

STATEMENT OF THE HONORABLE FEDERICO PEÑA
SECRETARY OF TRANSPORTATION
before the
SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
concerning
REGULATORY REFORM PROPOSALS
March 22, 1995

Mr. Chairman and Members of the Committee:

Good morning. I am pleased to join today's panel and appear before your Committee to discuss the proposals pending in the Senate to reform the regulatory process. The Administration made regulatory reform one of its highest priorities as soon as President Clinton took office, and the Department's regulatory process has already benefited -- delays are down, there is more emphasis on the concerns of small business, and we are starting to shrink the regulatory burden. We are proposing and issuing "smarter" regulations today than three years ago.

I am also pleased to head an agency that has a long tradition of doing our regulatory work the right way. The Department was one of the first agencies to use cost-benefit analysis as a tool to making good regulatory decisions, and the Department's analyses -- for example, those of the National Highway Traffic Safety Administration -- are widely regarded as among the best in the Federal Government. The Department was the first Federal agency to use regulatory negotiation, a means for involving business and consumers directly in

partnerships to create good regulations. The Department established an Agenda of upcoming regulatory actions as a means of informing the public about our activities before a Regulatory Agenda became a government-wide practice. We are also in the process of establishing a consolidated, electronic docket for all of our regulatory actions to ease public access to this important information.

We are committed to maintaining common sense in rules, and we believe it is important to repeal regulations that are not cost-effective. For example, I announced last week before the "Trucking Summit" my intention to seek the repeal of a current statutory mandate to require "preemployment" alcohol testing of applicants for safety-sensitive positions in the transportation industry. This testing is expensive and we don't believe it's justified. We are therefore proposing an end to this testing. We also responded quickly to amend our regulations when we learned that treating "salad oil" and other edible oils like petroleum products exposed the edible oil industry to unforeseen consequences and increased costs. We also believe in using non-regulatory approaches when appropriate, such as our proposal last year to use consumer information under the New Car Assessment Program to inform consumers of the rollover performance of new passenger cars and light trucks. As part of the President's regulatory reform initiative, we expect to identify other rules that should be repealed or amended.

At the Department of Transportation, however, we can never forget that safety is our highest priority. When safety problems occur, Congress and the American people look to DOT for solutions. In 1991, there was a terrible subway crash in New York City that killed 5 people and injured 171 others. It was determined that the train operator was under the influence of alcohol. Congress

subsequently provided the Federal Transit Administration with safety authority to mandate alcohol and controlled substance testing, and those regulations are in place today. They cost real money, and the testing is intrusive, but those are undoubtedly valuable regulations. Neither subway passengers nor crews should be endangered by illegal drug or alcohol consumption.

In September 1993, a towboat struck a railroad bridge in Alabama and dislodged it from its foundations. Shortly afterward, an Amtrak high-speed train ran off that bridge and 47 passengers and crew members were killed. The operator of the towboat misinterpreted available radar data, leading to the collision with the bridge. The Coast Guard has now issued regulations to mandate radar training. These will prove to be valuable regulations.

In this committee's 1991 ISTEA legislation, Congress mandated rulemaking on "anti-lock brake systems" (ABS) for heavy-duty air-braked trucks and buses. These systems are in use in Europe. This is a complex, technical subject, and a thorough rulemaking process was called for and was completed by our able staff. The final rule was published just recently in the Federal Register and the rule will be phased in over a two-year period, beginning March 1, 1997.

I have long been concerned about the differing levels of safety requirements between ~~small~~ commuter airplanes and the more stringent rules for the largest commercial carriers. Separately, the National Transportation Safety Board has advocated an end to these distinctions. We want to move quickly to have one level of safety for these planes, and we hope to make some concrete proposals in the very near term. These regulatory changes will have their costs, but I believe it is unambiguous that the costs will be worth it.

Right now, the Department is an enthusiastic participant in President Clinton's Regulatory Reform Initiative. We are reviewing our regulations with the aim of eliminating those that are obsolete or don't make sense. We are improving on existing guidance to make sure that our front-line compliance personnel get rewarded for results, not red tape. We are working with those compliance personnel and the industries we regulate create to partnerships in the field that focus on compliance with the safety and other objectives Congress has set for us. We have held productive safety summits for the aviation, rail, pipeline, and motor carrier industries. And we are continuing to pursue the strategy of negotiated rulemaking in a variety of areas.

We take very seriously the critical jobs that Congress and the American people expect us to perform – protecting the safety of the traveling public and assisting states and localities in creating their essential transportation infrastructure with due consideration for environmental impacts. An efficient, effective, and fair regulatory process is an essential, irreplaceable tool if we are to do these jobs right.

Given our long-standing commitment to doing regulations the right way, and given the priority that we place on safety, I have to ask one basic question when I review legislative proposals for regulatory reform – would regulatory reform legislation improve the situation, and provide more common sense in the regulatory process, so that we can do a better job?

Unfortunately, the assumption underlying many of the current regulatory reform proposals seems to be that virtually all government action is bad, and that

government action taken through regulation is particularly bad. Some would place so many procedural and legal obstacles and delays in the paths of agencies that they can rarely bring a significant regulatory project to a successful conclusion.

In evaluating the three bills you have asked me to review today -- H.R. 9, S. 343, and S. 291 -- I find that, while some provisions are not harmful to the regulatory process, others would impair significantly the ability of the Department of Transportation to maintain the level of safety the American people assume everyday. The bills are very long and detailed; I will be able to discuss only some of the major topics the bills address.

Cost-Benefit Analysis

All three bills require cost-benefit analyses or regulatory impact analyses (RIAs) for "major" regulations. The Department of Transportation has a strong, long-standing policy of performing RIAs on such regulations, which is consistent with the Clinton Administration's Executive Order on regulations and earlier orders in the Bush, Reagan, and Carter Administrations. Indeed, I want to stress that the Department does an economic evaluation for all its rules, not just those that are "major." To be required to do a more detailed RIA solely on the basis of a lower dollar threshold is a waste of tax dollars. The Department believes that the appropriate threshold for requiring an RIA is \$100 million in annual economic impact, as provided in the Executive Orders for all four Administrations. In this respect, the Department supports the threshold in S. 291 and opposes the \$50 million threshold proposed by H.R. 9 and S. 343. There is no adequate justification for requiring the massive paperwork and delay associated with

producing the kinds of RIAs required by these bills for regulations having only half the economic impact that four consecutive Administrations, Republican and Democratic, believed was an appropriate trigger for analysis.

All three bills require a preliminary RIA at the NPRM stage and a final RIA at the final rule stage for major rules. H.R. 9 adds the requirement of a notice of intent to engage in rulemaking, to be published 90 days before the NPRM, including a portion of the contents of the preliminary RIA. But we already address this issue by publishing our Semiannual Regulatory Agenda, which gives notice of upcoming rulemaking actions. The NPRM will give interested parties a full opportunity to respond to the proposal and the substance of the agency's RIA. Therefore, H.R. 9's notice of intent has no apparent purpose except delay for delay's sake.

H.R. 9 also builds in extra delays by requiring a public hearing or 30-day extension of the comment period on an NPRM or notice of intent if 100 persons, acting individually, request a hearing or extension. These requirements can be counterproductive. Public hearings are generally helpful and useful, but in some cases produce little additional substantive information. Agencies concerned about having to extend a comment period may respond by having a shorter initial comment period. Besides, it is not always self-evident what it means to have 100 ~~persons~~ "acting individually" (e.g., a petition, a letter-writing campaign sponsored by one organization?). These "one size fits all" mandates do not necessarily lead to better rules; they do add procedural hurdles that create delays and litigation possibilities having nothing to do with the substance of a rule.

The thrust of any RIA requirement is a cost-benefit determination. We support cost-benefit analysis; we've been looking at the costs and benefits of alternatives to rules, as an essential part of our job, for many years. But some requirements of the bills for RIAs are not sensible. For example, H.R. 9 would create procedural delay by requiring that RIAs be sent to OMB for up to two months before publication, even if OMB can review and approve the RIA in substantially less time.

The absolute prohibition in S. 343 against issuing rules that are not cost-beneficial will cause problems. H.R. 9 has a similar provision. This Department, when it has the discretion, does not issue rules in which the costs exceed all the reasonably anticipated benefits. But the Department does not always have discretion. If a statute tells the Department to "Require X," and "X" is not cost-beneficial, then the Department is nonetheless statutorily compelled to impose the requirement. This would put the Department in the untenable position of violating either a statutory mandate or S. 343's prohibition on non-cost-beneficial rules. For example, the Oil Pollution Act of 1990 mandated a rule requiring double-hulled tank vessels, even though the costs exceeded the benefits by more than 2:1. The language of S. 291 on this point, which allows the agency to issue a rule without an RIA determination that it is cost-beneficial when the statute requires action, is preferable. We want to work with Congress to ensure that legislation requires only reasonable, cost-effective regulations.

S. 343 goes beyond the other bills by allowing people to petition the agency for a new cost-benefit analysis of a major rule, even if a cost-benefit analysis has already been performed for that rule. That is, if the Department issued a major safety rule in 1986 or 1990, and did an RIA that found the rule to be cost-

beneficial, anyone could petition the Department to do another such analysis today. A denial of such a petition is subject to judicial review. Having to consider such petitions, and do new RIAs on existing rules, would divert scarce agency resources. This provision is an invitation to special interests to harass agencies with repeated petitions and lawsuits, preventing them from dealing with today's very real problems. As I mentioned earlier, we periodically review all of our existing regulations, including whether they continue to be cost-beneficial, and, if warranted, we take appropriate action to remove or revise them.

Risk Assessment

All three bills impose new requirements concerning risk assessment. These provisions pose a somewhat different problem for the Department of Transportation than they may for the Environmental Protection Agency (EPA) or other agencies whose concerns are largely health-related. Very simply, the bills don't fit DOT's circumstances. Attempting to fit the square peg of DOT safety rules into the round hole of the bills' risk assessment provisions can only delay and distort DOT rules.

These provisions would have a wide impact on DOT, affecting our safety and environmental protection rules that have a \$100 million (S. 291), \$50 million (S. 343), or \$25 million (H.R. 9) impact. The following are the major DOT safety programs to which these provisions would apply:

- The aviation safety program of the Federal Aviation Administration.
- The maritime safety programs of the Coast Guard.

- The motor carrier safety program of the Federal Highway Administration.
- The pipeline safety program and hazardous materials safety program of the Research and Special Programs Administration.
- The motor vehicle safety standards program of the National Highway Traffic Safety Administration.
- The railroad safety program of the Federal Railroad Administration.

In addition, some DOT administrations issue environmental regulations. These regulations typically either implement statutory directions (e.g., Coast Guard rules implementing the Oil Pollution Act of 1990) or attempt to balance the interests of parties having an interest in the environmental effects of transportation (e.g., FAA rules concerning airport noise mitigation).

Risk assessment and risk characterization, as defined in S. 291 and S. 343, have little to do with the Department's safety rulemaking process. Unlike EPA or health agencies, DOT safety rules seldom are based on a quantification of the risks of toxicity or exposure for exposed individuals, populations, or resources. DOT agencies learn, through experience and data collection about real world transportation safety problems (including analysis of accidents), how a particular practice, piece of equipment, design, or human factor may affect the safe operation of aircraft or ships or trains or trucks. Then the agency takes regulatory steps to increase safety through modification of practices, training of personnel, improvements in technology, etc. We can then continue to evaluate accident data to determine if our rules are having their intended effect and modify them if appropriate. Much of what we already do to define safety problems is a very real form of risk assessment, but it makes no sense to require the FAA or the Coast Guard to go through an EPA-like risk assessment

procedure, using techniques and terminology that are not meaningful in an aviation or maritime safety context. Adding procedural steps makes it less likely that agencies can take the proactive steps necessary to address perceived safety concerns before accidents happen.

To force DOT safety rulemakings into an ill-fitting template designed for other types of rulemaking would slow down important safety rules, defer or decrease benefits, and lead to the waste of resources on empty exercises that attempt to cast DOT consideration of safety improvements into the bills' risk assessment framework. Additional resources would clearly be required. It is not likely that Congress would provide extra funds for these tasks. The bills' risk assessment requirements, then, would constitute a kind of unfunded mandate upon the Department's budget. The resources needed to comply with this mandate would have to be diverted from the task of actually improving transportation safety.

The Department does, of course, estimate the likelihood of certain occurrences (e.g., aircraft accidents) in the context of doing the cost-benefit analysis of its rules. In this sense, the Department has always performed risk assessments. We have found risk assessment useful in looking at new situations, such as the appropriate standards for Amtrak's new high-speed rail vehicles. But to impose on DOT rulemakings the lengthy, detailed, and burdensome procedural requirements of the risk assessment provisions of these bills fails the test I mentioned earlier today: it does not produce a better, more efficient, more effective, fairer process. It merely establishes a set of procedural obstacles having little relationship to the substance of the rules involved.

S. 343 adds a provision allowing persons to petition for a new risk assessment review of existing rules. It is objectionable for the same reasons as the parallel provision concerning cost-benefit analyses. H.R. 9 adds a provision prohibiting the issuance of a major rule unless the agency certifies that risk reduction strategies justify costs and that the risk assessment is based on objective and unbiased scientific and economic evaluations of all significant and relevant information provided by interested parties. Judicial review provisions attaching to both these provisions add to the ways in which litigation concerning procedural hurdles can tie the Department's efforts to improve transportation in totally unnecessary knots.

Peer Review

S. 343 and H.R. 9 both require peer review panels to review health, safety, and environmental regulations, with a \$50 million and \$100 million threshold, respectively. Both proposals are objectionable because they would add substantial delay to rulemaking, all the more so since (under H.R. 9) they apply to cost assessments as well as risk assessments. An agency which determines who appropriate peer reviewers may be, convenes a panel, complies with the procedural requirements of the Federal Advisory Committee Act (as S. 343 specifies), allows the panel to review the rule and provide comments, and then reviews and responds to the panel's comments, will add several months to a year to the rulemaking time frame. Moreover, I do not expect peer reviewers to volunteer their services. DOT agencies do not have money in their budgets to pay for expert panels, so this requirement would constitute another unfunded mandate on the agencies, diverting resources from the real business of improving transportation safety.

These proposals are also objectionable because they specifically allow interested parties to sit on peer review panels. We regularly solicit input from and form partnerships with interested parties. We negotiate with them as part of regulatory negotiations. But to place a representative of a regulated transportation company on a supposedly "independent" peer review panel, when that company has submitted comments and its own "advocacy numbers" to the docket, makes the regulatory process substantially less fair.

Regulatory Flexibility

Both S. 343 and H.R. 9 would amend the Regulatory Flexibility Act (RFA) to add requirements for review of regulations by the Small Business Administration (SBA). Thirty days before publication of a notice of proposed rulemaking (NPRM), an agency would have to send the text of the proposed rule and the initial regulatory flexibility analysis to the SBA Chief Counsel for Advocacy for review, who has 15 days to respond. If SBA responds, the agency must address the response in the NPRM. This requirement will lengthen the regulatory process unnecessarily and provide additional procedural steps which parties could litigate.

Review of Existing Regulations

S. 291 requires a long-term review of major rules, spread over ten years. The Department of Transportation is no stranger to regulatory reviews. It has regularly conducted such reviews, and during the Bush Administration it completed a review of all of its regulations during one 90-day period. We are

now embarked on a regulatory review in the Clinton Administration that will produce significant results by June 1. That successive Presidents, of both parties, have ordered their Administrations to review existing rules suggests to me that regulatory review is a matter that can appropriately be left to the Executive Branch. The job gets done. A statutory requirement layered on top of past, present, and future Executive Branch reviews is superfluous.

Judicial and Congressional Review

It is very appropriate for agencies to be subject to judicial review over the substance of their rules. Did the agency faithfully execute the statutory mandate on which the rule was based? Did the agency make a reasonable decision given the facts in the rulemaking record? These are the kinds of questions the courts have properly answered since the inception of the Administrative Procedure Act (APA).

It is not consistent with the aim of an efficient, effective, and fair regulatory process to allow for more litigation over the procedural steps Congress has added to the rulemaking process. A regulation that is consistent with the law authorizing it and soundly based on the rulemaking record should not be subject to challenge based on alleged nonconformity with procedural requirements of the kind ~~that~~ proliferate in these bills.

I have already mentioned a number of specific ways in which the three bills invite litigation concerning new procedural steps in rulemaking. The least objectionable general judicial review provisions among the three bills are found in S. 291. This bill makes RIAs (including risk assessments) reviewable in the

context of normal APA review of rules. H.R. 9 makes compliance with all its provisions explicitly reviewable, with specific directions to the courts to consider agency action unlawful if it fails to comply with the bill's risk assessment provisions.

S. 343 goes further. In addition to a number of specific judicial review provisions for procedural steps, S. 343 would erase judicial construction of the APA by abolishing court deference to an agency's construction of the statutes underlying its rules. Courts are directed to uphold agency statutory interpretations if the agency interpretation is one "clearly intended by Congress." This is a very high standard for an agency to meet, and it would seem, in the absence of crystal-clear legislative draftsmanship, to place greater importance on legislative history and invite successive cycles of post-legislative history. This is not a healthy development for the field of administrative law, let alone for the ability of agencies to implement often-ambiguous statutes. Congress should emphasize clear drafting so that it is unnecessary to delve into "intent."

~~This bill would also allow a court to uphold an agency interpretation only if it found that the agency had chosen from among a range of permissible interpretations and had chosen the interpretation that maximizes net benefits to society. This plays mischief with the law. Even if the plaintiffs, the agency, and the court agreed that, as a matter of law, the agency's interpretation was the best construction of a statute, the court is still instructed to find the interpretation erroneous if another interpretation could arguably result in slightly higher net benefits.~~

I find it ironic that, in the same session that finds Congress debating ways of limiting "lawsuit abuse" and trying to stem what some view as a "litigation explosion," these bills, particularly S. 343, would encourage lawsuit abuse interfering, in a most irresponsible way, with the most important responsibilities Congress itself has given to the Department of Transportation and other Federal agencies.

Finally, added to all the other procedural delays, S. 343 proposes a modified legislative veto provision. When important DOT safety rules are concerned, there is no justification for delays, which simply defer the benefits of the Department's rules. And where DOT safety rules are concerned, deferred benefits mean that needless deaths, injuries, and property damage will occur.

Conclusion

I have stressed that an efficient, effective, and fair regulatory process is an essential, irreplaceable tool if we are to do our vital safety and other tasks well. The test we should apply to reform proposals is whether they improve, and provide for common sense in, the regulatory process, so that we can do our job better for our customers — the American public. Having reviewed these bills, I must conclude that they fail this test. I oppose, and the Administration opposes, the enactment of bills that have the serious adverse effects on my and other agencies' abilities to perform the vital tasks that Congress itself has given us.

Thank you. This completes my statement, and I would be pleased to respond to questions the Committee may have.

