Letters

We welcome letters from readers, particularly commentaries that reflect upon or take issue with material we have published. The writer's name, affiliation, address, and telephone number should be included. Because of space limitations, letters are subject to abridgment.

Burn Superfund

TO THE EDITOR:

I am writing in response to Jerry Taylor's article "Salting the Earth: The Case for Repealing Superfund" (*Regulation*, 1995 Number 2). Taylor is absolutely correct in calling for the repeal of Superfund. Congress unquestionably botched the design of the program by, among other things, failing to require that only real and significant waste problems be addressed and basing cleanup financing on the constitutionally questionable imposition of retroactive liability. However, even more unforgivable is the EPA's repeated refusal to limit the scope of the program to cleanups that are necessary as determined through credible science.

In my recent book, *Science-Based Risk Assessment: A Piece of the Superfund Puzzle*, I conservatively estimate that the EPA exaggerates Superfund-site risk assessments by at least a factor of 100. If that risk exaggeration is factored into Superfund-site risk assessments, more than 70 percent of the sites on the National Priorities List (NPL) would not require cleanup as we know it, in other words, burning dirt and pumping and treating groundwater for 30 years.

Although the EPA could, if it wanted to, make Superfund a workable program, it has instead chosen to intimidate Congress to the point where the only debate on Capitol Hill is how to pay for the cleanup of the 1,300 NPL sites, versus whether all of the sites are in need of cleanup. As long as the size of the current Superfund program is not on the table, true reform of Superfund will likely be unachievable. Instead of the EPA continuing to burn dirt, Congress should burn Superfund.

Steven J. Milloy
President
Regulatory Impact Analysis Project Inc.
Washington, D.C.

What Do We Want from Superfund?

TO THE EDITOR:

The fate of the Superfund program has never been more uncertain than it is today. Jerry Taylor suggests that we abandon the Superfund program as we know it, turning it completely over to the states. The new state-run program he recommends would be of limited duration, as it would only continue for as long as current trust-fund money is available. When the money runs out, he suggests, the program should be disbanded.

Taylor is not alone in arguing that the benefits of the Superfund program are not worth the costs. He asserts, as do many other critics of the program, that most of the sites on the National Priorities List should not in fact be cleaned up—an assertion that ignores repeated public opinion polls suggesting that the American public wants those sites cleaned up. Does that mean we should clean up sites at any cost? Certainly not. In fact, most Superfund policy mavens would agree that costs should be taken into account in selecting a cleanup remedy. However, before we decide we are spending too much money, we need to agree on what we are trying to achieve with site cleanups.

As Milt Russell of the University of Tennessee has framed it, the choice we face is whether we want a program that is "risk based," that is, one that addresses risks posed by contamination, which can often be accomplished by removing people from the site and surrounding areas, or whether we want a cleanup policy that is "contamination based," that requires that sources of contamination be remedied to protect the environment and future uses of the land. It is also worth noting that what we mean by a risk-based approach gets far more complicated when risks to the environment are included, as they should be.

The question of "how clean is clean" is, at heart, a philosophical—rather than a scientific—issue. Repeated public opinion polls clearly show that the American public wants contaminated sites cleaned up. Thus, a radical change to a risk-based strategy may well result in a backlash five years hence. A more constructive approach would be to adopt a cleanup policy that acknowledges that there are cases where likely future land use or harm to ecological systems requires extensive cleanups, although that will not be the case at all sites. A change in policy that requires "containment remedies" at all sites may not, in fact, be palatable to the American public.

Finally, those seeking a radical rollback of cleanup standards often rely on unsound arguments (although they sound persuasive) for why Superfund dollars are not well spent. We should engage in a constructive debate regarding the benefits—broadly speaking—of the Superfund program and whether they are worth the associated costs. For example, one really cannot compare the dollars spent on Superfund cleanups to dollars spent on breast-cancer screening and assert that the latter is more cost-effective than the former. First of all, the two programs have fundamentally different objectives. The goal of Superfund cleanups is not only to prevent cancer deaths, but also to address noncancer health effects and, in some cases, to address contamination that threatens possible future water supplies and ecosystems. Second of all, it is not legitimate, even when looking at cancer cases or deaths avoided, to compare the

cost of actual cleanups to the cost of a screening program. A screening program per se does not save lives, it provides patients and their doctors with needed information that may—when coupled with appropriate medical intervention (in this case, chemotherapy, radiation, or surgery)—save lives. Thus, if one were going to compare the two programs on the sole basis of cancer cases avoided, the proper comparison would either be between the hazard ranking system and a breast-cancer screening program, or between the full Superfund program and the full costs of breast-cancer screening programs and the follow-up medical intervention.

In sum, whether we need Superfund or not depends in large part on what we are trying to accomplish. Could the Superfund law and program be improved? Absolutely. Tough policy issues—such as determining what we are trying to achieve with site cleanups and who should foot the bill for those cleanups—need to be addressed forthrightly by Congress and by those lobbying to revise the law. The American public deserves a frank discussion about these issues. It is Congress's responsibility to make this happen.

Kate Probst
Senior Fellow
Resources for the Future
Washington, D.C.

Lessons from Europe

TO THE EDITOR:

Jerry Taylor has written a provocative and often persuasive attack on Superfund. Progress in cleanups has been slow, transaction costs are too high (though probably not as great a proportion as Taylor suggests), and remedies have not been "clean" enough or "cost-effective" enough to please critics. Taylor's solution includes eliminating most of the program, beginning with the draconian liability system, and making dealing with hazardous waste primarily a state responsibility.

What would happen if we moved to such a system? While we know a lot about Superfund's mistakes, many of which are detailed in Taylor's article, we know relatively little about the alternatives. Taylor suggests that things are so bad that even full repeal would be an improvement. Is it likely that people will accept doing nothing as an improvement? The public is likely to be concerned with hazardous waste, and it is that concern—rather than risk assessments or cost-benefit analyses—that has given Superfund political vitality in both Republican and Democratic administrations. And whatever we think about Superfund, inactive hazardous waste sites do pose some problems. So we are left with a need to assess the adequacy of alternative systems for dealing with inactive hazardous waste. How effective would a less coercive system be? How much can the states be expected to do?

While nobody can predict with certainty what would happen, there are applicable lessons to be gleaned from European experiences with such systems. Tom Church and I recently completed a comparison of the American Superfund program with programs in the Netherlands, Denmark, and Germany. None of those countries has as strong a liability doctrine as that found in the United States, and so all must fall back on a combination of more voluntary programs and taxpayer financing of cleanups. A more limited liability doctrine means that there are many more "orphan sites," since such sites are by definition those for which a liable party cannot be found. And public funds for cleaning up such sites are so limited that the process will extend far into the next century.

There are, in addition, problems with private cleanups. These occur when and where government has sufficient leverage (when pollution threatens to spread from captive industrial sites or where improvements in land quality are necessary for anticipated uses), and not necessarily where problems are greatest. In many instances, containment, rather than remediation, is the norm.

How much can we expect states to do? In the German federal system, the states have the primary responsibility for dealing with hazardous waste. Only a few of the German states have any programs in place at all, those programs are all plagued by shortages of personnel and remediation funds and hampered by cumbersome legal doctrines that make it easier to make landowners, rather than polluters, pay. American state administrative and financial capacity is not likely to be any greater, and without a strong liability system, the states will have trouble compelling private action. European systems, compared with the American program, are even slower, they clean up fewer sites, and the cleanups that do occur are to low standards. On the plus side, the transaction costs are certainly lower. Pending changes indicate that the European systems are moving in our direction, and we would be wise to move in theirs without necessarily going all the way.

Robert T. Nakamura
Professor of Political Science
State University of New York
Albany, N.Y.

Ozone and Libertarian Principles

TO THE EDITOR:

The piece by Edward Hudgins, "Regulatory Rollback: Twelve Targets," (*Regulation*, 1995 Number 2) makes a pitch for allowing states and localities to determine "what standards are appropriate for their region." I would agree that the degree of control technology required in Los Angeles should not automatically be required in all other parts of the United States that do not meet the ozone standard. On the other hand, in certain regions the ozone levels are the result of transported pollutants from other states and localities. Allowing individual localities to set their own ozone standards would ignore the regional aspects of how smog is formed. Because air pollution does not respect community boundaries, ozone standards do not lend themselves to libertarian principles. It was for this reason that the Clean Air Act established the Ozone Transport Region.

Barry Garelick
Manager, Environmental Programs
Solar Turbines Inc.
San Diego, Calif.

In Defense of the ADA

TO THE EDITOR:

I am writing in response to an article in *Regulation*, 1995 Number 2, "Handicapping Freedom," by Edward L. Hudgins of the Cato Institute. The article recommends weakening or perhaps repealing the Americans with Disabilities Act (ADA). I disagree with practically everything in the article. I am an attorney and a writer on disability issues who uses a wheelchair as a result of polio incurred 49 years ago.

The basic problem I have with the article is that it provides a conclusion in search of a rationale. That is, it makes certain knee-jerk judgments but fails to support the result asserted to be correct.

According to Hudgins, the ADA "devalues property by restricting use without paying the owners any compensation." This is not a legitimate objection, it is a philosophy. The libertarian point of view would prevent many, if not most, fire, safety, and environmental laws. But governments, be they federal, state, or local, have traditionally imposed certain requirements on businesses. The cost of those requirements belongs to the business as part of the cost of doing business. For example, a municipality might require fire extinguishers in a restaurant, but the restaurant is expected to pay for them.

In the case of the ADA, the cost of providing access has been exaggerated. In many cases, there is no cost or very little cost. Further, unlike fire extinguishers, which we hope never to have to use, a person in a wheelchair patronizing an accessible restaurant will increase the owner's income—a fact conveniently overlooked by Hudgins. In addition, access requirements are usable on a daily basis, unlike the fire extinguisher, which usually sits in a corner gathering dust.

The libertarian philosophy claims that the interests of minorities can be safeguarded by promoting and preserving property rights. For example, it is claimed that insurance companies will require fire and safety features to reduce potential liabilities. If an industry pollutes the air or water, a private property owner will sue for a cleanup, without benefit of the law. Fat chance. The history of fire, safety, and environmental issues shows that if the government does not require it, it will not be done. We are not yet ready for the benevolent society (which may possibly exist on some other planet) wherein every reasonable action will be done privately and voluntarily.

An ironic twist to this philosophy is the case, mentioned in the article, of people with asthma suing McDonalds' and Burger King to prohibit all smoking, even though those restaurants had nonsmoking sections. It is doubtful that the plaintiffs are disabled within the meaning of the ADA, and it is doubtful that the ADA would provide relief. It is far more likely that the plaintiffs would have a cause of action based on common law tort. If so, private tort action would be more efficacious than action under the ADA, but I cannot imagine Hudgins complaining about "undue costs" if the plaintiff were to prevail on a tort theory. In other words, limiting lawsuits to private property or personal injury suits could be far more costly to businesses than government-imposed regulations, yet the libertarian philosophy appears to be that private citizens can preserve rights more efficiently with less cost than through government regulation.

Also on the subject of cost, reliable estimates place the cost of mere maintenance of welfare payments to disabled people at the staggering amount of more than $200 billion annually. That is the cost of merely supporting disabled people in institutions or homes. One of the avowed purposes of the ADA is to reduce that staggering amount by enabling disabled people to acquire skills, get jobs, and become productive taxpayers. That is why conservatives supported the ADA. To accomplish those goals, it is obvious that improvements need to be made in all essential areas of life: education, transportation, employment, housing, and telecommunications. What good does it do to provide a job for a disabled person if he cannot get to the job site? While the ADA does impose some costs, it also provides a benefit in terms of reduced welfare payments, another fact conveniently overlooked by Hudgins.

Horror stories about the costs of compliance with the ADA abound, but the stories too often prove to be incorrect. For example, I was told that restaurants will be put out of business because the ADA requires menus to be in Braille. Not true. Braille menus (which actually do not cost very much), are only one option; the ADA allows waiters to read to blind patrons. A recent article in the *Washingtonian* (August 1995) stated that the cost of a wheelchair lift on a bus is up to $100,000, and that the tiny town of Glen Echo will have to double its tax rate because the ADA requires the construction of a costly elevator in its two-floor town hall. Both stories are untrue. A D.C. Metro spokesman told me that the cost of a wheelchair lift on a bus is about $15,000, a far cry from $100,000. An official of the town of Glen Echo told me that they will not double the tax rate; they decided to put in an elevator because it was the right thing to do, not because the ADA requires it.

On this last point, there is a glaring omission in the article. Nowhere does the writer mention the "undue hardship" exception in the ADA. That exception means that a business need do nothing if the improvement in question would impose an undue financial burden. Obviously, Marriott and McDonalds' have the resources to put in ramps and parking spaces that other businesses may lack. The undue hardship exception also applies under Title II, relating to state and local government. The tiny town of Glen Echo would benefit from the exception.

A recent study on the cost of compliance with the ADA shows that of the 436 reasonable accommodations provided by Sears between 1978 and 1992, 69 percent cost nothing, 28 percent cost less than $1,000, and only 3 percent cost more than $1,000. A recent Harris Survey of business executives indicated that the vast majority felt that the ADA was working well.

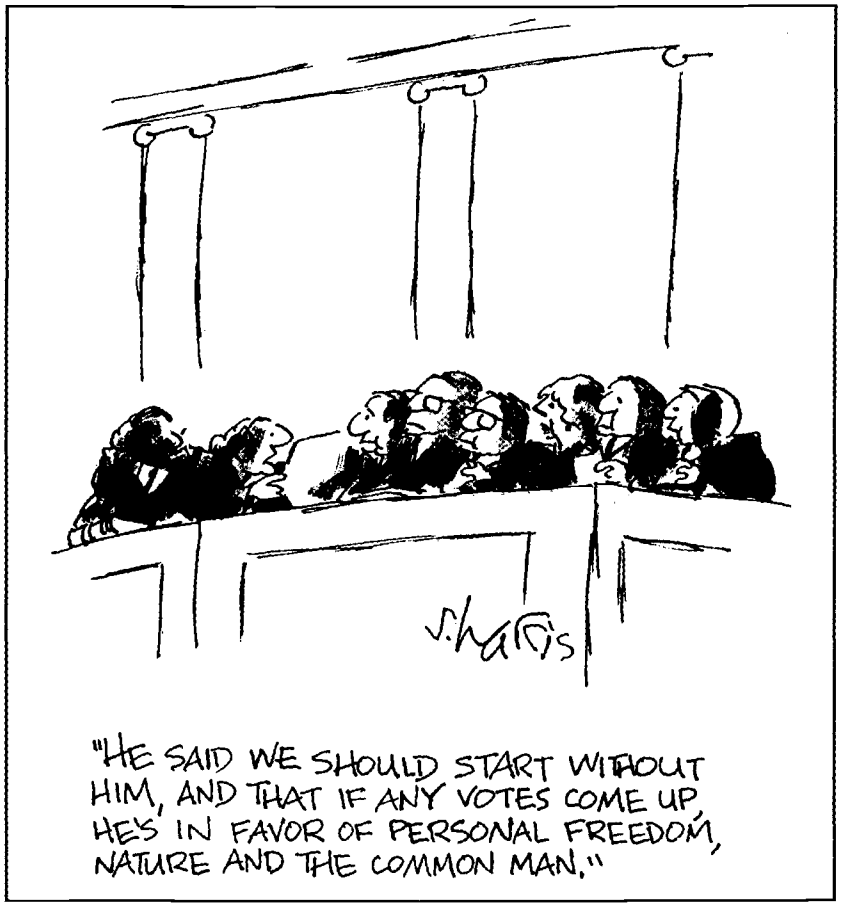
The author complains about a flood of lawsuits under the ADA without providing any documentation. A document from the Justice Department, "Myths and Facts About the Americans with Disabilities Act," states that in the five years since the ADA was enacted, only about 650 lawsuits have

been filed. This is tiny, considering that there are six million public and private employers and 80,000 units of government that must comply.

As a lawyer, I know that litigants often do not have the funds to pay lawyers. Title II does not provide for any compensatory or punitive damages; if the plaintiff is successful, the court can order a ramp installed. That is a small reward for the plaintiff or his attorney. Attorneys' fees can be awarded if, and only if, the plaintiff wins, but many attorneys will not take a potentially lengthy case if the fee is contingent. Public-interest law firms that help disabled litigants are notoriously understaffed.

The author complains about undesirable people being protected by the ADA. This is not so. Congress was very sensitive to this issue and, after lengthy debates, protected substance abusers only if they were in an approved rehab program and were not a danger. The ADA does not protect criminals or criminal behavior. It specifically excludes from coverage behavioral disorders such as "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism . . . compulsive gambling, kleptomania, or pyromania." The definition of disability is reasonable and is working well. We must have confidence in the court system to arrive at reasonable results. Just because a person files a complaint does not necessarily mean that he will win. There are many people who are truly disabled but often receive society's scorn. Obese people and people with various mental disorders can be called the "last minority." Not all of these people are disabled under the ADA but some are. It may be difficult to draw lines, but that is what the courts are for. If there are defects in the ADA, constructive and positive solutions are needed, not knee-jerk negativity.

The author complains about handicapped parking spaces not being used. Many commercial parking lots set aside one or two spaces for handicapped drivers. This handicapped driver believes that there are not enough handicapped parking spaces, not too many. Further, many insensitive able-bodied people will park in a handicapped space. If a handicapped driver does not appear one day, is that a waste? Does the author really advocate first come, first served? Such an idea is impractical and in effect deprives the handicapped driver of access to parking. Contrast the designated seats on the subway for the elderly and disabled. If, on a given run, such a seat is empty, an able-bodied person could take the seat and give it up at the next stop if a disabled person boards. But such flexibility does not exist with respect to parking places.



Does the ADA inconvenience business? Well, disabled people are inconvenienced quite often. Forget the cost of wheelchairs, prosthetics, home care, adapted vehicles—costs that may or may not be covered by insurance. Just getting out of the house requires advance detective work worthy of the CIA. Some bus lines and all rental car companies require pre-arranging by the disabled person for an accessible bus or hand-controlled car. Such restrictions on access do not apply to the nondisabled traveller.

The ADA is not affirmative action. Contrary to the author's assertions, the disabled plaintiff has the burden of proving his case. Employers may show hostility to disabled people as a result of the ADA, but the employer who will not employ a disabled person because of fear of a lawsuit could also be faced with a lawsuit if he fails to hire the disabled person.

About the only point on which I agree with the author is that so far, the ADA has not resulted in an increase in employment for disabled people. More than two out of three disabled people are totally out of work. This is truly a national disgrace about which all citizens should be concerned. But it is a reason to strengthen the ADA, not weaken or repeal it.

In my opinion, except for the dismal employment picture, the ADA is working well. It has been of tremendous benefit to disabled people. It is the Magna Carta, Emancipation Proclamation, and Bill of Rights for all disabled people. We are also Americans and,

yes, we too have a contract with America.

Richard Treanor
Washington, D.C.

Principles plus Policy

HUDGINS replies:

Richard Treanor's letter indeed illustrates the difference between two approaches to regulation. Treanor states that my concern for private property rights "is not a legitimate objection, it is a philosophy." In fact, it is a legitimate objection *because* it is a philosophy. Both Treanor and myself base our arguments on assumptions. I state mine openly. It is that individuals should be allowed to live their lives as they see fit, as long as they do not initiate the use of force against others. The purpose of government is to protect their rights to life, liberty, and property. By contrast, Treanor apparently believes that government is a sword that the majority of the moment should be allowed to freely wield, initiating force as those in power see fit. I would argue that my philosophy defines a peaceful, civilized society.

Treanor dismisses the notion that public health and safety can be protected by private means such as property rights, contracts, standards set by insurance companies, or tort remedies—as opposed to a government command-and-control approach. But in fact the private sector does protect safety in many ways. Consumer electronics products are certified by Underwriters' Laboratories. Most of the reasonable safety precautions in manufacturing facilities in fact would still be required by insurance companies if the Occupational Safety and Health Administration disappeared tomorrow.

Returning again to the ADA, Treanor points out that the act contains language mandating "reasonable accommodation" and an exemption from requirements that cause "undue hardship" to an enterprise. The problem is that since federal bureaucrats determine what is "reasonable," in practice the ADA is anything but that.

Illustrative of the problem is an example from an ABC News special by reporter John Stossel entitled, "The Blame Game: Are We a Country of Victims?" Stossel focuses on four employees (I would call them scam artists) working in an Ithaca, New York social services building who claim "multiple chemical sensitivity." They claim to be allergic to everything, a disability they say they contracted at work. The city changed the building's ventilation but that was not enough. The employees claimed that they were allergic to carbonless copy paper. The city agreed to photocopy every piece of paper they had to handle and to air out the building for 24 hours. The city built a room for them with specially filtered air. Still unsatisfied, the employees have sued the county for $800 million, while they spend their days at home collecting disability payments. If anything, the city of Ithaca was being too "reasonable." Multiply this example and you have a real picture of how the ADA works in practice.

Treanor quotes a public relations piece from the Justice Department claiming that there have only been 450 lawsuits under the ADA. I suspect that that figure takes no account of legal bills for lawsuits threatened by extortionists inside and outside government, empowered by the ADA. Nor does the figure refute my point that legal bills mount as enterprises prepare defenses against the 45,000 complaints filed at the EEOC.

Costs of compliance with the ADA do vary from business to business, agency to agency, and issue to issue. But as I say in my piece, businesses and local governments have to make real tradeoffs and sacrifices to satisfy the ADA.

Treanor ends on a philosophical note—despite his criticism of philosophical approaches—comparing the ADA to the Magna Carta and the Bill of Rights. It is just this sort of confusion—comparing government mandates and restrictions under the ADA with the right to live one's life free from the initiation of force by others, and substituting government force for moral suasion and true compassion—that has created the bloated, intrusive, and arbitrary government that many of us are trying to change.

Edward L. Hudgins