Testimony

Testimony of

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before the

Senate Governmental Affairs Committee

June 3, 1998

Thank you for inviting the Natural Resources Defense Council (NRDC) to testify today on S. 389, the Mandates Information Act. NRDC is a membership organization, founded in 1970, dedicated to protection of human health and the environment. NRDC now has over 350,000 members from across the country.

We urge members of the Committee to oppose S. 389. We do so because, rather than offering a balanced approach, this bill would skew decision-making based on unreliable estimates of costs at the expense of the public's health and the environment. If this bill is about providing information to improve decision-making as its sponsors have indicated, changes should be made to ensure that Members of Congress have the complete picture. If it is important to have special procedures to expose hidden mandates on the private sector, it is equally important to apply these special procedures to hidden attacks on public health, safety and environmental protections. Representative Waxman offered an amendment in the House, the Defense of the Environment amendment, to do just that. NRDC urges the Committee to adopt this amendment to give S. 389 a more balanced approach.

I will discuss this amendment in more detail, as well as identify NRDC's specific concerns with the underlying bill, but first let us take a look at what we are talking about when we talk about private sector mandates. We are talking about requiring companies that generate hazardous waste to pay the cost of disposing of it. We are talking about requiring companies that discard their waste in the nation's lakes and streams to reduce the toxic and cancer-causing chemicals they release. We are talking about requiring companies to provide the public information about toxics emitted into their communities. We are talking about requiring meat packers to ensure that the meat they sell is safe to eat and not contaminated with deadly bacteria. These are just a few examples of fundamental public health and safety protections that impose costs on the private sector, but which produce tremendous benefits that the public rightly expects as well.

S. 389 is about curtailing such private sector mandates. The bill's text focuses on complicated procedures like points of order, but its real effect will be to strip away fundamental protections that the American public depends on their government to deliver.

I. S. 389's New Procedural Hurdles Would Block Important Health and Safety Protections.

S. 389 would expand to the private sector procedural mechanisms enacted as part of the Unfunded Mandates Reform Act of 1995 (UMRA) that focused on public sector mandates. The proposed legislation would establish a point of order against considering bills that impose costs exceeding $100 million on the private sector. Under S. 389, a point of order can even be raised against a bill for which the Congressional Budget Office (CBO) has determined that a cost determination is not feasible. At the same time, S. 389 would expand what is required in the CBO analysis to make such analysis practically impossible to complete. Thus, the opportunity exists for any member of the House of Representatives or the Senate to block important new health and safety protections.

Contrary to what some argue, the ability to raise a point of order is a significant impediment to new legislation. If it were not, there would be little interest now in extending the point of order to private sector mandates. The 1995 Unfunded Mandates Act already requires the collection of information about the costs of private sector mandates; what it does not include is a mechanism to block such proposals.

While a simple majority can defeat a point of order, in reality points of order are rarely appealed to the full House or Senate. The 1995 law explicitly provided for a vote on a point of order raised against an unfunded mandate in the House, but no such provision was added for the Senate. Even when a vote occurs, this procedure creates an opportunity for Members of Congress to kill important health and safety protections without directly voting against them. Furthermore, debate on the point of order is limited to ten minutes per side in the House. This means that an opponent of new legislation to improve inspections at meat packing plants, for example, could raise a point of order against the bill and defeat the bill with little discussion of the issue.

Even members of the majority party have criticized the point of order provisions in the bill. At the October hearing on H.R. 1010, the original House companion to S. 389, former Representative Bob Walker (R-PA) testified that "the point of order would put [this bill] into a procedural nightmare" and could cause "legislative gridlock."

Furthermore, the applicability of S. 389 is sweeping. While on its face, S. 389 only appears to affect new legislation, it could have significant impact on existing health and environmental protections. Many environmental laws require Congressional reauthorization to assure their continued effectiveness. Such reauthorization would be subject to S. 389's requirements. S. 389 itself contains no exemptions from its requirements, although presumably the exclusions in the original unfunded mandates law would apply to this bill's expansion of UMRA's requirements. While UMRA contains important exclusions for statutory rights that prohibit discrimination, no exclusion exists for health and environmental protections even though poll after poll demonstrates that such protections are one of the government functions most valued by Americans.

In attempting to minimize the impact of the proposed new point of order, proponents of the bill cite the limited number of times that points of order have been raised under the original Unfunded

Mandates Act. In his testimony before the Senate Budget Committee in February, Representative Condit reported that a point of order against mandates on local governments was only raised five times in two years. Such limited examples, however, do not prove the limited impact of the point of order. Instead, they simply reflect the absence of new proposals to address pressing environmental problems. Unfortunately, the past several years have revealed a greater interest in Congress to roll back health and environmental protections than to strengthen them. In other words, it is not that a point of order lacks the power to stop a proposal from moving forward, but rather there has been nothing to stop.

II. **S. 389 Would Inappropriately Elevate Inflated Cost Estimates Above the Public's Health and Safety.**

NRDC is not against making the government work better and improving the delivery of services to the public. But that is not what this bill is about.

A. Mandates Frequently Redistribute Costs Where They Belong Rather than Create New Costs.

S. 389 is based on a faulty premise—that industry is being asked to bear unfair and inappropriate costs to deliver safe and healthy living and working environments to Americans. Federal environmental laws have not created new costs, but simply helped to distribute them where they belong. Cleaning up pollution, protecting health, and making workplaces safer has shifted costs from the people who suffered such harms to the enterprises that inflicted them.

Economic theory has long recognized that polluting industries bear only a small fraction of the cost of the damages that they inflict on common resources such as the air we breathe and the water we drink. As Garrett Hardin demonstrated in his now classic essay, "The Tragedy of the Commons," free use of common resources leads to their destruction. G. Hardin, "Tragedy of the Commons," Science v. 162 (1968), pp. 1243-48. We normally expect people to pay for the resources and commodities they use. They are led thereby to use only the amounts that will yield them marginal benefits that are worth the price. When we are not required to pay for venting fumes into the atmosphere, pouring pollutants into lakes and rivers, or dumping toxic wastes in the ground, we disregard the costs of these activities to society. We clutter the environment with our wastes even though the benefits we enjoy are far less than the cost we impose on others.

This is precisely the problem that many so-called mandates are designed to correct. It is not just a matter of equity—ensuring that those that inflict damage are the ones who pay for it. It is also a question of efficiency. For the market to allocate scarce resources efficiently, the price of a product must reflect its true costs—including not only the raw materials, labor, capital investment, but also the damage done to the environment and our public health.

S. 389 focuses on only one side of the equation. It requires a calculation of costs to regulated entities without any consideration of benefits. A bill could have benefits that greatly outweigh its costs, but still be held up or stopped by the new congressional procedures. The cost analysis required by S. 389 would provide a distorted picture of reality and a poor basis upon which to make legislative decisions. Cost analysis of a bill to reduce the use of cancer-causing pesticides would show a burden on

agri-businesses, but not the benefits to farm workers and consumers from improved health and lower medical bills.

In many circumstances, short-term costs often result in tremendous long-term savings. Yet, such reality would not be reflected in S. 389's analysis.

B. The Information Required by S. 389 is Unreliable.

Furthermore, the data required by S. 389 is inherently unreliable. Industry has consistently exaggerated the costs of complying with environmental laws. At the beginning of the Clean Air Act debate in 1970, for example, Lee Iacocca, then Vice President of the Ford Motor Company, proclaimed that the Act "could prevent continued production of automobiles . . . [and] is a threat to the entire American economy and to every person in America." Statement by L.A. Iacocca, Executive Vice President, Ford Motor Company, Sept. 9, 1970. Yet, autos are still produced and auto companies continue to profit. Ford Motor Company more than doubled its profits for the first quarter of 1997 compared with a year earlier. "Ford's Earnings Double As Company Slashes Costs," Wall Street Journal, April 17, 1997. Later utility companies complained that the Clean Air Act's acid rain controls would cost $1,500 per ton. "Acid Rain Pollution Credits Are Not Enticing Utilities," New York Times, June 5, 1995. In reality, they cost about $100 per ton. "Heavy Breathing," National Journal, January 4, 1997.

The fact is that new technologies are developed in response to pollution control requirements that dramatically reduce compliance costs. These new technologies in turn generate new profits and jobs for American companies. Such benefits are completely ignored by the analysis that would be required by S. 389. Numerous studies show that markets for environmental technology and services, both domestic and worldwide, are large and rapidly growing. Estimates of U.S. environmental industry market size range from $65 billion to $170 billion. Hoerner, Miller, Muller, Promoting Growth and Job Creation Through Emerging Environmental Technologies (National Commission for Employment Policy: Washington, DC), April 1995, at 8 n. 15. According to Commerce Department statistics, the U.S. environmental products industry is responsible for over 1.2 million U.S. jobs. U.S. Department of Commerce, Environmental Industry of the United States, September 1997. Moreover, the U.S. environmental products industry is generating a trade surplus of over $1 billion. Office of Technology Assessment, Industry, Technology, and the Environment (November 1993), p. 12.

Again, I want to emphasize this point. S. 389 would lead to worse rather than better legislative decisions. The analysis required by S. 389 would provide only a small and distorted piece of the total picture. Tremendous resources would be devoted to generating reports of limited value. CBO itself has said: "More detail is not necessarily better. Analysis of the effects of legislation by state, locality, or other categories often adds significantly to the preparation time, making it more difficult to meet the normal timetable for Congressional action. Without consuming enormous resources, such detail is unlikely to be very accurate, and it may result in so much data that users would find it overwhelming and undigestible." Statement by Robert D. Reischauer, Director, Congressional Budget Office, testifying before the Senate Committee on Governmental Affairs (April 28, 1994) at 21.

C. The Information Required by S. 389 is Impractical.

Not only is the analysis required of CBO unreliable, it is impractical. One of the issues debated during consideration of the Unfunded Mandates Reform Act of 1995 was how to define costs. Congress made the explicit choice to limit the cost analysis to direct costs—those costs incurred by the regulated entities to comply with the mandate. See 2 U.S.C. �658b(c)(1). Even these direct costs are difficult to calculate accurately. For example, many cost studies do not take into account the cost of activities that would be undertaken even if a federal mandate did not exist. See Senate Committee on Environment and Public Works, Analysis of the Unfunded Mandates Surveys Conducted by the U.S. Conference of Mayors and the National Association of Counties at 16 (1994). In addition, legislation rarely specifies exactly what is required for compliance. Instead, Congress appropriately delegates implementation to the agencies with the expertise to set exact emission limits or identify what is technically possible. Given these circumstances, it is impossible to make realistic cost estimates. How, for example, can CBO calculate the prospective costs of technology-based standards that will take the Environmental Protection Agency years to finalize?

Now, S. 389 would expand the analysis of costs to include certain indirect costs. This raises all kinds of problems. S. 389 would require CBO to provide analysis of, among other things, the effect of private sector mandates on "consumer prices and on the actual supply of goods and services in consumer markets," and the "profitability of businesses with 100 or fewer employees." Section 101(a)(B). CBO itself has said that such indirect effects are difficult to calculate. In its recent report, An Assessment of the Unfunded Mandates Reform Act in 1997, CBO stated that the extensive body of scholarly work that is necessary to estimate indirect effects is typically not available for private sector mandates. The report states, "CBO knows of no economics literature on the indirect costs of encryption, the air passenger ticket tax, or similar, more narrowly focused, mandates." Congressional Budget Office, An Assessment of the Unfunded Mandates Reform Act in 1997 (February 1998). The Office of Management and Budget (OMB) has also recognized the inherent difficulties in calculating indirect costs accurately. In its September 1997 Report to Congress on the Costs and Benefits of Federal Regulations, OMB limited its analysis to direct cost and benefit estimates because "there is no consensus about or transparent estimate of the indirect costs."

S. 389's emphasis on costs and the requirement to include indirect costs could lead to absurd results. Would CBO, for example, score as costs lost income to cancer specialists from limitations on teen-age smoking even though health care costs are reduced and lives are saved?

So, while S. 389 would make the required cost analysis practically impossible to complete, the bill at the same time creates a new point of order against legislation when CBO has determined that no way exists to estimate the cost. Clearly this provision is more about blocking important legislation than it is about providing information to Congress. If the point of order is an enforcement mechanism to ensure that the required cost analysis is done, why should a point of order be allowed when despite CBO's best efforts the cost analysis cannot feasibly be done?

III. If S. 389 Moves Forward, Changes Are Essential to Ensure a Balanced Approach.

As written, S. 389 provides incomplete and unreliable information upon which to make decisions. If

the Committee moves forward with this legislation, it is essential that it is amended to represent a balanced approach. Recent experience indicates clearly that hidden new mandates are far less a problem than stealth efforts to weaken health, safety and environmental protections. That is why when the companion bill, H.R. 3534, was considered on the House floor a few weeks ago, Representative Waxman offered his Defense of the Environment Amendment. The amendment was supported by the Clinton Administration, as well as by environmental, labor and other public interest groups. While it was narrowly defeated in the House, NRDC hopes the Senate will recognize the importance of such an amendment to enhancing the quality of Congressional decision making and insist such changes be made to the Mandates Information Act.

The Waxman amendment would have expanded the bill's approach to create a point of order against provisions that remove, weaken, or prohibit the use of funds to implement mandates established to protect human health, safety, or the environment. With increasing frequency, efforts have been made to attach controversial, anti-environmental riders to unrelated, widely supported legislation. Just before recess, anti-environmental forces in Congress hijacked the transportation spending bill and inserted riders that undermine a critical air program to protect air quality in National Parks and promote the use of motorized vehicles in remote areas of Minnesota's Boundary Waters Canoe Area. And just three weeks earlier, three other environmental assaults affecting the nation's parks, forests and mineral resources were added to the emergency spending bill and became law.

Too often Members of Congress are forced to accept controversial anti-environmental provisions attached, often at the last minute, to must-pass spending bills and other unrelated, widely supported legislation. The two riders added to the transportation bill, for example, were never considered as part of either the House or Senate version, but simply added to the bill literally in the dark of night at the conference committee. These attacks on clean air and our national parks will become law despite lacking the necessary support to move forward on their own. This is an unconscionable subversion of the democratic process. As Representative Vento said during the House debate of the mandates bill, promoting such riders "is bad process, and it translates into bad policy." A Waxman-type amendment would help ensure that these hidden provisions undermining health, safety and environmental protections are subject to an open debate and a separate vote.

NRDC urges you to amend S. 389 to expand its point of order procedures to cover both hidden anti-environmental riders as well as hidden mandates. Such an amendment would help stop the current assault on the environment, as well as the assault on the legislative process.

IV. Conclusion

The changes now being considered as part of S. 389 were rejected in 1995 as too extreme and should be rejected again now. While information regarding private sector mandates was required to be collected under the 1995 Act, the enforcement mechanisms designed to make it more difficult to enact legislation containing public sector mandates were not applied to private sector mandates. Congress made the deliberate choice in 1995 not to allow a point of order to be raised against bills containing private sector mandates. As Senator Dorgan acknowledged in his floor statement in support of the bill, "if CBO cannot reasonably make an estimate of a private sector mandate, the bill would create no

point of order." Cong. Rec. (March 15, 1995) at S3920.

Whatever merit may support limiting federal interference with state and local autonomy, these arguments simply do not apply to the private sector. In fact, most state and local governments do not support efforts to limit private sector mandates. If the private sector is not paying to clean up its waste, cities and counties are stuck with the contaminated land and increased health costs.

NRDC does not support the expansion of the Unfunded Mandates Reform Act of 1995 to private sector mandates. Again, it is important to remember that what we are talking about when we talk about federal mandates is important health and safety protections that the American public wants and deserves.

In conclusion, NRDC urges members of the Committee to oppose S. 389. We believe a point of order against private sector mandates is unnecessary and would undermine critical health and safety protections. One need only look at campaign contributions and lobby disclosure forms to discover that industry needs no special assistance in getting their case heard. If you do move forward with the bill, changes should be made to ensure a balanced approach. We urge you to adopt the Defense of the Environment amendment. Whatever special procedures are applied to hidden mandates should also be applied to hidden attacks on health, safety and environmental protections.

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