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Congressional Risk Proposals*

Dalton G. Paxman**

Introduction

In early 1993, many members of Congress were looking to an active environmental agenda, bolstered by a new administration with a decidedly pro-environmental stance. By the end of the Congressional Session, in October 1994, the weight of partisan politics and a densely packed schedule crushed optimistic and ambitious plans to reform federal environmental laws.¹ The only significant environment bill reaching the President creates a desert wilderness in California. Risk assessment proved to be a major, if not the largest, obstacle, and it contributed to a massive environmental train wreck at the end. Legislators nevertheless showed unprecedented interest.

The terms "risk assessment" or "risk analysis" appeared in over 30 bills and amendments, of which about a dozen bills applied specifically to environmental health risks.² I will discuss the most important and try to find some meaning in five themes that emerged in the debates. Since the 103d Congress is now relegated to history, I will avoid detailed discussion of particular legislation. Yet, there is a strong likelihood that the 104th Congress will reincarnate most, if not all, of these measures, especially since the majority and minority parties have switched places.

* Views expressed here are the author's, and do not necessarily reflect those of the Office of Technology Assessment or the U.S. Congress. The author thanks Mark Boroush, David Butler and Mike Gough for thoughtful comments, but any mistakes are his.

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¹ Congressional Environmental and Energy Study Conference, *Environment, Energy, and Natural Resources Status Report for the 103d Congress*, Oct. 13, 1994.

² See generally, Congressional Research Service, *Comparison of Environmental Risk Provisions in the 103d Congress (1994)* (reprinted in part, Linda Jo Schierow, *Comparison...*, 5 Risk 283 (1994). See also, L. J. Schierow, *Senator Johnston's Proposals for Regulatory Reform...*, 6 Risk 1 (1995).

Context of 103d Congress

Congressional interest in risk assessment represented a confluence of political and scientific factors. Congress, reflecting public sentiment, became more conservative and antigovernment. The Administration energized the opposition, and several key studies by nonpartisan, non-ideological, science policy organizations and a book by a U.S. Supreme Court nominee fomented interest in risk assessment.

All of the reports represented views of respected experts who provided recommendations and options for Congress. A Carnegie Commission released "Risk and the Environment,"³ the Office of Technology Assessment released "Researching Health Risks"⁴ and the National Research Council released "Issues in Risk Assessment"⁵ and "Science and Judgment in Risk Assessment."⁶ Also, Judge Breyer's Supreme Court nomination sparked interest in his book.⁷

Collectively, these works raised the visibility of risk assessment. Attention by the media and the scientific community after each release made risk an unavoidable issue. They increased the perception of the lay public that fundamental problems exist with how agencies do risk assessments. They also detailed for Congressional staff and others interested in risk reform the nature of concerns and recommended remedies. Thus, risk-based bills became very prescriptive, often taking language directly from various reports.

Besides directly enhancing Congressional interest, these reports also brought more scientists and alternative scientific perspectives into the legislative process. A common finding was the need for more research and the importance of research in improving risk assessment. Advisory panels for the reports were a ready source of experts for many hearings

³ Carnegie Commission on Science, Technology and Government, *Risk and the Environment* (1993).

⁴ *See generally*, U.S. Congress, Office of Technology Assessment, *Researching Health Risks* (1993).

⁵ *See* National Research Council, *Issues in Risk Assessment* (1993).

⁶ *See* National Research Council, *Science and Judgment in Risk Assessment* (in press).

⁷ Stephen Breyer, *Breaking the Vicious Cycle: Toward Effective Risk Regulation* (1993).

on Capitol Hill. The often well-attended and well-publicized hearings created a sense of importance that did not escape the attention of most members of Congress.

Another factor in the prominence of risk issues was the widespread antigovernment feeling and growing public disenchantment with Congress. Few would have predicted, at least in public, the consequence of the sentiment in the 1994 midterm elections. Yet, observers detected a movement seeking diminished government control.⁸ This conservatism manifested itself as an environmental backlash, where skeptical and sometimes antagonistic lawmakers aimed barbs at the environmental movement.⁹ Members of Congress questioned the need for the public and private spending on the environment. Some saw federal regulations as burdens on local jurisdictions. A prominent example concerned waterborne radon in Hastings, Nebraska, a town of 23,000, where a plant to remove radon would cost \$65M and be the single largest drain on the town's treasury.¹⁰

The environmental community described what emerged as an "unholy trinity," consisting of "takings" (used by some to describe the economic losses from governmental regulation), "unfunded mandates" (federal requirements for state and local expenditures) and risk assessment (encompassing cost-benefit analyses). Environmental organizations saw not only a triple threat, but also diminished clout limiting their effectiveness in negotiations.

Overarching particular issues was Congress' relationship with the Clinton Administration. Legislative battles often served as opportunities for partisan one-upmanship rather than debates on merits. Because some in Congress and the environmental community viewed increased calls for risk assessment as weakening environmental legislation, it became in many ways a partisan issue. Some used it to delay legislation and prevent the President from achieving legislative success.

In committee hearings, Administration officials argued that the type and extent of policy analysis, such as risk assessment, was an

⁸ Catalina Camia, *Legislators Draw in the Reins on Environmental Rules*, Cong. Q., April 30, 1994, at 1060-1063.

⁹ *Id.*

¹⁰ *Supra* note 4, at 162.

executive, not legislative prerogative.¹¹ Risk-based legislation, they argued, was unjustified¹² — particularly in view of an executive order requiring risk assessments for all major regulations and creation of a committee to explore comparative risk assessment.¹³

Agenda

Distinct philosophical differences framed legislative debates. For clarity, I classify these into three camps, each with its own agenda.

The most strident and ardent camp consisted of those wanting to roll-back legislation to ameliorate what they viewed as an excessive regulatory burden. This group contends that the benefits for some environmental regulations do not justify their costs. They believe that many environmental problems arise from “phantom” risks,¹⁴ unsubstantiated by science, or the Environmental Protection Agency’s (EPA’s) excessively conservative assessments that forces them to regulate minor risks. To ease regulatory burdens, this camp pushed for increased analysis of costs and benefits prior to regulations being adopted and for the use of “good science.”

A second camp tried to maintain the status quo. Many current laws forbid or limit consideration of costs in deciding whether to regulate or the level at which to do so. This camp viewed various risk proposals as an attempt to weaken and eventually eviscerate environmental laws. With the Administration, it also argued that risk assessment and cost-benefit analyses were already being required by executive order.

Members of the final group were somewhere between the first two. They sought reform by, e.g., proposing ways to improve EPA’s risk assessments, but they aimed to provide EPA with organizational processes and offices to facilitate interaction with the scientific community and to improve the use of science. They did not fear their efforts would “weaken” environmental protection.

¹¹ See generally, *Strengthening Risk Assessment within EPA: Hearing Before the Subcomm. on Technology, Environment, and Aviation, House Comm. on Science, Space and Technology*, 103d Cong., 2d Sess. (1994).

¹² *Supra*, Katin testimony.

¹³ E.O. 12866, 58 F.R. 51735, Sept. 30, 1993.

¹⁴ See, e.g., Huber, *supra* in this issue of Risk.

Risk Legislation

The 103d Congress' failure to pass any major environmental legislation was not for lack of trying. Again, twelve bills had language serving at least one of two broad objectives. Several required economic and risk analysis by codifying risk assessment into EPA's rulemaking process. Others altered the way EPA conducts risk assessments by setting forth and mandating a process for updating risk assessment guidelines with increased involvement of the scientific community. Both called for comparative risk assessment to foster the public understanding of the magnitudes of risk. I classify such proposals into the five categories shown in Table 1 and discussed below.

Table 1
Risk Proposals in the 103d Congress

Comprehensive Risk Bills

- HR 4306 Risk Assessment Improvement Act (Klein)
- HR 2910 Risk Communication Act (Moorhead)
- S. 110 Environmental Risk Reduction Act (Moynihan)
- S. () Sound Science in Risk Assessment Act (Lott)

Risk-Related Amendments to Environmental Bills

- Johnston Am't to S. 171 Department of Environmental Protection Act (Mica/Thurman with analogous bill in House)
- Johnston Am't to Clean Water Act Reauthorization (Mica/Thurman with analogous bill in House)
- Johnston Am't to Safe Drinking Water Act Reauthorization
- Zimmer Am't to HR 109 Department of Environmental Protection Act
- Zimmer Am't to HR 1994 Environmental Research, Development, and Demonstration Act
- Walker Am't to HR 3870 Environmental Technologies Act

Risk-Related Am't to Non-Environmental Bill

- Condit Am't to HR 3171 USDA Reorganization Act

Risk-Related Provisions in Environmental Legislation

- HR 3800 Superfund reform (HR 3800)
- HR 2448 Radon bill (Waxman)
- HR 872 and S. 331 Pesticide Food Safety Act (Waxman, Kennedy)
- HR 1672 Food Quality Protection Act (Lehman, Bliley, Rowland)
- HR 4916 Environmental Research and Development Demonstration Act

Risk-Related Provisions in Appropriations Bills

- PL 103-327 Depts. of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1995
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Comprehensive Risk Bills

Comprehensive risk legislation has risk assessment as its organizing principle. It centered on either the practice and conduct or the use and application of risk assessment by the EPA.

• Risk Assessment Improvement Act

Representatives Klein, Zimmer and 14 co-sponsors introduced H.R. 4306 in April 1994. It would have established a Risk Assessment Program within EPA to develop a process for independent peer review of risk assessments, developing and issuing risk assessment guidelines designed to incorporate state-of-the-art science, and providing the opportunity for public input. It would have required the White House Office of Science and Technology Policy (OSTP) to establish a Comparative Risk Assessment pilot program to test risk-ranking methodology and to develop interagency coordinating mechanisms for communicating state-of-the-art practices to states. OSTP was to evaluate risk assessment research and training needs and to prioritize research according to need and the largest uncertainties in risk assessment.

The original bill had the support of environmentalists, industry and the Administration.¹⁵ However, Rep. Walker added amendments that would have required the judicial review of contested risk assessments and that “objective” and “unbiased” science were to be used by EPA in its risk assessments. Walker’s stated objective was to indicate that the guidelines were to be considered “binding rules” and not general statements of policy; risk assessments, therefore, were to be “conducted, applied and practiced throughout the agency in accordance with the guidelines.”¹⁶ Courts could then look at contested risk assessments for departure from the guidelines.

Brown claimed the amendments destroyed the coalition supporting the bill and altered its intent,¹⁷ and EPA Administrator Browner withdrew support in July 1994.¹⁸

¹⁵ *Inside EPA*, Risk Policy Report, Oct. 14, at 17–20.

¹⁶ See generally, H.R. Rep. No. 857, 103d Cong., 2d Sess. (HR 4306, The Risk Assessment Improvement Act of 1994).

¹⁷ *Id.*

• *Risk Communication Act*

Introduced by Rep. Moorehead in February 1994, the RCA contained principles for risk assessment and characterization. It sought to ensure that risk assessments are as scientifically objective and inclusive of all relevant data as possible. It would have required EPA's risk assessments to distinguish scientific findings from other considerations; to consider and discuss all available data; to describe the selection of any significant assumption, inference or model, to explain the basis for the choice and to identify any policy or value judgments.

EPA also would have had to characterize populations or resources at risk and provide the best estimate and the range of uncertainty; provide meaningful comparisons to other risks; set out a process for reviewing assessments in view of new information; and ensure public participation in formulating risk assessment and characterization guidelines.

• *Risk Reduction Act*

Senator Moynihan introduced this bill to require EPA to set risk-based priorities. It would have established two committees within the EPA: one to rank risks to human health and the environment; another to determine the benefits of eliminating such risks. Its stated objective for forming these committees was to make science, not politics, the basis for selecting health and environmental priorities. The bill would have required the EPA to create risk assessment guidelines that would set minimum standards for different risk assessment approaches.

• *Sound Science in Risk Assessment Act*

Senator Lott would have required EPA to develop uniform general procedures governing risk assessments and incorporate relevant guidelines. His bill would have required assessments to be "consistent," of "high technical quality," "scientifically sound" and "unbiased." Moreover, EPA must "disclose all significant uncertainties regarding facts, scientific knowledge, the validity of analytical techniques, or numerical risk estimates" in terms "readily understandable" to the public. In a cover letter, the Senator urged his colleagues to support it because "(r)isk assessments must be accountable to the public and Congress; not just subject to the discretion of invisible bureaucrats."

18 *Id.*

Risk-Related Amendments to Environmental Bills

Amendments to several major pieces of environmental legislation engendered vigorous policy disagreements over whether environmental laws should contain mandates for EPA to balance costs and benefits of regulation as well as the requisite level of analysis. The heaviest debate centered on risk proposals by Senator Johnston and Representative Walker. While six separate bills contained amendments, in most cases they were slight variations of Johnston's original amendment.

• *Johnston amendments to
EPA elevation to cabinet-level status legislation*

To S. 171, Senator Johnston attached an amendment requiring each final rule to contain what became known as "Johnston-type" analysis. The amendments would have required regulations to contain an estimate of human or ecological health addressed by the rule and the rule's anticipated impact on the target risk; a comparative analysis of the risk addressed by the rule compared to other risks to which the public is exposed; and an estimate of the costs associated with implementation of and compliance with the rule.

Industry lauded Johnston's amendment,¹⁹ since it required EPA to estimate risk and conduct comparative risk and cost-benefit analyses for every regulation. EPA also would have to certify that a proposed regulation would significantly advance public protection. The original bill failed to leave committee, partly because of the risk language.

• *Johnston amendments to
Safe Drinking Water Act Reauthorization*

Amendments to SDWA reauthorization carried Johnston-type analyses but were only to apply to major regulations (exceeding \$100M), and would have required only that benefits justify, rather than exceed, cost (as required in the original). This bill came close to passing.

• *Johnston-type amendment to Clean Water Act*

A bipartisan group in committee drafted an alternative to the reauthorization of the CWA, but their version contained risk assessment provisions. For all CWA regulations, EPA would have been required to

¹⁹ *Supra* note 15.

perform risk assessments. A significant departure from the original Johnston amendment was a requirement that contested risk assessments undergo judicial review. The amendment kept this bill in committee.

• *Zimmer amendment to the EPA cabinet bill*

Representative Zimmer amended the EPA cabinet bill to create an Office of Environmental Risk (OER). It was to provide an organizational structure within EPA where the director would develop and implement a strategy for risk reduction. The amendment also created an Advisory Committee on Relative Risks to advise the director. Like the Moynihan bill (S. 110), EPA would set its priorities based on relative risk ranking.

• *Walker amendment to the Environmental Technologies Act*

The Environmental Technologies Act directs the OSTP to set federal environmental research and development priorities by using scientifically-objective information, data, and assessments of risk. The Walker amendment established guidelines on the necessary elements for a sound risk assessment and the methods for communicating those assessments. It added fifteen criteria for conducting risk assessments and language on risk comparisons and substitution risk, judicial review, and public notice and comment. The House approved the amendment, assuring that other environmental legislation, particularly the CWA reauthorization and Superfund reform, would not be reauthorized without comparable risk assessment provisions.²⁰

Risk-Related Amendment to Non-Environmental Bills

The Condit Amendment to USDA reorganization was the only major non-environmental bill containing risk language. It established an Office of Risk Assessment and Cost-Benefit Analysis (ORA&C-BA) to perform cost-benefit analysis and risk assessment on all major regulations coming out of USDA. President Clinton signed the bill.

Risk-Related Provisions in Environmental Legislation

While not focusing specifically on risk assessment, some environmental legislation contained risk-related provisions dealing with either specific health risks, such as radon, or a type of risk, such as hazards at Superfund sites.

²⁰ *Supra* note 1.

• *Superfund reform*

Provisions in this bill required that, for any hazard at a Superfund site, the EPA would include central estimates of risk, as well as upper and lower bound estimates.

• *Radon Awareness and Disclosure Act*

Representative Waxman introduced this bill calling for EPA's assessments of radon dangers to include estimates of population risk and the reasonable range of uncertainty about such estimates. It passed the House, but its companion (S. 657) stalled in the Senate.

• *Pesticide Food Safety and Food Quality Protection Acts*

Representative Waxman and Senator Kennedy introduced into their respective chambers the Pesticide Food Safety Act. Each established a single "bright line" standard of one cancer in a million for pesticide residues in raw and processed foods, if the pesticide is found to cause cancer in animals or humans.

Representatives Lehman, Bliley and Rowland introduced competing legislation. In contrast, the Food Quality Protection Act would have established a single negligible risk standard for pesticide residues in both raw and processed foods. In setting a standard, EPA would have had to consider the validity, completeness, and reliability of available studies; the nature of toxic effects; the dietary exposure; and the effects on major subgroups of consumers. Dietary risk levels must consider the percentage of food actually treated, and actual residue levels. Obviously, this would have required EPA to consider more information to offset health considerations before setting a standard.

Either bill would have overturned the Delaney Clause that governs pesticide tolerances: It bars the EPA from granting tolerances for pesticide residues found to induce cancer in animals that concentrates in processed foods.²¹ This prohibition made the Clause an important symbol of environmental protection and food safety to environmental and other public interest groups but also a symbol of excessive zeal to agricultural and chemical industries.²² Either bright line or negligible

²¹ National Research Council, *Regulating Pesticides in Food: The Delaney Paradox* (1987).

risk standards would allow EPA to consider other information, even if an animal assay of a pesticide demonstrated carcinogenicity.

- *Environmental Research and Development Demonstration Act*

ERDDA required that EPA identify personnel needs for research, its Science Advisory Board (SAB) review EPA research activities and that EPA submit Congressional reports to identify, prioritize and describe major research areas that would reduce risk assessment uncertainties. The bill also established a separately-identified risk assessment research program and sought to improve methods for assessing economic impacts.

Risk-Related Provisions in Appropriations Bills

Among the most significant, but least noted, proposals appeared in Conference Reports concerning EPA appropriations.²³

- *Conference report on EPA appropriations*

Both Senate and House reports contained language that sought to improve the quality of supported research. The conferees agreed on the importance of “credible” science and the need for EPA to improve peer-review. They required EPA to work with the National Science Foundation (NSF), the National Research Council, and the Carnegie Commission in the merit review process. The Senate report required that half of EPA’s extramural research be subject to the NSF peer-review process. It also required EPA to report to Congress on research to be conducted, addressing not only its nature but also how it would affect EPA’s priorities. The Act was signed in September 1994.

Risk Themes

Other than the Condit Amendment to the USDA Reorganization Act and the appropriations measures, no bill, amendment, or provision containing risk language reached the President. In fact, many claim that opposition to risk proposals largely contributed to failure of the 103d Congress to pass environmental legislation.²⁴

²² Christopher J. Bosso, *Pesticides and Politics* (1987).

²³ See generally, S. Rep. No. 311, 103d Cong., 2d Sess. (Appropriations for Veterans Affairs and Housing and Urban Development, and Independent Agencies).

²⁴ *Supra* notes 1 and 15.

Several analysts have assessed the major issues legislators were trying to address. For the House Committee on Science, Space, and Technology, Schierow provided a side-by-side comparison of provisions related to environmental risk analysis.²⁵ Agency and Congressional sources also analyzed risk bills.²⁶ From these sources and the legislation, I discerned five major themes that kept reappearing, including good science, cost-benefit analysis, transparency and accountability, risk comparisons, and administrative prominence.

These themes seem to be based on several common perceptions relating to whether environmental laws are primarily protect human and environmental health or as create unwarranted economic burdens. Most recent proposals seem to be driven by the second view.

Perceptions That Drive Many Proposals

One perception is that the agency uses conservative assumptions biased towards stringent regulation. Moreover, EPA scientists and risk assessors are seen as “invisible bureaucrats,” out of touch with the scientific community. Those who believe this feel that, if they open up the process, risk assessments would not withstand peer review and we would be rid of excessively costly regulations of marginal benefit. Compared to other risks in public life, the thesis goes, environmental risks are not great, and if the public understood this, they would not support regulation. Finally, some see EPA’s lawyers as controlling decision making, minimizing and even ignoring scientists’ input.

Good Science

Thus, a key theme appearing throughout recent proposals is that “good science” needs to be used. In this context, “good,” means the latest risk-assessment methodologies and knowledge of the effects of specific chemicals. Even more, “good science” implies replacing policy-based default assumptions with actual health data. Finally, it requires using all available data, not selectively excluding data that does not support regulation. The stated goals of the RCA and the RAIA were to mandate the use of “good” science in risk assessments.

²⁵ *Supra* note 2.

²⁶ *Supra* notes 1 and 15.

Bills focused on several aspects of risk assessment to promote good science. Common proposals included mandates for peer-reviewed risk assessment guidelines that EPA would periodically update. The RAIAs required regular development and publication of EPA risk assessment guidelines; similarly, the USDA Reorganization Act requires the USDA to develop a strategy for consistent risk/benefit analysis using state of the art scientific methods. Superfund reform bills required a national risk protocol with guidelines for assessments related to Superfund sites.

The RAIAs required EPA to provide independent peer-review of its risk assessment guidelines and mechanisms for the Director of the Risk Assessment Program, established in the bill, to consult with assessment experts. Similarly, the amendment to the EPA elevation bill required it to publish and use peer-reviewed guidelines. The RAIAs also required EPA to review all of their risk characterizations annually to determine compliance with guidelines and report to Congress. Also, several bills required EPA to develop a process for reviewing prior assessments.

Repeatedly, language required EPA to provide Congress with reports on research and training needs. The RAIAs required the director of a Risk Assessment Program it created to evaluate and report them. Similarly, ERDDAs required EPA to identify research personnel needs, and its SAB to review research activities. Both the RAIAs and ERDDAs required EPA to submit Congressional reports that identify, prioritize, and describe major research areas to reduce risk assessment uncertainties. The ETA required specific procedures to develop research priorities for environmental technologies.

To achieve state-of-the-art science, several provisions facilitated peer review and communication with the scientific community. This is probably best demonstrated in the Appropriations conference reports.²⁷ Conferees required EPA to subject extramural research to a peer-review system guided by the NSF and other science organizations.

Cost-Benefit Analysis

A major feature of most risk proposals is that EPA characterize and quantify regulated risks as well as the benefits and costs of regulation. Yet, two major differences appeared. The original Johnston amendments required cost-benefit analysis of all rules, while the

²⁷ See generally, H.R. Rep. No. 715, 103d Cong., 2d Sess. (Appropriations for Veterans Affairs and Housing and Urban Development, and Independent Agencies).

SDWA proposals required EPA to only assess the benefits of rules having a likely effect exceeding \$100M. Another is that in the original, the benefits must “exceed” costs, while the SDWA required the rules to only “justify” costs.

Requiring such an analysis in any environmental bill engendered particularly sharp debate. Rep. Waxman claimed that the original Johnston amendment would contradict several environmental statutes, such as the SDWA, that explicitly forbid cost-benefit analysis.²⁸ This proved especially troublesome since his subcommittee had jurisdiction over many major environmental statutes.

Other provisions mandated EPA to characterize and quantify regulated risks, including estimates of existing risks and their “significance.” By comparing those to estimated risks under proposed exposure levels, the agency could calculate benefits in terms of “lives saved” or “health effects averted.” The RRA creates a Committee within EPA to determine such benefits for each rule. Some bills also required agencies to characterize and quantify costs, e.g., the USDA and SDWA reorganization.

A clear objective of some legislation, e.g., the EPA elevation and SDWA reauthorization bills, was that EPA identify reasonable opportunities to achieve significant risk reduction, i.e., to reduce the greatest risks and avoid regulating “minimal” ones.

There also appeared a willingness to promote research into developing new methods for estimating costs and benefits. ERDDA contained language to establish a separately identified risk assessment research program and to improve methods to assess economic impacts. SDWA reauthorization required EPA to establish methods for determining costs and benefits of environmental regulations.

Transparency and Accountability

Because some perceive risk assessments as excessively conservative, certain provisions called for EPA’s processes to incorporate “more public input” and be “more open.” Critics derided the agency for its use of conservative default assumptions, which, they argue, accumulate and exaggerate the actual risk to health and the environment.²⁹ For

²⁸ *Supra* notes 1 and 15.

each risk assessment, EPA must identify and describe the use of any assumption. Since default options often involve *policy*, not *science*, choices, language also calls for distinguishing science from policy.

Most risk provisions required EPA to develop and publish risk assessment guidelines, designed to make risk assessments “transparent” to the public. The RAI A required EPA to disclose the degree of conservatism, as determined by the default assumptions used in assessment. Further, the agency had to explain its choice of assumptions, inferences and models and provide a representative list of alternatives. Similarly, the Superfund reform bill calls for EPA to develop a national risk protocol that makes the models used and the selection criteria for the models transparent. The language indicated that its authors wanted these guidelines to be “binding.”³⁰

The RAI A required EPA to release a public notice of its intent to publish and to report to Congress on the status of risk assessment guidelines. SDWA required EPA to report to Congress on risk management decisions that present an inherent and unavoidable choice between competing risks.

Certain provisions also would mandate that contested risk assessments undergo judicial review. By requiring compliance with guidelines, those provisions were intended to increase agency accountability.³¹ In contrast, EPA Administrator Browner claimed that this provision would make guidelines and risk assessments “unreasonably vulnerable to judicial challenges.”³²

Risk Comparison

Relating or comparing disparate risks became a major theme in the 103d Congress. The objective was to use risk assessments to compare one risk, or set of risks, against another to set regulatory priorities and to put risk estimates in a magnitude context — as well as to promote research.

²⁹ *Supra* notes 5, 6 and 7.

³⁰ *Supra* note 16.

³¹ *Supra* note 16.

³² *Id.*

For several years, analysts have considered setting EPA's regulatory priorities based on relative risks. Relative to other risks that most individuals confront, some analysts believe that many regulated environmental risks are small.³³ They have elaborate mechanisms for comparing fatalities from one activity or substance to those for another. EPA's SAB released two reports that examined risk-based decision making within the agency.³⁴ More recently, EPA commissioned a conference on the topic and published its proceedings.³⁵ Congress also looked into EPA priority-setting. The RRA established two committees within EPA to rank risks to human health and environment. The Zimmer amendment to the EPA elevation bill created a committee on relative risk to advise EPA on its strategic direction. The SDWA reauthorization required EPA to identify and rank sources of pollution with respect to the relative degree of risk of adverse effects on human health, the environment, and public welfare.

Others argue that risk comparisons furnish a poor foundation for risk communication, decision making or priority setting — claiming that quantifiable consequences alone are only one of the legitimate lenses through which to view threats, safety, and the environment. They also argue that those involved in risk ranking must not only consider risk magnitude but also other dimensions, e.g., fear of risk.³⁶

Nevertheless, relative risk appears in the Walker and Johnston amendments, and the Risk Communication Act, all mandating comparisons of EPA-regulated risks with those familiar to ordinary citizens and ostensibly putting them into a meaningful perspective.

In furtherance of these objectives, the EPA appropriations bill for example, requires EPA to report to Congress on research it will conduct on comparative risk assessment.

³³ See, e.g., Breyer, *supra* note 7.

³⁴ See generally, U.S. Environmental Protection Agency, Science Advisory Board, *Unfinished Business: A Comparative Assessment of Environmental Problems* (1987) and *Reducing Risk: Setting Priorities and Strategies for Environmental Protection* (1990).

³⁵ Adam M. Finkel & Dominic Golding, *Worst Things First? The Debate over Risk-Based National Environmental Priorities* (1994).

³⁶ *Id.*

Administrative Prominence

To minimize the role of value judgments and foster science-based decision making, several bills elevate those conducting risk assessments to prominent positions. The RAI A established a Risk Assessment Program at EPA, and the Zimmer amendment to the elevation bill established the OER and an advisory committee on relative risk. Similarly, the USDA Reorganization Act established the ORA&C-BA.

Not only were these offices to conduct risk assessments, but also to make expertise accessible to administrators. The language of the RAI A required the program director to advise the EPA administrator; and the Zimmer amendment required the director of the OER to advise EPA offices. Similarly, the director of ORA&C-BA will advise USDA offices and agencies about risk-related issues.

Some provisions even elevated risk assessment to the Executive Office of the President (EOP). An RAI A provision promoted interagency coordination by requiring OSTP to survey risk assessment practices and advise the President and Congress. The survey would examine and continuously monitor methods and uses of risk assessment within agencies.

Expectations for the 104th Congress

The last Congress set the stage for risk legislation. Even without changes in membership, risk figured to be the issue on which the success of most, if not all, environmental legislation would depend. Republican control should, however, enhance political momentum and accelerate the introduction of risk proposals. Democratic leadership brought risk proposals up for committee debate, fearing they would weaken environmental legislation with analytic requirements and opportunities for time-consuming legal challenges. However, a Republican-controlled Congress, with fewer reasons, if any, for reluctance, faces few obstacles that prevented bills from being brought to floor votes in the 103d Congress.

“Risk assessment” and “comparative risk” became political buzzwords. Congressman Brown complained that most legislators and staff did not fully understand the science or the implications of

pending legislation.³⁷ Certainly, some risk language was highly prescriptive and very technical. This and the level of Congressional interest provides a window of opportunity for professional societies and trade organizations that might see value in mobilizing their members to help educate the current Congress.

By controlling committee agendas, chairs will likely facilitate debate on risk analysis. A sign of their desire appears in a seldom discussed codicil of the Republican "Contract with America," used during the midterm election and the transition to the 104th Congress. It describes bills that would, if that party prevailed, be introduced within the first 100 days of the session. Under the "Job Creation and Wage Enhancement Act," risk assessment and cost-benefit analysis are part of a bill to "create jobs and raise worker wages." Given this time pressure, one should expect Congress to introduce some of the proposals discussed here, either unchanged or as parts of new legislation. Also, the attention devoted to such issues in the last Congress ensures they will be central in future environmental debates.

³⁷ *Supra* note 16.

