need is to convince members of Congress to demonstrate such a sense of balance when they write the basic regulatory laws."
- "The Clean Air Act is one of the most costly pieces of regulatory legislation in history. Its incremental costs -- expenditures beyond those that the private sector would voluntarily spend -- totaled \$22 billion back in 1979....The annual cost for air pollution control, paid by the consumer in the form of higher prices for goods and services, amounted to \$400 for a family of four in 1979. That figure is clearly higher today."

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This is not the time either to rest on laurels or to become satisfied with the status quo. Rather, now is the right time to move to Phase II of the effort to reform the antiquated and needlessly burdensome regulatory apparatus of the federal government.

Phase I has generally been accomplished. It consisted of establishing a comprehensive and fairly effective system for reviewing pending rulemaking. A major advance has been the incorporation of formal benefit-cost analysis in that review process. The Reagan Administration has estimated that its reviews to date have reduced the cost of compliance with federal regulation by \$9-11 billion in terms of capital outlays, and \$6 billion a year on a continuing basis.

Surely, additional improvements in administrative procedures are both desirable and possible. Benefit-cost analysis is a developing mechanism, especially as it is applied to regulation. Nevertheless, it is clear that the major obstacles to further substantial improvement in the regulatory process cannot be eliminated by executive action. Those obstacles are the rigid requirements and limitations in the basic statutes governing regulatory activities. After all, every regulation is issued pursuant to an act of Congress.

Recent experience shows that the fundamental shortcomings of government regulation result more from statutory than from administrative deficiencies. For example, the current leadership of the Occupational Safety and Health Administration has been trying to reduce the burdens of its rule-making. However, the courts have struck down specific changes on the grounds that the proposals were inconsistent with the statute under which the agency operates. The inherent desirability of OSHA's proposals is clear -- to achieve health and safety objectives in a more cost-effective manner. As a result, revisions in the law now inhibiting such improvements should become a high priority.

Many legislative enactments mandate unrealistic goals or unreasonable methods for social regulation and need to be revised. Such onerous regulation ranges from the "zero discharge" goal of the Clean Water Act to the "zero risk" provision of the Delaney Amendment of the Food, Drug and Cosmetic Act. The expiration of the Clean Air Act and Clean Water Act provides striking opportunities for incorporating desirable changes along these lines. A word of caution: recent experiences in the environmental area demonstrate the need for regulators to conform to existing statutes, whatever their shortcomings may be. But that experience also points up the need to update statutory requirements rather than introduce arbitrary administrative changes.

I do not underestimate the importance of improving administrative review of existing as well as proposed regulations. Nevertheless, the present time is ripe for embarking on a second phase of regulatory reform: the review and revision of the substantive laws governing the regulatory process. Today, I want to focus on statutory problems in two key areas:

1. The environment, specifically renewal of the Clean Air Act and the Clean Water Act.
2. Occupational health and safety.

The selection of new appointees to regulatory agencies is a related and vitally important function. The experiences of recent years in several administrations demonstrate the need to select people who take a balanced approach to the benefits and burdens of regulation. Appointing uncritical enthusiasts for expansion of government regulation inevitably produces a regulatory regime characterized by excessive burdens and cavalier disregard of economic impacts. Similarly, regulators who lack a basic sympathy toward the programs they administer -- or who, through lack of sensitivity, project such a negative image -- are also counterproductive.

Regulatory activities that are deemed worthy of continuation should be managed by people who are both sympathetic to the important social objectives to be achieved and equally concerned with minimizing the burdens they impose on individual citizens as taxpayers and consumers. The leadership of regulatory agencies -- as well as of other governmental activities -- should understand that good policymaking means a careful balancing of a variety of important considerations -- such as clean air and high employment, healthier working conditions and greater productivity. Today, however, the most urgent need is to convince members of Congress to demonstrate such a sense of balance when they write the basic regulatory laws.

Let me turn to the serious and difficult question of amending the environmental and safety laws.

Updating the Environmental Statutes

With the benefit of hindsight, it is now clear that the urgent and strident concern for improved environmental quality that characterized the past decade unfortunately meant that important economic factors got lost in the rush to regulate. But is equally important not to shift to the other

extreme. Thus, in considering changes in the Clean Air Act and the Clean Water Act, the issue is not whether environmental controls are needed. That issue was settled years ago. The pertinent question now is how to improve the effectiveness of the billions of dollars spent each year on pollution control. Unfortunately, that important goal has been obscured by the plethora of disturbing reports on administrative shortcomings in EPA. In retrospect, many of those administrative problems arose from misguided attempts to work around extremely onerous statutory requirements. The undramatic but serious business of environmental cleanup requires attention to be focused on those shortcomings in existing law.

Revising the Clean Air Act

The Clean Air Act is one of the most costly pieces of regulatory legislation in history. Its incremental costs -- expenditures beyond those that the private sector would voluntarily spend -- totaled \$22 billion back in 1979, the last time that the government attempted to cost out these regulations. According to the Council on Environmental Quality, expenditures of nearly \$300 billion will be needed to meet Clean Air Act requirements during the period 1979 to 1988 (measured in 1979 dollars). The annual cost for air pollution control, paid by the consumer in the form of higher prices for goods and services, amounted to \$400 for a family of four in 1979. That figure is clearly higher today.

Clean air regulation generates many other costs to the economy. These include increased construction costs due to delays in granting permits, lags in initiating new projects due to potential environmental challenges, and reduced progress in reaching the goal of increasing U.S. energy independence. It is ironic to note that lags in productivity-enhancing investment caused by

clean air regulations interfere with the achievement of the goals of the Clean Air Act itself.

For example, in areas where air quality is better than the national standards (designated as Prevention of Significant Deterioration areas), delays of two or three years in obtaining building permits are commonplace. That results in greatly increased construction costs. It now takes eight to ten years to construct a 1,000-megawatt coal-fired power plant, whereas it took only four to five years to construct such a facility a decade ago. More than half the \$1 billion cost of such an installation is due to requirements for scrubbers and the interest and related expenses incurred during the four- to five-year period of extra delay.

But, in addition, these delays postpone the time that aging, less efficient, and more polluting factories can be replaced with more productive and less polluting new facilities. In this way, some of the provisions of the Clean Air Act are self-defeating. Ironically and unintentionally, they retard efforts to reduce air pollution.

Let me suggest seven changes in the Clean Air Act that would produce a salutary effect on the economy without sacrificing air quality objectives crucial to public health:

- (1) EPA should be required to establish standards that will protect the public against "unreasonable risk of adverse health effects." In determining "unreasonable risk," the EPA administrator should be required to consider the nature and extent of the risk, the attainability of the standard, economic values, and other important public interests.
- (2) Secondary (non-health-related) air standards should be set by individual states.
- (3) "Prevention of Significant Deterioration increments" for allowable air quality degradation should apply only to national park areas.

- (4) All mandated control technologies should follow the procedures for "best available control technology."
- (5) States should be allowed to substitute emission fees for current offset procedures in nonattainment areas. In general, market incentives should be substituted for command and control regulation when possible. The need for statutory change is underscored by the recent Court ruling that sensible innovations such as the "bubble concept" -- treating pollutants for a whole plant rather than by individual smokestacks -- are "impermissible" under current law.
- (6) New emission sources and modified sources should not be required to install additional control equipment -- absent newly discovered health threats -- within ten years of installation of approved equipment to control a particular pollutant.
- (7) Research on the causes of "acid rain" should be accelerated. No inflexible legislative requirements should be set without sufficient scientific evidence and cost/benefit analysis.

America's resources are vast but not unlimited. We can indeed afford to protect our citizens from unreasonable exposure to unhealthy air pollutants. But it is imperative that the laws governing how we accomplish this important task be designed to encourage the most effective and least disruptive means of achieving these important environmental objectives. Reauthorization of the Clean Air Act gives Congress the opportunity to do just that.

Revising the Clean Water Act

The Clean Water Act, like its costly cousin the Clean Air Act, was scheduled to be reauthorized or revised by October 1, 1981. But it remains unchanged to date. The Act appears to have arrested the degradation of water quality. Yet the evidence that it has actually improved water quality is largely anecdotal. There is no doubt, however, that the Act has been costly. According to the latest published figures from the Council on Environmental Quality, incremental costs for industries and municipalities totaled over \$12 billion in 1979 -- \$6 billion in public spending (financed by taxpayers) and

more than \$6 billion in private expenditures (paid by consumers). The CEQ also estimated that the cumulative incremental costs for the period 1979-1988 would total nearly \$170 billion.

The two primary goals of the Clean Water Act are 1) to eliminate the discharge of pollutants by 1985, and 2) to make all lakes and streams fishable and swimmable by July 1, 1983. Both goals are widely acknowledged to be unattainable. Since technically these are goals and not legal requirements, supporters of the current law see no need to change them. Nonetheless, unrealistic goals do have consequences. For instance, recent efforts by the Environmental Protection Agency to allow more state control over designation of the use of a particular stream has been challenged on the grounds that it is an abandonment of the "fishable/swimmable" goal.

Three primary Clean Water Act requirements will create much confusion if they are not modified soon. First of all, the July 1, 1984, deadline for installation of Best Available Technology (BAT) for toxic pollutants and Best Conventional Technology for conventional pollutants cannot be met. According to the Act, EPA must specify BAT for 129 toxic substances used in 34 different industries. Thus far the agency has been able to promulgate regulations for only 3 industries -- inorganic chemicals, timber processing, and iron and steel. Furthermore, rigidly proceeding to new, more costly standards is not necessary in many cases. Current cleanup methods for conventional pollutants have proved to be effective for removing a high percentage of heavy metals and other toxics. In light of these facts, the deadlines should be extended to July 1, 1988, as EPA has urged.

The 1977 amendments to the Clean Water Act also require "pretreatment" of toxic substances that are discharged by industry into publicly owned treatment

works. National categorical standards are required for 129 toxics and 34 industries. But only requirements for electroplaters and timber products have been set to date. Industry, the EPA, and the House Subcommittee on Oversight and Review all concur that this approach should be abandoned in favor of local control over usage of sewage facilities on the basis of the current permitting system.

The third major Clean Water Act provision needing immediate revision is the permitting system itself, the National Pollution Discharge Elimination System. Between 1972 and 1976, EPA and the states issued approximately 65,000 "first round," five-year permits based on Best Practicable Technology. The second round of permits were to be based upon the more stringent Best Available Technology (BAT) requirements. Thus far 30,400 permits have expired. Over the next three years, the remainder of first round permits will expire. With 5-year permits, the backlog can never be reduced at current permit issuing levels. Before the permitting authority can complete permit issuance of existing expired permits, the reissued 5-year permits will begin expiring once again. The EPA, industry, and the House Oversight Subcommittee all have recommended that permits should have a longer life -- eight to ten years.

Updating The Job Health and Safety Statutes

The Occupational Safety and Health Act of 1970 created one of the most controversial of all federal agencies. Many critics have contended that OSHA has pursued the wrong goal -- focusing on the details of on-the-job safety rather than improving occupational health. In addition, the agency has been criticized for using the wrong tools in applying broad, standards-based regulations rather than using a flexible, incentives approach.

The most damning criticism of OSHA is that, although it imposes large costs on the private sector, it has accomplished little in the way of improving the conditions in which Americans work. Just look at the data on injuries, illnesses, and fatalities since 1972, the first year in which the agency was operational. The number of job-related illnesses and injuries per worker has been rising since 1972, as has the number of lost workdays per worker. The annual number of workplace fatalities has fluctuated without any visible trend for better or worse.

After a shaky start, dominated by the promulgation of a host of silly and nitpicking regulations, OSHA began to streamline its regulations. This change has reduced the day-to-day complaints on the part of those regulated. Yet the fundamental statutory shortcomings remain. If anything, they are now more visible. As I noted earlier, the courts have struck down several important administrative efforts to reduce the burden of OSHA regulation because of statutory requirements.

The lesson to be learned is that the vagueness of the OSHA statute is now the problem which must be addressed. Clearly, the underlying statute needs to be made more explicit. The revision should embody three modifications:

- (1) Change the basic role of OSHA from that of a legal adversary, making inspections and insisting on compliance with complex detailed standards, to a safety leader. Such an organization should investigate new techniques in safety engineering, publish and disseminate information, and assist the safety departments of individual firms in solving their specific problems.
- (2) Make explicit what is "reasonable" and "feasible" by allowing decisions to be made on the basis of a comparison of the benefits to workers to the compliance costs. Such analyses should include the explicit costs of safety equipment, and the implicit but substantial costs of the paperwork burdens of technical compliance.

- (3) Shift the basic orientation of enforcement from punishing employers if workers do not comply to a shared system of incentives, encouraging cooperation and flexibility in responding to specific job-safety problems.

From the viewpoint of legislators, the courts, and OSHA itself, these changes will allow a much more effective pursuit of the ultimate goal: improving the safety and health conditions in which American men and women work.

I hope that the Mine Health and Safety Administration can benefit from the positive experiences of OSHA. For example, the 1977 Federal Mine Safety and Health Act requires mandatory enforcement inspections at all mines, regardless of their safety record. The 1977 act also severely restricts consultative nonenforcement visits at operating mines. The result is similar to OSHA's experience that inspectors are generally viewed as policemen rather than safety professionals who can provide constructive help.

Surely, mine safety would be enhanced and the loss of productivity reduced if MSHA would focus its enforcement efforts on serious hazards. Balancing enforcement with cooperative programs should aim not on enhancing statistics on inspections and sanctions, but on reducing and better yet preventing mine injuries and illnesses.

Conclusion

Just a few words of conclusion: The task of updating regulatory statutes is not easy. The types of changes that should be made depend on the nature of existing regulation, the specific regulatory mechanisms currently in use, and the shortcomings, if any, in the unregulated private economy. I do not advocate a simple or uniform response. Each regulatory law should be examined individually and carefully.

In the area of economic regulation -- notably energy and surface transportation -- greater reliance on competition and market forces is extremely desirable. For social regulation, we must recognize that the status quo in federal regulation is so often dominated by those types of interventions that generate more costs than benefits. Thus, regulatory reform -- by revising or eliminating regulations that generate more costs than benefits -- could result in cumulative advantages to taxpayers and consumers alike, and simultaneously help to restore America's productivity and competitiveness at home and abroad.