Diane More current ('final?) Version of Shelley "I"'s revisions ACIR

ENVIRONMENTAL PROTECTION AGENCY
REGIONAL OPERATIONS/STATE/LOCAL RELATIONS

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SUBJECT: AGIR - Sections

MESSAGE: Here are our three sections
① Safe Drinking Water (6 pages)
② Clean Water (5 pages)
③ Clean Air (6 pages)
They are all numbered individually in the bottom left corner

The Safe Drinking Water Act

Overview

The *Safe Drinking Water Act* (SDWA) regulates drinking water for the roughly 58,000 community water systems (as well as providing lesser requirements for the additional 140,000 non-community water systems such as restaurants, campgrounds, churches, schools and factories) serving 25 or more persons on a regular basis. Approximately 37,000 of these systems serve less than 500 customers. The nearly 16,000 systems that are privately-owned range from trailer parks and homeowner associations, whose primary business is other than providing drinking water, to investor-owned water systems closely regulated by state utility commissions. 82 percent of systems in urban areas are publicly-owned.

SDWA was originally enacted in 1974 and amended in 1986. It directs the U.S. Environmental Protection Agency (EPA) to establish maximum levels for chemical, radiological and microbiological contaminants in public water systems, water testing and (for a few contaminants) specific treatment requirements, procedures for states to become primary implementation authorities for the Act and provides for enforcement and public notification. It sets a wide range of responsibilities for states and drinking water suppliers.

Why the Mandate was Adopted

Prior to 1974, states were responsible for ensuring drinking water safety, generally relying on voluntary standards set by the PHS. Congress adopted the SDWA in 1974 in response to a number of serious concerns that had been documented over the previous several years in studies of the U.S. Public Health Service (PHS).

A key PHS study cited in the congressional Committee reports found that only 10-15% of water systems conducted adequate testing for basic microbiological safety; that one-third of systems that tested found contamination exceeding the PHS limits; and that 56% of systems had physical deficiencies that could seriously affect safety. Small systems' lack of economies of scale was repeatedly noted as a major source of water safety vulnerability. An earlier PHS had noted that many of its drinking water standards were based on insufficient data, did not cover many known contaminants, and that new contaminants -- particularly organic chemicals with potentially carcinogenic effects -- were occurring in drinking water and could require regulation.

Thus, Congress decided in passing SDWA in 1974 that the lack of national requirements meant that the status quo was entirely inadequate to assure safe drinking water to the American people. Unsafe drinking water endangers both the residents of a local community and state and interstate travelers and interstate commerce, and is at odds with the American people' fair expectation that tap water anywhere in American should be safe to drink. Thus, there is an enduring national interest in ensuring safe drinking water.

(1) SDWA

A second area of concern is standard-setting: how contaminants are selected for regulation, and how they are regulated once selected. Current law requires EPA to select and regulate 25 new contaminants every 3 years, regardless of whether or not so many contaminants actually present a health risk that warrants regulating, and regardless of whether scientific data or EPA resources clearly support all such regulations. Instead of the current law's mandatory duty to regulate, EPA should have a mandatory duty simply, on a regular basis, to examine the health effects and occurrence of a minimum number of contaminants, decide whether or not those contaminants warrant regulation based on that scientific examination, and regulate only those that do.

In addition, the current law's focus on affordable and available treatment technologies in setting standards does not allow flexibility to ensure that potentially-costly future regulations are also "worth it" in the degree of risk reduction they provide. So far, the relationship of health risk reduction benefits to treatment costs appears to have been fairly reasonable. For the risk reduction benefits of SDWA described above, a recent Congressional Budget Office (CBO)

② SDWA

report found that "available data do not indicate that {SDWA} has imposed high costs on most households[,] ... [the] Act currently places a small fiscal burden on most municipalities," and that " $1.4 billion to $2.3 billion per year should be viewed as a range of estimates of the total cost that water systems will bear to comply with SDWA regulations that went beyond pre-SDWA standards."

However, CBO reported that costs per cancer case avoided for different contaminants currently regulated, averaged for all water systems, varied between $0.5 million to $4.3 billion. While these are largely theoretical costs, no treatment costs actually incurred by water systems (CBO states that "the high cost per cancer case avoided [is] ... the result of the extremely small number of cases avoided" rather than reflecting water system's actual treatment costs), the CBO analysis does illustrate the potential value of assessing and determining whether the benefits of a potential regulation are worth the costs. After all, drinking water standards are promulgated with the expectation that some systems whose source water does not meet the standard will in fact have to build such treatment. Thus, they should be formulated to be not only practical to implement but reasonable.

A third area of concern has been the lack of federal financial assistance for compliance given the cost burden imposed by SDWA mandates, particularly for small systems. While over $16 billion in grants and loans have been provided for rural water supply infrastructure through the Department of Agriculture, SDWA contains no authority for financial assistance to systems to aid with these compliance costs.

Innovations to Reduce the Mandate Burden: Progress to Date

In addition to the issues described above, some have raised other areas of concern for which appropriate, consensus remedies have already been identified in the congressional discussions over SDWA reauthorization, or in the EPA Safe Drinking Water program Redirection initiative. This initiative was undertaken beginning in October 1994 to explore ways in which the authority of the existing SDWA could allow the EPA to set more risk-based, cost-effective, flexible priorities for the drinking water program.

MCLs as Performance Standards: For example, one concern voiced is to revise SDWA so that compliance with maximum contaminant levels is based on performance not process. In fact, this is already the case. Systems whose finished water (that is, water within their distribution lines) violates an MCL need simply use whatever technology or other means their state will accept to bring their finished water quality into compliance with the MCL (the standard). Neither SDWA nor EPA's regulations require a system to use any specified technology to meet a MCL.

There have been two problems with MCL compliance in practice. One is that, for some contaminants, there is no technology or other means that many smaller water systems can afford that will treat their water to comply with the MCL. This problem is well-known, well understood, and appropriately addressed by providing new affordability variances, as in all three SDWA bills passed by either House of Congress to date.

The second problem is much less known. EPA must (under SDWA) set the MCL by reference to affordable, available technology that comes as close as feasible to the level at which there is "no adverse health effect." While the MCL that results is a numerical performance standard, many states have been unwilling to allow systems to use a different technology (or packaged rather than custom-engineered technology) than the technology that is the reference point for the MCL. This does not arise from a lack of state flexibility in implementing the law but results from an understandable state reluctance to approve technologies that may lack an extensive track record guaranteeing that systems using them would come into compliance with the MCL. The remedy is the provision in all relevant SDWA bills requiring EPA to list a range of technologies enabling states to presume that a system's use of such technologies will allow it to meet the MCL.

The Good Science Basis for Surface Water Filtration: Some of the more emphatic concerns voiced about SDWA relate to the Surface Water Treatment Rule (SWTR), which requires filtration for all surface waters whose sources are not clean and demonstrably free of the indirect indicators of microbial contamination, and of conditions that would tend to produce such contamination. The concerns are that the costs of filtration in such cases may be substantial and risks may seem relatively low because there may not always be direct evidence of specific existing and measurable contamination. While these concerns may seem troubling, the SWTR is based in sound science and well-established knowledge and practice in public health and sanitary engineering.

The SDWA allows EPA to prescribe a mandatory treatment technique, such as filtration, rather than a performance standard MCL, where it would be "technically or economically infeasible to measure the level of a contaminant." This is the case with microbial contaminants (such as giardia or crypto sporidium), which can be dangerous in any concentration and which (unlike most chemical or radiological contaminants) do not tend to dilute relatively evenly in surface water supplies. A system might sample uneconomically large quantities of water, find no waterborne diseases, and still not be able scientifically to be confident that diseases which would pose a serious threat to public health were not present. Thus, because of the nature and unpredictable occurrence of microbial contamination, the fact that samples may be free of direct contamination does not mean, scientifically, that the water is reasonably safe from that contamination where other, related conditions that show safety are not also present.

This is a widely accepted policy in the states and the drinking water and public health professions. Thirty states required filtration for all surface water systems even before the SWTR was promulgated. The American Water Works Association, the water industry's professional organization, has had a policy for three decades that water systems should filter all surface water supplies, without any exception -- even when source waters are well protected. The states and EPA have granted such exceptions to over 140 systems nationally. The late Abel Wolman, a pioneering sanitary engineer and for over six decades the dean of American water supply

(4) SDWA

professionals, long urged surface water systems to use multiple barriers, in which they both protected source waters and filtered. Thus, EPA's allowance of filtration avoidance for source water protection is more lenient than the widely held view among sanitary engineers.

Nonetheless, some small water systems that lack economies of scale may well have difficulty affording filtration of surface water supplies. (It should be noted, however, that some of the claims of high filtration costs often inappropriately include high and unrelated costs of replacing worn out supply infrastructure.) Because surface water filtration is such a basic, essential health protection measure, EPA has advocated, and all three SDWA bills that passed the House or Senate have included, authorization of a State Revolving Loan Fund to help underwrite the cost of filtration, and provisions to authorize less costly, package filtration plants for small systems that states will accept in all cases, without custom engineering.

The challenge to which these measures respond is to find creative ways to afford the necessary level of protection consistent with the SWTR, not to provide less protection in this vital area. Indeed, protection of drinking water against microbial contamination is the most basic public health provision a water system can give its customers.

Water System Monitoring Requirements: While concerns have also been voiced that systems are forced unproductively to spend money on testing, which costs "do not improve water quality," this is true only in a literal sense. Tests of water quality do not literally "improve water quality" but simply tell what that quality is. But if systems do not adequately test the quality of their water, on what scientific basis can customers, state regulators, or the systems themselves be sufficiently confident that water quality is safe? The burgeoning sales of bottled water, which a 1993 survey for the American Water Works Association identified as being about half motivated by concerns for drinking water safety, make complacency about consumer confidence and testing mistaken. Clearly, the appropriate issue for discussion in response to concerns about testing costs is, what constitutes "adequate" testing?

EPA has added testing waiver programs that states can adopt and which can cut testing costs by more than two-thirds. These waivers are given in situations where an anthropogenic (man-made) contaminant was never used in an area, or where hydrogeologic data shows that a system's water source is not vulnerable to contamination. Nearly all states have EPA-approved programs in place, and EPA has frequently given expedited, interim approval to allow many of these states to give systems waivers prior to full approval, specifically to address the cost concern.

However, EPA has recently recognized that even these waiver programs have their limitations. They are more resource-intensive to start than some states can afford without more federal aid, and gradual state implementation has not enabled all eligible systems to get the benefits of such waivers. Thus, as a part of its drinking water program redirection initiative, EPA has been framing and considering alternatives to reduce testing requirements for chemical contaminants (the source of greatest small system cost) to focus on those systems at risk of contamination, and on sampling to be done at the time of the water system's maximum vulnerability.

5

SDWA

This approach can be flexible, cost-effective, responsible public health policy if tests are timed and located by good information to be properly indicative. Good information and good science are the foundation of responsible public policy.

RECOMMENDATION: ***Congress should enact amendments to address the high per capita costs of small systems, to allow EPA to examine health effects and occurrences of specific contaminants, to determine priorities for standard-setting, provide more implementation authority for states, and to provide financial assistance to water systems and states to ensure fuller protection of pubic health and prevent contamination of drinking water.***

6 SDWA

THE CLEAN WATER ACT

Overview

The Clean Water Act (CWA) is the primary Federal legislation that protects the Nation's surface waters, such as lakes, rivers, and coastal areas. The goal of the Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

The CWA provides a comprehensive framework of standards, technical tools, and financial assistance to address the many sources of pollution that can adversely affect water quality, including municipal and industrial wastewater discharges, polluted runoff from urban and rural areas, and habitat destruction.

The CWA requires national minimum standards for major industries, such as iron and steel manufacturing and petroleum refining, that provide a single, minimum level of pollution control for all dischargers in a industry based on the best treatment technologies available.

In addition, States survey their waters, determine an appropriate use, such as recreation or water supply, and then set specific water quality criteria for various pollutants, as needed to protect those uses. These criteria, together with the national industry standards, are the basis for permits that limit the amount of pollution that can be discharged to a water body. Under the National Pollutant Discharge Elimination System, sewage treatment plants and industries that discharge wastewater are required to obtain permits and to meet the specified limits in those permits.

The CWA also provides Federal funding to help States and communities address their clean water needs. Funding is also provided to the States to address another major water quality problem -- polluted runoff from urban and rural areas.

Protecting valuable aquatic habitat, such as wetlands, is another important component of this law. Filling wetlands with dredged or fill material can destroy or degrade these important aquatic areas and have a profound impact on water quality. To minimize impacts, the CWA requires permits to ensure that these types of activities are conducted in an environmentally sound manner.

D CWA

Why the Mandate was Adopted

Twenty years ago, the quality of America's rivers, lakes, and coastal waters was declining rapidly. Lake Erie was dying. Many rivers were little more than open sewers and sewage commonly washed up on beaches. Fish kills were a common sight. Wetlands were disappearing at a rapid rate. Threatened by industrial pollution and inadequate sewage treatment, our rivers, lakes and harbors were overwhelmed by the uncontrolled waste of a growing Nation.

In the 1960's, water pollution controls were implemented as needed to attain limited water quality standards adopted by each State. States were to decide the uses of water to be protected, degrees of pollution abatement to be required, and the time to be allowed a polluter for abatement. This approach to water pollution control was of limited success. Many States did not adopt needed standards. The appropriate type or degree of effluent treatment was often disputed. Schedules for pollution control slipped because of the failure to take enforcement action.

Prior to 1972, many communities dumped untreated or under treated sewage directly into lakes, rivers and oceans. Water quality standards did little to foster commitment to increased sewage treatment. Progress toward improvement of sewage treatment facilities was hindered by lack of a single national treatment standard and the lack of Federal funds to assist communities with the costs of construction.

In 1972, the Congress responded to widespread public concern for serious water pollution problems and enacted a comprehensive national program to protect the quality of the Nation's waters (termed the "Clean Water Act"). The CWA supplemented the existing State water quality standards with national minimum treatment standards for industry and for sewage treatment plants. A national discharge permit program was established to assure that controls were implemented. The level of funding for Federal grants to communities to support sewage treatment plant construction was dramatically increased. And, new authority was adopted for protection of wetlands.

Today, the American people recognize the CWA as one of the most successful environmental statutes. In an August 1995 Harris poll, 72% of Americans indicated that laws and regulations to control water pollution were "not strict enough" while only 45 said the laws and regulations are "too strict."

2
CWA

Benefits and Concerns

The quality of the Nation's waters has improved dramatically as a result of a cooperative effort by local, State, and Federal governments to implement the water pollution control programs established in the CWA.

The dramatic improvements in sewage treatment over the past twenty years are a national success story. Local, State and Federal governments have invested over $80 billion in sewage treatment facilities under the CWA. These facilities now remove millions of tons of pollutants from municipal wastewaters annually and have made routine discharge of raw sewage increasingly rare. Much of this progress was accomplished by the implementation of a single, national, minimum standard for sewage treatment (termed "secondary treatment").

Over fifty major categories of industry comply with national "effluent guidelines" establishing minimum standards for effluent discharges. These guidelines, and related requirements concerning industrial discharges to sewage treatment systems, result in the removal of over one billion pounds of toxic pollutants from industrial wastewaters each year.

Despite this progress, serious water pollution problems remain. Almost 40% of the waters assessed by the States have not attained desired water quality. Water pollution still causes beach closings, makes some fish unsafe to eat, and prevents attainment of water quality goals.

In addition, there are growing concerns that clean water programs have not been adapted to meet changing conditions. Local governments are concerned that Federal funding for sewage treatment construction (now provided in the form of low interest loans rather than grants) does not provide the same financial benefit that it did in past years and that requirements to address pollution other than sewage, such as stormwater, pose a financial burden.

States are concerned that, as some of the largest industrial and sewage discharges have been controlled, pollution control program requirements should be more flexible. States, local government, and private citizens have expressed concern with requirements related to permits for activities in wetlands.

3) CWA

Innovations to Reduce the Mandate Burden: Progress to Date

In addressing the remaining water quality problems, the Federal government must work with State and local governments to reinvent the original, successful Federal, State and local partnership for clean-up of the Nation's waters. The two key elements of this new partnership must be --

-- a renewed commitment to Federal funding to support financing of municipal water pollution control projects; and

-- a significant increase in flexibility in the implementation of pollution control programs related to municipalities and other dischargers.

A) Assure Adequate Funding

As a first step in creating a new partnership for water pollution control, the Federal government must continue to support financing of municipal water pollution control projects.

At a minimum, at least $2 billion should be made available each year within the states revolving loan fund for low interest loans to finance municipal water pollution control facilities. States must continue to have flexibility in allocating funds to the most important and needy projects in the State.

In addition, States must be given greater flexibility to assure that financing of local water pollution control projects is consistent with the fiscal constraints faced by local governments, especially small communities. Congress must provide States with clear authority to extend loan repayment periods and to forgive a part of loan as needed to assure that projects meet affordability guidelines.

B) Increase Flexibility and Efficiency

The Federal government must work with State and local governments to design significantly increased flexibility for implementing low cost, realistic water pollution controls.

A key step in this effort is for the Environmental Protection Agency to continue working with the Stormwater Federal Advisory Committee, including State and local governments, to assure that measures for control of municipal stormwater discharges are developed using the full flexibility available under the current law.

In addition, in addressing overflows from combined storm and sanitary sewers, the EPA must adhere to the consensus policy for control of these discharges developed by State and local governments and other organizations. This policy provides a common-sense; realistic approach to effective control of water pollution problems caused by these discharges and assures that local governments are able to implement controls on reasonable timetables that are respectful of fiscal constraints.

The Federal government must work constructively with State and local governments to develop innovative, low cost approaches to water pollution control. For example, the Environmental Protection must encourage States to address water pollution problems on a watershed basis and must provide clear guidance and authority for the use of innovative and cost-saving methods of pollution control such as "trading" of pollution controls among pollution sources in a watershed.

Finally, the Federal government should dramatically improve the effectiveness permit programs.

EPA must reduce the reporting burdens of facilities with Federal permits to discharge to waters. This effort should include streamlining regulations, reducing effluent monitoring, and streamlining permit applications. These steps would increase flexibility and improve efficiency for both municipal and industrial dischargers.

EPA should also work to improve and permit programs for activities in wetlands. Key concepts in this area include providing new authority for "mitigation banking" to accomplish wetlands protection goals more effectively, reduced regulatory burden through better use of general permits, and improved processes for identification of wetlands.

RECOMMENDATION: Reinvent the successful Federal, State and local partnership for clean-up of the Nation's waters by renewing the Federal commitment to financing of water pollution control projects through flexible loan programs and assuring that State and local governments participate in the design of significantly increased flexibility for implementing low cost, realistic water pollution controls.

5
CWA

The Clean Air Act

OVERVIEW

The Clean Air Act establishes a framework for the attainment and maintenance of air quality standards at a level to protect public health and the environment. It sets emission standards for motor vehicles and fuels, regulates hazardous air pollutants, protects stratospheric ozone, and takes steps to limit acid rain. The original Clean Air Act, signed into law by President Lyndon B. Johnson in 1963, was considered to be the first modern environmental law enacted by the United States Congress. The Clean Air Act of 1970, reviewed and amended in 1977 and 1990, forms the basis of the nation's air pollution control program today. National level requirements were established so that no facility would be assured of a competitive advantage by having to meet less stringent controls.

Health-based national ambient air quality standards are the center-piece of the Clean Air Act. The standards are to be met through the application of control technologies that effectively reduce emissions and thereby produce improved air quality.

WHY THE MANDATE WAS ADOPTED

Federal and state clean air legislation has existed since the 1960's, enacted in part at the request of the nation's cities who sought federal action to deal with air quality problems. The first state clean air law was enacted in 1952. Prior to that time, efforts to control air pollution were primarily the purview of the cities. The first national air pollution legislation was enacted in 1955 to address killer smogs in Donora, Pennsylvania, and New York City. Federal funds were provided for research, training, demonstration projects and grants-in-aid to local governments. Cities, experiencing difficulties enforcing local air pollution laws, supported national air pollution standards because local polluting industries threatened to move to other, less regulated areas. The Clean Air Act of 1963, prompted by a continued decline in the nation's air quality, changed the pattern of federal-state-local relations by authorizing national air quality criteria and permitting federal intervention if a state could not successfully address its air quality problems. For the first time, federal grants were provided to states. With the passage of the Air Quality Act of 1967, states were required to develop, set and implement plans to achieve national air quality standards. Increased federal funding was also provided. By 1970, however, only 21 states had submitted implementation plans, and Congress decided it was necessary to set standards and enforce state implementation

The framework for the nation's current clean air effort was developed under the 1970 and 1977 versions of the Clean Air Act. The 1977 Amendments added provisions to preserve the air quality in relatively pristine areas. They also deferred some of the strict requirements established in the 1970 legislation, which had proved to be unachievable within the time originally allowed.

Although great progress toward cleaner air was made under the 1970 and 1977 versions of the Act, the 1990 Amendments were enacted because twenty years of effort and commitment had <u>not</u> yet assured Americans the health and environmental protection they sought. In 1990, almost 140

D CAA

million people still lived in communities that violated the health standard for smog. More than 40 million people still lived in communities that violated the health standard for carbon monoxide. The Toxics Release Inventory, covering only a portion of industry, reported nearly three billion pounds of toxic emissions being released into the air. More than 22 million tons of sulfur dioxide releases each year were continuing to threaten public health and add to the acidification of lakes and streams.

The 1990 Amendments were enacted in response to broad public concern that America had not yet achieved the benefits of clean air. After 20 years of national deadlines, state plans, and "good faith" efforts, the Clean Air Act had not been able to achieve the established goals. In 1990, Congress added more detailed and specific requirements to the Act. Congress was clear that its reason for adding the specific requirements was years of public frustration with the lack of progress in cleaning up the air on the part of both the federal Environmental Protection Agency and the state and local governments. As a result, Congress added requirements for EPA to establish new programs, such as acid rain control and operating permits, and to issue new regulations for a wide variety of industries (e.g., automobiles, steel, chemicals, oil, utilities).

The 1990 Amendments also included specific pollution reduction targets requiring state and local governments to reduce the pollution that causes ground-level ozone (or smog) by 15 percent over six years and then 3 percent per year thereafter. In addition, the 1990 Amendments included specific requirements for states and local governments, such as vehicle inspection and maintenance programs, to help improve air pollution. These requirements generally vary according to the severity of the air pollution problem in question. In exchange for more specific requirements, Congress provided states and local areas with longer deadlines to meet the standards -- as long as 15 to 20 years for those areas with the worst problems. By and large, the Clean Air Act gives state and local governments flexibility to determine how best to achieve those reduction goals.

In 1990, mandatory sanctions provisions were also added to the law. Though previous Clean Air Acts contained discretionary sanction provisions, those provisions lacked the predictability and objectivity of the provisions which were added to the law in 1990. Today, it seems clear that the sanctions provisions are working. With only a handful of exceptions, areas are not being sanctioned because --for the first time -- they are meeting deadlines and air quality is steadily improving in all parts of the country.

Federal grant money to the states to implement the Clean Air Act has grown steadily over time, from $49.5 million in 1975 to $96.2 million in 1988 to $181 million in 1995.

BENEFITS AND CONCERNS ABOUT THE CLEAN AIR ACT AND THE 1990 AMENDMENTS

The Clean Air Act has dramatically reduced air pollutant emissions from industries and motor vehicles. The benefits include large reductions in respiratory and heart problems, dramatically

3 CAA

reduced cancer and mortality rates, impressive cuts in crop and forest damage, and greatly improved visibility. Lead emissions have dropped 98% since 1970 because of flexible, phased reduction of lead in gasoline and industrial controls. The Clean Air Act has also substantially cut emissions of particulate matter (78%), sulfur oxides (30%), carbon monoxide (25%) and smog-forming volatile organic compounds (24%). Meanwhile the domestic economy grew by 71 percent and the U.S. population by 25 percent. By 1990 overall air pollution was cut by 146 million tons per year, over half a ton for every man, woman and child in America.

Following passage of the 1990 Amendments, more than half of the smog and carbon monoxide areas in the country are now meeting the national health-based standards, and they are doing so on time. Moreover, more than two billion pounds of toxic emissions and millions of tons of sulfur dioxide emissions are being removed from the air each year. These numbers represent tens of millions of people breathing cleaner air across the country. Almost without exception, every area of the country is seeing reduced pollution levels, which means that threats to public health are being reduced, even if all areas do not yet meet the air quality standards.

In addition to the substantial health benefits of the Clean Air Act, air pollution control is improving visibility, protecting aquatic and forest ecosystems, reducing crop damage and reducing damage to materials (e.g., electrical components, paints, statues and monuments).

Specific benefits resulting from implementation of the 1990 Amendments include:

An unprecedented number of cities have reached the milestone of meeting health-based standards set in the CAA. Of the 98 areas of the country that were designated as non-attainment for ground-level ozone in 1990, 55 of those areas now have "clean" air and 22 have formally been redesignated to attainment. The reductions mean 140 million people live in areas that have reached attainment and therefore will experience reduced mortality, reduced airway resistance in asthmatics, and reduced respiratory illness.

Tailpipe standards for cars being built today are 25 to 60 percent more stringent than standards for new cars built in 1990. These standards continue a tremendous pattern of progress since the early 1970's, with the result that automobiles today are 90% cleaner than they were twenty years ago. These significant reductions have been integral to the efforts to reduce smog-forming pollutants across the country.

Diesel-powered urban transit buses built today emit almost 90 percent less particulate emissions than buses in 1990. These emission reductions ensure a decrease in premature deaths, improved lung function and reduced respiratory disease.

This progress can be attributed to a combination of influences: strong health-based standards; a working partnership between federal, state and local governments to achieve those standards; an ongoing commitment on the part of many sources to the development of innovative strategies for the reduction of air pollution; and, a strong, continuing public desire for clean air.

3) CAA

Yet, even with the success to date under the Clean Air Act Amendments of 1990, in our best years more than fifty million Americans - one in five - still remain exposed to unhealthy levels of air pollution. In the worst years that number may be one in three.

Many of these Americans are terribly sensitive to the effects of air pollution -- because they are children, because they are old, or because of respiratory or heart disease. Millions of acres of forests, croplands, and watersheds are still harmed by acid rain; communities suffer multiple exposures from toxic releases; and increased radiation from the thinning stratospheric ozone layer continues to cause an increase in skin cancers and cataracts.

For all those reasons, the focus of the 1990 Amendments has not just been to sustain the historic progress, but instead to keep finally the underlying promise of the Clean Air Act: clean, healthy air for all Americans. Given the overall success of the 1990 program -- especially in contrast to the previous twenty years -- a constructive approach to addressing state's concerns is to continue the recent efforts to redefine our partnerships and identify flexible ways to ensure continued progress toward clean air for all Americans under the framework of the 1990 Clean Air Act Amendments.

The greatest challenge in implementing the Clean Air Act has been to find the right balance between enforceable federal standards and the need for flexibility to adapt and innovate locally. State and local governments recognized and supported the need for more stringent standards and enforcement tools during the debate over the 1990 Amendments to the Clean Air Act. At the same time, the Clean Air Act assumes states will develop a fairly high level of sophistication to manage air quality programs, including developing the capacity to review complex operating permit applications from major sources, and developing and using computer models to predict future air impacts. In addition, the need to make the trade-offs required in preparing State Implementation Plans and the need to establish vehicle inspection and maintenance as required by the 1990 Amendments have forced state executive and legislative leaders to make politically unpopular decisions. This has created tremendous tension in the implementation of the Clean Air Act, tension sometimes exacerbated by decisions EPA has made or, in some cases, decisions EPA had delayed making because of its own constrained resources for implementing the 1990 Amendments.

INNOVATIONS TO ADDRESS PROBLEMS ASSOCIATED WITH MANDATES

To reduce this tension and smooth the implementation of the Clean Air Act, EPA has worked diligently with the states over the past eighteen months to identify specific problems arising in the implementation of the Clean Air Act, and to resolve them. The States have responded by working with EPA in identifying issues of specific concern. For example, in January 1995 the National Governors Association and the Environmental Council of States identified 64 specific issues where the states were looking for additional flexibility. EPA has effectively addressed the vast majority of these issues. The States have publicly supported this activity and hope to continue working with EPA in this fashion in the future.

4 CAA

Some examples of the extensive flexibility provided to the states in the implementation of Clean Air Act-mandated requirements as a result of this ongoing consultation include:

New rules and/or policies to provide flexibility for what constitutes an "enhanced" vehicle inspection and maintenance program;

Alternative methods for states to demonstrate attainment with the ozone standard;

Extended attainment dates for areas affected by overwhelming transport of pollution from upwind areas;

A proposed rule that would have States merge their construction and operating permit processes and to automatically incorporate into their permit the State's construction requirements. This eliminates the additional delay and administrative burden of separate permit processes;

A proposed rule waiving for five years EPA's ability to object to most permit revisions, and allowing States to exempt insignificant permit revisions from any EPA or public review.

Current joint state and federal efforts should prevent sanctions from being imposed in most states, and the record supports this belief. Of the roughly 2000 individual state implementation plan elements finally due by mid-1995, only two elements were not completed on time. Of the almost 400 sanctions "clocks" that were, by law, started during this process, only one set of sanctions is currently in place. Two other sanctions are in place for continuing violations of the health-based limits on lead pollution. In contrast to the pre-1990 cycle of failure which characterized earlier Clean Air Act deadlines, the efforts of states reflected by the completeness of state implementation plans represent a clear success story.

In addition to the work with the NGA, EPA has also focused on collaborative efforts to address specific and difficult air control problems and issues. Some of those efforts include:

Ozone Transport Assessment Group- Thirty-seven states represented by state and local air control officials and EPA officials, with input from industry and environmental groups, are working together to recommend specific ozone control measures needed based on an agreed upon modeling and assessment process. This effort was established after states and regional organizations concluded that ozone nonattainment areas cannot demonstrate attainment simply through the implementation of control measures within a nonattainment area; significant ozone and ozone precursors reductions outside the boundary of the nonattainment area were needed in order to demonstrate modeled attainment.

Grand Canyon Visibility -The Grand Canyon Visibility Transport Commission was created by the CAA of 1990 to determine what, if any, steps are needed to preserve clear days and improve visibility in 16 National Parks and wilderness areas located on the Colorado Plateau. The Commission is composed of eight Governors or their designees, five tribal representatives, and

5) CAA

five federal agencies. The Commission established a Public Advisory Committee (PAC) to obtain broad input as it formulated strategies for protecting visibility. The PAC has developed a set of emission management recommendations for the Commission and is holding public hearings to discuss these. The Commission will formally consider the PAC report in June 1996. If the recommendations are approved, they will be forwarded to EPA for action.

Cooperative Agenda Setting - EPA is consulting with its state partners on identifying priorities and appropriate implementation strategies to meet the Clean Air Act goals. State, local and tribal officials will be involved in a comprehensive planning effort. This effort will include goal setting, strategy identification, role definition, and discussion of resource allocations.

The commitment to building partnerships in meeting the challenge of clean air for all Americans is central to the success of the nation's air quality program.

RECOMMENDATIONS

Congress should continue to support federal funding and technical assistance to ensure that the EPA and States can meet the promise of the Clean Air Act Amendments of 1990. *Funding to states has increased over time, but continued strong funding is needed to keep up with the requirements of the Act. It is also important that EPA receive necessary funding to be able to provide the states with the technical support they need (for emission factors, inventories, modeling, monitoring, control technologies, information transfer, training, etc.) and to help provide for regional and national solutions, where warranted.*

EPA's recent emphasis on partnerships and programs that provide states with performance goals and with federal technical assistance to help states develop regional solutions should be continued. *The history of the Clean Air Act has shown that providing general goals to states and to EPA has not been successful (e.g., after 20 years of continually extended deadlines, 98 areas of the country still failed to meet the national ozone standard in 1990). However, at the same time, specific federal mandates do not necessarily make sense in every part of the country. A reasonable balance is needed. EPA's recent efforts to provide flexibility in developing attainment plans and work with states to address the regional nature of the air pollution problem in the eastern areas is a good example of how the Clean Air Act should be implemented.*

6 cAA

Diane – In case anyone is looking for this
M/T

UNITED STATES DEPARTMENT OF LABOR

FACSIMILE TRANSMISSION

OFFICE OF CONGRESSIONAL AND INTERGOVERNMENTAL AFFAIRS

200 Constitution Avenue, N.W.
Room S-1325
Washington, DC 20210

Confirmation: 202/219-6141

May 1, 1996

TO: KRIS BALDERSTON

DEPARTMENT/COMPANY:

FACSIMILE NUMBER:

FROM: EARL GOHL

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IMMEDIATE OFFICE OF THE ASSISTANT SECRETARY	202/219-5288

MESSAGE: ACIR alternative positons

Diane - Here's memo to Leon. If mtg. is set up, please get Carol copy for herself + extras. Thks.

The Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) (29 U.S.C. 201, et seq.) sets national standards for minimum wage, overtime compensation, equal pay, child labor and recordkeeping for most workplaces in the United States. Enacted in 1938 and linked to the Commerce Clause of the Constitution, its goals were to correct and eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers without substantially curtailing employment or earning power. In describing these objectives, the U.S. Supreme Court, speaking through Justice Burton, also observed: "The Act declared its purpose in broad and sweeping terms. Breadth of coverage was vital to its mission. Its scope was stated in terms of substantial universality..."[1]

Thus, in order to effectuate the remedial purposes of the Act, FLSA's coverage is construed broadly, while exemptions from the Act's protections are construed narrowly. In addition, Congress, through successive amendments, has expanded the Act's coverage. In 1966, Congress covered employees of certain publicly-operated institutions, principally schools and hospitals.[2]

The Education Amendments of 1972 further extended FLSA coverage to employees of public pre-schools. In 1974, Congress covered virtually all remaining State and local government employees not covered by the 1966 and 1972 Amendments. The 1974 Amendments were challenged as unconstitutional in National League of Cities v. Usery and, in 1976, the Supreme Court held that FLSA's minimum wage and overtime pay standards could not be applied constitutionally to employees of State and local governments engaged in integral or "traditional" government activities.[3] The Court ruled that FLSA could be applied to employees of State and local governments engaged in non-traditional activities.

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[1] Powell v. United States Cartridge Co., 339 U.S. 497 at 509, 516 (1950).

[2] Two years later, the U.S. Supreme Court upheld the constitutionality of including state-operated hospitals and schools under FLSA's "enterprise" coverage concept in Maryland v. Wirtz, holding that Congress had the power to subject a State to the same minimum wage and overtime pay limitations as other employers whose activities affect commerce; and, where a State engages in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State may be required to conform to Federal regulations.

[3] Thus, this decision overruled the earlier Wirtz decision.

In 1985, the Supreme Court completely reversed National League of Cities in Garcia v. San Antonio Metropolitan Transit Authority. In so doing, it restored full application of FLSA to State and local governments. The Court concluded that the "traditional governmental function" test was unworkable and inconsistent with established principles of federalism. In order to mitigate FLSA's impact on State and local governments following this ruling, Congress amended FLSA in 1985 to give special accommodations to State and local governments by allowing for compensatory time off in lieu of overtime pay, providing special rules relating to the use of volunteers, and delaying implementation of compliance obligations to allow for a transition period.

In 1995, Congress passed the Congressional Accountability Act which expanded FLSA coverage to its own employees.

Benefits and Concerns

FLSA provides fundamental worker protections that, for the most part, are now national in scope. The Act ensures that minimum employment standards are observed in the working relationship between nearly every employer and employee in fulfillment of its original purpose -- to eliminate conditions detrimental to the health, efficiency, and general well-being of workers and the economy. The Act requires that covered workers be paid at least the minimum wage and that non-exempt, covered workers be paid premium pay for time worked over 40 hours in a week; it does not proscribe work schedules, when a workweek must start, how many hours workers should work in a week or day.

Concerns of State and local governments include:

- Considerable confusion has arisen since the Garcia decision over proper implementation of FLSA in the State and local public sector; improper claiming of FLSA's "executive, administrative, and professional employee" exemption from overtime pay continues to confound many State and local governments.

- Due to inadequate monitoring of compliance obligations and widespread misunderstanding of FLSA's requirements, State and local governments' confusion over the overtime pay provisions has resulted in significant litigation, with employees winning substantial retroactive back pay awards for unpaid overtime pay. Litigation costs are substantial, even if the State or local government successfully defends its employment policies.

- FLSA is viewed by some as intrusive because it requires State and local governments to implement employment policies they would not have to implement without the Federal law.

Innovations to Mitigate Burdens

Following the 1985 FLSA Amendments, DOL provided substantial guidance and technical assistance to State and local governments in efforts to educate them on their compliance obligations. Letter rulings that give expert advice on the law continue to be available to guide public agencies in their decision making on FLSA issues. These Opinion Letters, written in response to inquiries on fact-specific situations, can be used as part of a good faith defense against alleged violations in subsequent court actions.[4]

In 1992, after a series of court decisions involving public employers progressively narrowed the exemption for executive, administrative, and professional employees, DOL revised the regulations to grant a special exception to the "salary basis" test for State and local governments to allow partial-day deductions from pay when accrued leave is not used to cover the absence, based on public accountability principles and restrictions against paying public employees for time not actually worked.

Recommendation

Make no statutory changes in the FLSA. However, much of the expense of litigation might be avoided if State and local governments enlisted DOL's assistance in understanding their compliance obligations under the law, particularly the requirements for employee exemptions under the FLSA. The Department of Labor should be provided additional resources to develop training and technical assistance publications in order to provide guidance to State and local governments under the FLSA. State and local governments should seek specific guidance from DOL through the letter ruling process on any difficult issues confronting them.

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[4] See sections 9 and 10 of the Portal-to-Portal Act of 1947 and Regulations, 29 CFR Part 790. These letter rulings must come from the Administrator of the Wage and Hour Division of the Department of Labor.

Family and Medical Leave Act

The Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. 2601 et seq.) requires employers to grant eligible employees up to 12 workweeks of unpaid, job-protected leave each year for specified family and medical reasons, and to maintain group health benefits during the leave. Employees must be restored to the same or equivalent position at the end of the leave. In certain limited cases when an employee chooses not to return to work at the end of the leave, the employer may recover its costs of maintaining group health insurance during the leave. Enacted in 1993, FMLA became effective for most employers in August 1993. However, the effective date was delayed for employers with collective bargaining agreements, to give employers and employees some flexibility in bargaining on FMLA-related issues.

The FMLA allows employees to better balance work and family needs by taking reasonable, temporary unpaid leaves for the birth and care of a newborn child; for placement of a child for adoption or foster care; to care for a child, spouse or parent with a serious health condition; and for an employee's own serious health condition that makes the employee unable to work. The FMLA was enacted to advance national interests in preserving family stability and promoting economic well-being among working men and women through greater job security and more flexibility to meet important family responsibilities.

Employers were also expected to realize significant benefits from improved worker productivity and morale, reduced employee turnover, reduced need to hire and train permanent replacement workers, and greater labor-management stability. Any costs of implementation were expected to be mitigated by the fact that the leave was unpaid and many employers already had family and medical leave policies in place, particularly in those States where similar requirements had already been enacted. The General Accounting Office calculated that the primary costs associated with FMLA would relate to extending medical benefits and hiring temporary replacements during covered FMLA leave periods.

Benefits and Concerns

The FMLA makes a significant positive contribution toward the national policy objective of strengthening family stability and improving economic security for working men and women, particularly during times of family or medical crises. It is sound public policy for workers, for families, and for employers. The bipartisan Commission on Leave conducted a nationally representative random sample survey of private sector worksites, the results of which were released in October 1995. The survey found that, for the vast majority of covered worksites, implementation of the FMLA resulted in either a small cost increase or no cost at all.

Concerns of State and local governments include:

- Because some State and local governments had leave policies in effect that varied from FMLA's requirements, there is a perception that the Federal law is not flexible enough.
- Some claim that FMLA compromises collective bargaining negotiations between State and local governments and public employee unions.
- Some reported significant costs related to training personnel specialists on the law's provisions and to the time spent counseling individual employees. Recordkeeping requirements for tracking FMLA leave were perceived as burdensome, especially in cases where both spouses work for the same employer.

Innovations to Mitigate Burdens

The FMLA does provide some flexibility for State and local governments in that no existing provision (including a provision in a collective bargaining agreement) need be changed if it provides greater rights or benefits than the Federal law. Also, leave granted pursuant to an employer's previously established policy, a collective bargaining agreement or State law requirements often can be counted as part of an employee's FMLA entitlement if the leave is taken for an FMLA-qualifying reason.

DOL consulted representatives from State governments with State FMLA laws to discuss policy issues arising under the Federal law and sought their input in formulating regulatory provisions. To the extent the Federal statute allowed, efforts were made to minimize regulatory burdens at the lowest levels essential for determining compliance with statutory requirements. A user-friendly "question and answer" format was adopted to make the implementing rules easily understood.

DOL also conducted an extensive FMLA outreach and education effort. The Department prepared and distributed comparisons of State and Federal family and medical leave laws to assist employers in States with similar requirements in understanding their compliance obligations. Fact sheets and compliance guides were also distributed. DOL representatives were made available for speaking engagements and presentations on FMLA compliance issues. Technical assistance continues to be provided, including through letter rulings that give expert advice on the law.

Recommendation

Make no statutory changes in the FMLA. The law enjoys high approval and widespread support. State and local governments should obtain technical assistance from DOL in understanding their compliance obligations under the law. Specific guidance should be sought through the letter ruling process on any difficult compliance issues confronting them.

Davis-Bacon and Related Acts

The Davis-Bacon Act (40 U.S.C. 276a, et seq.) applies to Federal contracts over $2,000 for construction, alteration or repair, including painting and decorating, of public buildings and public works. A covered contract must specify the minimum wages to be paid by contractors and subcontractors to the various classes of laborers and mechanics working on the contracts. The minimum wages are based on the wages found prevailing by the Secretary of Labor for corresponding classes of laborers and mechanics on similar projects in the local area where the work is to be performed.

The Davis-Bacon Act was enacted in 1931 at a time when the Federal Government had begun a substantial building program across the United States. Requirements to award construction contracts to the lowest bidder and limited available work opportunities were causing a downward spiraling of local wage levels as out-of-town contractors underbid local contractors for Federal projects and then paid employees substandard wage levels, thereby disrupting local economies. Recognizing the vast influence of the Federal Government's purchasing power on local economies, Congress enacted Davis-Bacon's prevailing wage protections to bring stability to the construction industry by creating a wage floor which would stop the downward-spiral of wages. The Act was patterned after similar State prevailing wage laws.

Congress extended Davis-Bacon's prevailing wage protections through about 60 other enabling statutes that authorize Federal grants, loans, and other assistance for construction projects meeting various public purposes and needs (e.g., highways, waste water treatment plants, low-income housing, etc.). These laws are known as the Davis-Bacon Related Acts (DBRA). (Under most Related Acts, State and local government employees working on a construction project are not covered by the prevailing wage requirements.)

With a renewed emphasis on reducing the costs of government and awarding contracts based on price to the lowest responsible bidder, it is evident that the basic purpose of the original Act continues to be relevant today.[5]

Benefits and Concerns

DBRA prevailing wage requirements provide an important mechanism to equalize the opportunity for local construction contractors to bid on Federally-funded work through the competitive bid process, without undermining workers' wage levels. These laws protect both local economies and workers' wages from the unscrupulous contractors that would undercut workers' wages as a means to gain a competitive advantage in bidding. Unfortunately, even today, in a labor-intensive industry like construction, an expedient way to lower bid prices is to cut labor costs. The resultant sub-standard wages are often accompanied by shoddy construction practices and inferior quality, ultimately leading to higher costs for the building or project owner.

Concerns of State and local governments include:

- Reporting and recordkeeping are perceived to be burdensome and may make it difficult for small businesses to compete. Reduced competition may increase construction costs.

- Because some low-wage contractors may pay less than prevailing wages in an area, there is a perception that DBRA prevailing wages increase the total costs of construction. Some feel that increased costs may divert available resources from other needy projects.

- There is a perception that DOL's method of determining DBRA prevailing wages through voluntary surveys, and a lack of data from some areas, may skew the results and produce higher wage levels.

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[5] Congress strengthened Davis-Bacon protections on several occasions -- in 1935, when it lowered the original $5,000 contract coverage threshold for applicability to $2,000, and in 1964 when it amended the wage and fringe benefit requirements of the law.

Innovations to Mitigate Burdens

DBRA prevailing wage determinations are based on measures of central tendency. If a single wage has not been paid to more than half the workers in a classification determined through survey (i.e., a "majority" rate), then the weighted average rate is used as the prevailing rate. Thus, there will always be some contractors who pay less than prevailing wages for an area.

The Department of Labor adopted significant regulatory changes over the past decade in an effort to ensure that DBRA prevailing wage determinations accurately reflect wages being paid in local communities. To prevent the importation of non-local wage data in the survey process, DOL specifies that when there is not enough recent construction in an area, wage data from nearby surrounding areas will be used -- not distant areas. DOL rules prohibit using projects in metropolitan areas for setting DBRA prevailing wage rates in dissimilar rural areas. DBRA regulations also encourage apprenticeship and training of persons with limited experience at lower wage rates in approved training programs.

Recommendation

There appears to be little disagreement with the view that the Act's requirements could be updated, and that a balance is needed between the administrative costs associated with the requirements and the intended goals and socio-economic benefits to be achieved. The Clinton Administration, in an effort to explore alternative methods for achieving the intended benefits of Davis-Bacon at lower costs, developed a reform approach in 1994. The Clinton reform bill would have raised the Related Act threshold to $50,000 for alteration and repair projects, and $100,000 for new construction projects, and made other changes to reduce administrative burdens and costs while maintaining its essential worker protections. This reform proposal was introduced in 1994 but not acted upon by the Congress.

Raising the threshold for defining covered contracts would reduce the volume of smaller contracts subject to DBRA requirements while assuring that larger publicly-funded projects contain necessary labor standards protections. Simplifying recordkeeping requirements and reducing reporting burdens would further reduce contractor costs on publicly-funded projects, thereby lowering funding requirements and possibly encouraging more competition. The Administration and Congress should work together to bring about balanced reform of the Davis-Bacon and Related Acts.

Occupational Safety and Health Act

The Occupational Safety and Health Act of 1970 (OSH Act) grants the Occupational Safety and Health Administration (OSHA) broad authority to protect the safety and health of American workers. OSHA's authority extends to private sector employers with one or more employees. The OSH Act requires OSHA to establish workplace safety and health standards, conduct inspections, enforce the standards, issue citations and propose monetary penalties for violations. OSHA is also authorized to provide training, education and information, and to encourage cooperative programs with employers in order to reduce workplace hazards.

When OSHA was created in 1970, the Congress chose not to cover state and local government employees directly for several reasons. The Supreme Court had ruled, in cases involving other statutes, that the Federal Government had no authority to cover state and local government employees. Also, the philosophy of "states' rights" retained some influence in the Congress, preventing enactment of laws regulating many state activities directly. Despite these concerns, the Congress considered it important to extend protection to state and local employees. As part of a compromise giving states a role in occupational safety and health, states were given the option of voluntarily choosing to adopt an OSHA program for private and public sector workers. Since 1970, twenty-five states or jurisdictions have chosen to operate OSHA programs. Two states -- New York and Connecticut -- operate plans covering only their public employees.

Since only about one-half of the states participate, approximately 7 million public employees have no federal or state safety and health protection. ACIR recognizes that this is a problem. Public employees are not second-class citizens. They perform dangerous tasks (such as firefighting and hazardous waste removal) and deserve the same protection as workers in the private sector. A list of public employees killed on the job, which was submitted by the American Federation of State, County, and Municipal Employees (AFL-CIO) to the Senate Labor and Human Resources Committee in 1992, described some of the hazards faced by public sector workers. Among the dangers causing death were asbestos-related disease, electrocutions, crushing accidents from crane booms, and suffocation in confined spaces.

A most graphic example of the serious hazards often faced by public employees was provided in testimony before a Senate Labor Subcommittee by Amy Delguzzo, who described her father's agonizing death after a trench collapsed as he was fixing an underground pipe leak. Her father, an employee of the city of Madeira, Ohio, was trapped under layers of dirt for 20 minutes before rescue workers could set him free. He was revived and taken to a local hospital where he died. Sadly, this worker's death could have been prevented if proper trenching safety practices had been following by the city. However, Mr. Delguzzo's employer, a public entity, had no legal obligation to comply with these rules.

Benefits and Concerns

There are significant benefits when states adopt plans to protect their workers. Public employees have the right to safe and healthful workplaces and the right to have a government agency which protects worker safety and health. State and local employers may realize lower workers compensation costs, increased productivity from their workers, less property damage and fewer interruptions in work from accidents. According to the National Safety Council, the public sector accounts for 16 percent of all costs associated with workplace deaths and injuries. Removing unsafe work conditions for state and local employees may also protect the public since all those who enter public buildings are also exposed to hazards present in such worksites.

Protection of public employees is not an unfunded mandate; it is a moral obligation for all employers. Federal OSHA pays 50 percent of the costs to the 25 states which already cover their workers voluntarily. Providing safety and health protection to workers is a responsibility assumed by all private employers in this Nation as well as one-half of the states.

Concerns of State and local governments include:

- There is widespread misunderstanding as to what is required by OSHA and what is required by state and local governments.

- There is a lack of understanding of the rationale and basis for safety and health standards. The program's rules are perceived as being rigid and burdensome (especially record-keeping or reporting requirements).

- There is a perception that the program is more focused on punitive measures than compliance assistance.

- More federal money is needed for state safety and health programs.

Innovations to Mitigate Burdens

A number of states have protected public employees for almost twenty-five years. There has been no outcry about the costs of protecting their workers; when states or localities experience financial difficulty in complying with OSHA standards, state OSHA programs allow flexible compliance periods or alternative, less costly ways of protecting workers. A number of states have even adopted penalty systems for their public employee programs although OSHA does not require this feature of the federal program.

OSHA allows states which provide public employee coverage to design their own programs. As long as they are at least as effective as Federal OSHA, they do not have to be an exact replica. For instance, states are allowed to establish their own safety and health standards to deal with situations unique to their workplaces. Secretary of Labor Reich has emphasized that it is important to consider the impact on states and municipalities of maintaining a program as well as correcting hazards found in public workplaces. The Secretary recommended a phase-in period for coverage of all public employees to give the states time to make changes necessary to comply with OSHA. The delay would take into consideration the legislative calendars for the states initiating coverage in the future.[6]

Recommendation

To ensure that public sector workers are adequately protected, ACIR recommends that existing state OSHA programs continue to cover their public employees with substantial financial assistance from the Federal Government. ACIR also recommends that public employees in the remaining states be covered. This could be accomplished in either of two ways: by covering the public

[6] Testimony before the House Education and Labor Committee, February 10, 1994.

sector directly, as provided in bills considered by the 103rd and 104th Congresses;[7] or, by encouraging states to adopt programs for public employees under section 18 of the OSH Act. ACIR recommends that, in the future, all states which adopt a program to protect public employees be allowed a lengthy phase-in period.

[7]H.R. 1280 & S.575, 103rd Congress; S. 1423 & H.R. 1834, 104th Congress (all expand OSHA coverage to state and local employees). See also H.R. 1834, 104th Congress (expands OSHA coverage to federal employees). There was bipartisan support for expansion). Thus, both the 103rd and 104th Congresses expressed support for direct coverage of some or all public employees. There was general recognition that public employees should be covered directly because the approach to federal employee coverage by Executive Order in the OSH Act does not provide adequate protection.

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TOO MUCH
HIST, NOT
UNST IMPACTS.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF REGIONAL OPERATIONS
AND STATE/LOCAL RELATIONS

April 23, 1996

MEMORANDUM

SUBJECT: **ACIR Report -- Rewrite pages 1-6**

FROM: for **Shelley H. Metzenbaum** Anna Raymond
Associate Administrator

TO: **Interested Parties**
Federal Agencies
(See distribution)

Attached is a draft rewrite of the first six pages of the ACIR Report. Please have the appropriate individuals within your agency review carefully **ASAP** and contact Anna Raymond (260-0421) of my office by Thursday, April 25th with your comments. Please pay especially close attention to the Common Issues section, because it includes recommendations. We have promised ACIR to have this to them by Friday, April 26th, since they have already started the rewrite of the report.

We have also included a copy of proposed changes to one of EPA's specific mandate reviews. It is our understanding from ACIR staff they do not plan a separate summary and staff report on each mandate, but, rather will combine them. Accordingly, we have drafted proposed alternative language for each of our mandates as one section, using the following outline:

1) Overview of existing statute
2) Reasons for mandate
3) Benefits and concern with mandate
4) Corrections made to address problem
5) Recommendation

Attachments (2)
Introduction
Safe Drinking Water Act

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DRAFT

INTRODUCTION

The Unfunded Mandates Reform Act of 1995 (P.L. 104-4) represents a bipartisan agreement to strengthen the partnership between the federal Government and state, local and tribal governments. (NB: This language comes from the introductory paragraph of Public Law 104-4). To this end, Section 302 of the law directs the Advisory Commission on Intergovernmental Relations (ACIR) "to investigate and review the role of federal mandates in intergovernmental relations," balancing consideration of the impact of mandates on state, local, tribal and federal government objectives and responsibilities, the competitive balance between governments and the private sector and impacts on working men and women. The law also directs the ACIR to make recommendations to the President and the Congress as to appropriate relief from certain requirements of federal mandates for state, local and tribal governments aimed at facilitating their overall compliance with mandates while mitigating any resulting burdens on the private sector. Such relief includes flexibility in complying with rigid and complex federal mandates, reconciling inconsistent requirements, consolidating reporting requirements, establishing common terms of compliance, temporarily suspending certain non-critical mandates on fiscal grounds, and terminating mandates in cases of duplication, obsolescence or lack of utility.

Due to resource constraints, the ACIR was unable to complete the level of investigation envisioned by Section 302 of the law. In particular, the ACIR did not look at the competitive balance between governments and the private sector or impacts of mandates on working men and women.[1] Moreover, the detailed comparative analysis of mandates that would be necessary to make the kind of recommendations called for in the Unfunded Mandates Reform Act was beyond the resources of the ACIR. In this preliminary report, the ACIR instead proposes for public review and comment recommended changes in federal policies to improve intergovernmental relations while maintaining a commitment to national interests based largely on concerns raised by a relatively small number of state and local officials. The ACIR recognizes that these recommendations may therefore reflect a bias in favor of resource savings for state and local governments without giving full consideration to impacts on federal objectives and responsibilities, additional costs and burdens on the private sector or the affect on working men and women of implementing these recommendations. For this reason, these recommendations should serve the narrower purpose of identifying mandates of concern to state and local governments for more detailed investigation and follow-up recommendations as envisioned by the Unfunded Mandates Reform Act.

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[1]Due to resource constraints, ACIR was also unable to complete several reports required by other sections of the Unfunded Mandates Reform Act (UMRA). UMRA charges ACIR with completing four separate reports in fiscal year 1996. Financial constraints made it necessary for the ACIR to limit its attention to one report on the role of federal mandates. It was not possible to complete reports on 1995 court rulings, the effects of state mandates, or the feasibility of estimating baseline mandate costs and benefits as required by UMRA.

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DETERMINING THE APPROPRIATE FEDERAL ROLE

The American experiment with federalism was unique at its inception. When the Constitutional Convention met in Philadelphia in 1787, models for strong central governments existed, as did examples of confederations, consortia of independent governments agreeing to act together without creation of a national government. Federalist governments, however, were unknown in practice until the U.S. Constitution set forth the plan for this new model of government.

From the beginning of U.S. history, debate has raged about the meaning of a federal union among the states, and more specifically, about the appropriate roles of federal versus state or local governments. James Madison said during the drafting of the Constitution that it was "neither a national nor a federal constitution but a composition of both."[Check with Congressman Portman for citation.] A half century later, ambiguity remained. In the 1830's, de Tocqueville observed, "American government is no longer a federal government, but an incomplete national government". [Check with Congressman Portman for citation.] The United States has continued to define and refine how federalism can best work in a changing world. In *Garcia v. San Antonio Metropolitan Transit Authority (1985)*, the Supreme Court recognized that clear lines defining the appropriate scope of federal activities could not be drawn. Instead, the Court decided that it is the function of the federal legislative process to balance debate among democratically elected representatives of the people to determine the precise scope of national authority over state and local governments. Indeed, it has never been possible to sort out the balance between the Constitutional partners in a rational way that would prevail under all or even most circumstances.

James Madison, in Federalist Paper No. 51, described the value of the ambiguity. It served as protection for the citizens of the United States against the potential dangers of a too-powerful government. Madison wrote:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Madison also explained how the federalist system works to protect minority rights:

> It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens....

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Today, the success of this intentional tension has led many nations to pattern their political system after the American federalist system.

Despite the difficulty of sorting out appropriate federal, state, and local roles in theory, in practice such deliberations are made on a daily basis. Historically, the American people have determined that some activities are so important to national interests that a federal role is generally accepted as necessary. Among the most obvious is legislation protecting civil rights granted by the Constitution. In an earlier period, the economic emergency of the 1930's produced federal programs to alleviate national economic and social problems. In other instances, national policy is necessary because problems transcend state lines such as when dirty air or water from one state intrude on another state. As a result, some federal government mandates on state and local governments are recognized as an essential feature of the U.S. federal system.

Over time, a wide variety of circumstances have come to be recognized as justifying a national interest or federal action on an issue. These include:

- National defense and foreign affairs. The federal government is in a unique position to defend and represent the interests of the country as a whole.
- Civil rights. The Constitution and Bill of Rights guarantee to every U.S. citizen their civil rights. Federal laws and standards are passed as needed to implement those rights.
- Spillover effects crossing political jurisdictions. Actions taken in one state may result in costs and consequences in another. Federal and state laws are passed to prevent interjurisdictional spillover or to create a mechanism to compensate those who experience the consequences.
- Spillover effects from a business to the community. Federal laws are established to "internalize" costs that a single source generates but others, often the surrounding community, has to pay. Mandates on littering, wastewater, and airplane safety standards fall into this category. By establishing mandated standards or charges, the private generators of costs begin to absorb the costs they create. This creates market incentives that encourage development of innovative, lower cost approaches to deal with the costs as part of everyday investment and trading decisions. Standards can and are established at the federal, state, or local level. Federal standards are more appropriate in some cases depending on the nature and dispensation of the problem and of the industry.
- Preventing destructive interstate competition. State and local governments frequently compete with one another to attract business, tourism, and residents. Competition is and

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can be a healthy dynamic encouraging innovation, good management, and improved service delivery. It can also lead to destructive competition, with governments compelled to subsidize costs or cut services below levels that are in the best interest of the jurisdiction and its residents. Federal and state laws are adopted that establish a minimum set of standards below which states cannot compete.

- Minimum standards. Americans have been blessed with a standard of living higher than enjoyed in many parts of the world. Those who work, live, and travel in the United States assume and count on certain minimum standards associated with that standard of living. Federal laws have been adopted to ensure minimum work, living, and travel conditions throughout the United States.
- Protecting the interests of future generations. Some federal mandates are established to protect minimum standards for future generations of Americans. The American economy thrives in part because the "invisible hand" of competitive market forces let people and businesses trade to improve their own well-being. Future generations cannot trade on their own behalf, so federal and state laws are adopted to protect minimum standards for future generations.
- Risk-sharing and spreading. Some costly events, such as flooding, hazardous spills, and high unemployment, may occur at unexpected times in different parts of the country. Federal laws are adopted to establish national insurance arrangements to protect those experiencing unanticipated hardship, where private insurance arrangements have not been able to address the problem.
- Promoting commerce through private economies of scale. Variation in standards across states can create additional costs or uncertainties for private firms. Federal standards can reduce costs for private firms in many ways. Some federal standards have been established because they reduce the costs to business of complying with 50 or more state (and local) standards by establishing a single national standard. Some federal standards provide certainty that allow business and others to make long-term investments that would be too costly in an uncertain climate.
- Promoting commerce through improved information. Federal mandates, such as nutrition labeling requirements, SEC reports, and safety warnings, ensure that the general public, employees, and businesses have reliable information to make wise purchasing and investment choices. Because the industries operate on a national scale, national regulation is often a more efficient, common-sense approach for accomplishing the task.
- Serving a transient population Some programs, such as social security, serve people over their lifetime regardless of where they live. Federal laws and standards make it possible to serve a transient population regardless of their residence.
- Global representation. Increasingly international markets may necessitate federal action, especially when and where other countries are directly engaged in commerce.
- Evaluation. Justice Louis Brandeis described the states as the "laboratories of democracy." Accurate analysis of the experiments taking place in the laboratories requires that data from these experiments be accurately and consistently reported. Federal laws are adopted to ensure reporting of consistent data across the country so that evaluation of different public policies is possible, helping states and localities make

informed policy choices.

Federal laws are adopted for a wide variety of reasons, some of which are listed here, to serve the well-being of the people of the United States. How the laws are structured will vary. Some federal laws set standards or provides services or tax individuals or corporations directly; some laws are structured so states or occasionally local governments may opt whether or not to run a program and incorporate provisions of federal laws or let the federal government run the program in the state; some federal laws set standards that state and local governments as service providers, employers, or businesses must meet.

The challenge facing the federal government is to exercise its power and ability to resolve national needs while, at the same time, honoring state and local rights to govern their own affairs. The challenge is to capture for American citizens the economic and social advantages possible from actions at a national level without impairing innovation, adaptation, citizen engagement, and the sense of accountability to the people that can be much more vibrant at the local level.

The wide diversity of federal mandates makes it difficult to establish uniform ways to determine whether a mandate is proper or improper from an intergovernmental perspective, and if proper, if it is designed in the most appropriate manner. Nevertheless, analysis can help establish a clearer conceptual framework for thinking about the role of federal mandates. The ACIR has, through this report, attempted to contribute to that analysis by looking in depth at 14 federal mandates identified as being problematic by state and local governments.

THE ACIR REVIEW OF EXISTING MANDATES

As required under Title III, Section 302 of the *Unfunded Mandates Reform Act*, the ACIR initiated an investigation and review of the role of federal mandates in intergovernmental relations. The ACIR began its review process by drafting a number of criteria intended to assist the Commission in identifying mandates that are candidates for evaluation. The Commission's decision on which mandates to review were based on formulation of a set of criteria capable of meeting the following objectives:

(1) providing a basis for identifying mandates of significant concern; and

(2) providing a basis for formulating recommendations to retain, modify, suspend, or terminate specific mandates that are of concern.

The proposed draft criteria were published by the ACIR in the Federal Register in May 1995, so as to obtain public comment on their ability to fulfill these objectives. The ACIR met with or received correspondence from over 200 individuals or organizations, many from federal, state, local and tribal agencies and their constituency organizations. The criteria were modified in response to several received comments. For example, the criteria were revised to ensure that the analysis would look at the beneficial aspects of mandates and the reason for their adoption. Final criteria were published in the Federal Register (July 6, 1995). The full set of criteria can be found in Appendix B.

The ACIR next attempted to identify the universe of specific federal mandates to which the criteria could be applied. Information about mandates and their relation to the criteria were solicited from state, local and tribal governments, federal agencies, constituency organizations, and the public. To encourage receipt of broad and diverse points-of-view on the issue of federal mandates, the ACIR used several communication strategies, including reliance on several organizations other than the ACIR to solicit comments. These included:

- Publication of a Federal Register notice (citation), which elicited ___ comments, ___% of which were from individual state, local and tribal governments and their constituency organizations.
- A solicitation by the National Governors Association to each governor's office to list mandates of most concern in their state.
- A general appeal made in magazines and newsletters of national and state groups representing state and local governments (e.g., sample names of magazines).
- A survey of small rural governments conducted by the National Rural Development Partnership (from which ___ responses were received).
- Solicitation of state and local government officials attending national meetings (e.g., cite several conferences)
- An ACIR sponsored conference in March of 1996 in Washington, D.C., titled "Lightening the Load" (note: could cite registration and attendance figures and how many from "outside beltway")

Through these and other means, over the course of a (span of time from beginning of solicitation to end of comment period - 9 month period?), comments were received from over half the states, eight municipal leagues, four state associations of counties, national associations representing state and local governments and their officials, and from a variety of local government officials (note: recommend adding an appendix or table, cataloguing responses received, by type. If tabulated by sub-category, lists need not provide for mutually exclusive categories, as double entries might be appropriate and easier to report).

Although ACIR had hoped to prepare an information system to assist in the organization of comments, resources prohibited the systematic tracking and summary of the received comments.

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The _#_ comments to the ACIR and other sources reviewed by Commission staff identified over 177 separate Acts of Congress with mandate provisions meeting one or more of the specified criteria (note: recommend adding appendix listing 100/200+ mandates). The nature of the concerns identified by the criteria served to illustrate the diverse, complex, and challenging aspects in sorting out the role of federal mandates in the intergovernmental system. Constrained by time and resources, the ACIR elected to narrow the focus of its task of developing recommendations to a smaller, more manageable number of the federal mandates for closer inspection. The selection of this smaller set of mandates by the ACIR was based on the following materials:

(1) The preponderance of communications identifying the mandates as troubling to state and local governments. (Is this true?/Are we describing it right?/Can ACIR staff verify this?);

(2) The significance and diversity of issues posed for intergovernmental relations; and

(3) The criteria published by the Commission on July 6, 1995.

[Note: if we cannot document and describe methodology for narrowing then just say we narrowed to 14 to simplify analysis but not claim any special characteristics attributed to these 14.]

The *Unfunded Mandates Reform Act* also includes several other features deemed important by Congress in selecting mandates for review, and making recommendations. In Section 302(e), the Act requires that the ACIR give "highest priority" to federal mandates "that are the subject of judicial proceedings between the United States and a state, local or tribal government." This level of analysis was not possible. In addition, due to limited time and resources, the ACIR was forced to rely primarily on comments and the Commission staff to assist in identifying these mandates. To the extent comments on these type of mandates were not received, there could be several unintended omissions from the condensed list. Moreover, more thorough analysis was needed to verify and clarify some of the issues raised, especially since preliminary follow-up suggested so many of the problems cited arose from mis-understandings and misconceptions about what the laws and federal agencies actually required.

The ACIR staff focused on a selected set of Federal mandates to form the basis for recommendation to Congress and the President. Although substantial constraints on time and resources limited the number of mandates analyzed and the quality of the analysis possible even on the limited number, the Commission believes that all Federal mandates could benefit from the evaluation originally conceived by Congress that looks more fully at the role of federal mandates in intergovernmental relations and the specific questions set forth in Section 302(a)(3) of the Unfunded Mandates Reform Act.

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COMMON ISSUES

ACIR's review of existing mandates found a number of common issues complicating intergovernmental relations. These issues and the ACIR's proposed recommendations to address them include:

1. **Confusion and misinformation can create perceptions of rigidity that do not exist.** The ACIR analysis revealed how frequently misunderstanding and misinformation about federal mandates create a perception of problems that do not exist. For example, while state participation in the federal Occupational Safety and Health Act is completely voluntary, some commentors erroneously believed it to be a federal mandate. *The federal government should have an easily identified state and local government ombudsman or network of ombudsman who can answer questions and clarify confusion about what federal laws require of states and localities. The federal government should make an effort to make the list of ombudsmen readily available to state and local governments throughout the country.*

2. **Good communication is essential to good intergovernmental relations.** There are large gaps in information about the details of some federal laws and the assistance available to comply with it. Often, educational and technical resources exist in the federal government, state governments, non-profit service agencies and private for-profit legal and technical consultants to help local governments comply with federal laws, but the local governments are not aware of the availability of these resources. *When federal laws and standards are established, Congress should support both through authorization and appropriation the dissemination of information to state, local, and tribal governments about what the standards are and options for implementation.*

3. **Frustration for local governments can be exacerbated by the difficulty of sorting out federal requirements and state requirements.** Some mandates identified as problematic by local governments were in fact state, not federal, mandates. Local governments noted that one problem they encounter in trying to deal with mandates is a lack of clarity in determining what is required by the federal government and what is required by the state government. This lack of clarity can be exacerbated by actual or apparent inconsistencies in what the two governments require. It can be further exacerbated if an individual state or federal official does not try to help the local official find an answer to the question or a resolution of the problem, but instead doesn't answer the question, refers it to the wrong office, or even tries to identify another government office as being the problem. *State governments should have an easily identified local government ombudsman or network of ombudsman who can answer questions and clarify confusion about the what state laws require of localities. The state government should make an effort to make the list of ombudsmen readily available to local governments throughout the country. Both state and federal governments should make an effort to build strong links between the federal and state "local government ombudsmen." Also, federal and state government ombudsmen in each policy area should meet regularly with local governments in each state to develop clearer lines of communication.*

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4. Fear of retaliation can inhibit local government efforts to seek clarifying information from federal or state governments. Some local governments expressed reluctance to contact federal or state regulatory agencies to seek clarification about compliance requirements, for fear that the call would identify them as being in non-compliance and lead to enforcement actions. Many federal and state agencies, including OSHA, EPA, and several state pollution prevention offices have programs and policies that allow local governments and small businesses to request assistance without fear of follow-up enforcement actions. *Federal and state regulatory agencies should develop policies that allow local governments to ask questions and seek and receive technical assistance without fear of "retaliation", so long as the local government is making a good faith effort to comply with the law.*

5. Inflexibility may be created by the way a law is implemented, rather than the way it is written. Some of the problems identified to the ACIR may arise because of the way federal agencies or even individual officials choose to interpret the laws. *Federal agencies and officials should interpret laws in common sense ways, focusing on the result intended when the a federal mandate was established but allowing flexible methods for achieving those results.*

6. Conversely, too much flexibility may also create problems in program implementation. Federal regulation and guidance that specify certain methods can reduce costs of compliance, especially for smaller communities, because they can save communities the cost of developing individual approaches for addressing their problems. Furthermore, differences in the implementation of federal mandates across the country can create inequities across communities and across companies operating in different jurisdictions. It may also make enforcement more difficult. *Wherever possible, mandates should be results oriented rather than process oriented. At the same time, federal and state agencies should consider "default recommendations" that allow communities the option of using a standardized approach and saving the costs of local design and adaptation.*

7. Detailed procedural requirements. Detailed procedural requirements that do not permit flexibility in meeting national goals in ways best adapted to state and local needs and resources can be very frustrating. The imposition of exact standards or detailed requirements can result in unnecessary cost increases and delay achievement of national goals. *In general, state and local governments should be permitted flexibility in choosing the methods they adopt to comply with a mandate.*

8. Unnecessary paperwork. Reporting local activities and results to a national data base can prove an invaluable resource helping federal, state, and local governments evaluate program effectiveness, compare policy alternatives, and identify problems of non-compliance. Where federal funds are involved, it can also ensure fiscal accountability to the taxpayer. It can, however, result in excessive paperwork demands on local governments. The Clinton Administration, in [ ], initiated a review of federal reporting requirements to identify and implement opportunities to reduce unnecessary reporting. *The federal government should continue its effort to work with state and local governments to review and streamline reporting*

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requirements.

9. Incentives to ensure attention to state and local government costs. Prior to passage of the Unfunded Mandates Reform Act, when the federal government established mandates that imposed costs on other governments without providing federal funds, the magnitude of the costs was not always considered. If the federal government has no financial obligation, it has little incentive to try to control costs on state and local governments as co-implementers of national standards. *The federal government should implement fully the Unfunded Mandates Reform Act and the requirements that costs borne by state, local, and tribal governments be given full consideration in the development of new laws and regulations.*

[**Alternative language/closer to original ACIR staff recommendation:** *When state and local governments are co-implementers of national standards, the federal government should assume some share of mandate costs as an incentive to encourage federal attention to controlling costs in most cases. Exceptions to this would include cases where costs are created by those regulated locally, so that the need to create an incentive on those generating the costs dominate the value of a federal cost-control incentive, and cases where state or local government manage activities being affected by the standards, and federal subsidies will distort local incentives for improved management and innovation.*]

10. Accountability of state and local elected officials undervalued by federal government processes. State governments often are treated as just another interest group, as private entities, or as administrative arms of the federal government, not as sovereign governments with powers that derive from the U.S. Constitution. Local governments, despite the important role they play in delivering government services, have been given even less consideration. Tribal governments, too, are often treated as another interest group when their interests are addressed at all, rather than as sovereign nations with whom the United States government has treaty and trust agreements. This problem was exacerbated by overly narrow interpretations of the Federal Advisory Committee Act recently corrected by the UMRA. *Federal policy debate and the resultant laws should recognize that state, local, and many tribal governments are often co-implementers of federal regulations who, in contrast to all other interest groups, are led by elected officials who must account to their voters for their actions just as must the President and Members of the Congress.*

12. Inability of very small governments to meet mandate standards and timetables. The requirements of many federal mandates are based on the assumption that all local governments have the financial, administrative, and technical resources that exist in large governments. Many very small governments have only part-time staffs with little technical capability and very limited resource bases. Several federal agencies and federal laws incorporate provisions that allow extension of deadlines and modification of requirements for very small governments where minimal adverse effects on the achievement of national goals are expected. *Deadlines should be extended and requirements modified for very small local governments that cannot afford timely compliance with national standards. Where national standards that can affect the health or* *safety of visitors to a community are not being met, visitors should be notified.*

13. Models of flexibility worthy of further examination and replication. Federal, state, and local governments have been experimenting with many models for implementing national standards with increased flexibility. These warrant further examination for replication. *An intergovernmental effort should be undertaken to document, examine, and evaluate models that allow the citizens of the country to realize the value of national standards and flexible local implementation.*

14. Delays in compliance may drive costs of compliance up. State and local political processes can result in delays in addressing serious local problems and complying with reasonable national standards, ultimately leading to higher costs for citizens. Federal and state standards can serve as the needed external event that finally brings the relevant local parties to the table to negotiate the necessary action. *State and local governments should take advantage of the presence of federal (or state) standards for bringing critical players to the table in a timely manner to negotiate strategies for addressing local problems. The federal government should try to implement its laws in a manner that respects this dynamic relationship.*

*****

Many of the recommendations suggested here for addressing the common issues are being carried out by some federal agencies, as well as state and local governments. As is apparent from the comments received by the ACIR in the preparation of the report, however, more widespread adoption of the suggestions made here is advised.

RECOMMENDATIONS ON INDIVIDUAL MANDATES

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Staff Report -- The Safe Drinking Water Act

The Safe Drinking Water Act (SDWA) regulates drinking water for the roughly 58,000 community water systems (as well as providing lesser requirements for the additional 140,000 non-community water systems such as restaurants, campgrounds, churches, schools and factories) serving 25 or more persons on a regular basis. Approximately 37,000 of these systems serve less than 500 customers. The nearly 16,000 systems that are privately-owned range from trailer parks and homeowner associations, whose primary business is other than providing drinking water, to investor-owned water systems closely regulated by state utility commissions. 82 percent of systems in urban areas are publicly-owned.

SDWA was originally enacted in 1974 and amended in 1986. It directs the U.S. Environmental Protection Agency (EPA) to establish maximum levels for chemical, radiological and microbiological contaminants in public water systems, water testing and (for a few contaminants) specific treatment requirements, procedures for states to become primary implementation authorities for the Act and provides for enforcement and public notification. It sets a wide range of responsibilities for states and drinking water suppliers.

Why the Mandate was Adopted

Prior to 1974, states were responsible for ensuring drinking water safety, generally relying on voluntary standards set by the PHS. Congress adopted the SDWA in 1974 in response to a number of serious concerns that had been documented over the previous several years in studies of the U.S. Public Health Service (PHS).

A key PHS study cited in the congressional Committee reports found that only 10-15% of water systems conducted adequate testing for basic microbiological safety; that one-third of systems that tested found contamination exceeding the PHS limits; and that 56% of systems had physical deficiencies that could seriously affect safety. Small systems' lack of economies of scale was repeatedly noted as a major source of water safety vulnerability. An earlier PHS had noted that many of its drinking water standards were based on insufficient data, did not cover many known contaminants, and that new contaminants -- particularly organic chemicals with potentially carcinogenic effects -- were occurring in drinking water and could require regulation.

Thus, Congress decided in passing SDWA in 1974 that the lack of national requirements meant that the status quo was entirely inadequate to assure safe drinking water to the American people. Unsafe drinking water endangers both the residents of a local community and state and interstate travelers and interstate commerce, and is at odds with the American people' fair

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mandatory duty simply, on a regular basis, to examine the health effects and occurrence of a minimum number of contaminants, decide whether or not those contaminants warrant regulation based on that scientific examination, and regulate only those that do.

In addition, the current law's focus on affordable and available treatment technologies in setting standards does not allow flexibility to ensure that potentially-costly future regulations are also "worth it" in the degree of risk reduction they provide. A recent Congressional Budget Office (CBO) report found that costs per cancer case avoided for different contaminants currently regulated, averaged for all water systems, varied between $0.5 million to $4.3 billion. These are typically not treatment costs actually incurred, meaning "the high cost per cancer case avoided [is] ... the result of the extremely small number of cases avoided." Thus, the CBO also reported, "available data do not indicate that [SDWA] has imposed high costs on most households[,] ... [the] Act currently places a small fiscal burden on most municipalities," and that "$1.4 billion to $2.3 billion per year should be viewed as a range of estimates of the total cost that water systems will bear to comply with SDWA regulations that went beyond pre-SDWA standards."

However, the possible high cost of future regulations does suggest the potential value of having flexibility to examine and consider benefits and costs in selecting contaminants to regulate and in setting standards. EPA regulation and implementation requirements should focus efforts on the highest priority threats to public health, and encourage more cost-effective measures to gain the greatest risk reduction for drinking water dollars invested. Where the current law is too rigid to allow such important flexibilities, state and local officials believe it should be amended to provide for them.

A third area of concern has been the lack of federal financial assistance for compliance given the cost burden imposed by SDWA mandates, particularly for small systems. While over $16 billion in grants and loans have been provided for rural water supply infrastructure through the Department of Agriculture, SDWA contains no authority for financial assistance to systems to aid with these compliance costs.

Innovations to Reduce the Mandate Burden: Progress to Date

In addition to the issues described above, some have raised other areas of concern for which appropriate, consensus remedies have already been identified in the congressional discussions over SDWA reauthorization, or in the EPA Safe Drinking Water program Redirection initiative. This initiative was undertaken beginning in October 1994 to explore ways in which the authority of the existing SDWA could allow the EPA to set more risk-based, cost-effective, flexible priorities for the drinking water

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expectation that tap water anywhere in American should be safe to drink. Thus, there is an enduring national interest in ensuring safe drinking water.

Benefits of and Concerns About the Mandate

In contrast with the record of limited compliance with the 21 voluntary PHS standards that led Congress to pass SDWA in 1974, today about 70 percent of systems comply fully with generally more protective standards for over 80 contaminants. Full implementation of surface water filtration requirements will prevent an estimated 83,000 cases of illness annually; of lead abatement requirements, will protect an estimated 600,000 children from unsafe levels of lead in their blood. Additional safeguards now under development are needed to prevent harm from contaminants such as cryptosporidium, the microbe that caused an estimated 400,000 cases of illness and 100 deaths in Milwaukee in 1993.

In 1986, Congress amended SDWA to identify 83 specific contaminants (61 not previously regulated) for which EPA was to set standards, and required that 25 additional contaminants be regulated every three years. And, it mandated EPA regulations governing filtration for surface water supplies and disinfection for all systems (both surface and ground water).

State and local concerns over the Safe Drinking Water Act focus on three principal issues. First, SDWA does not effectively address the high per capita costs sometimes faced by small systems because of their limitations in achieving economies of scale. While SDWA properly looks to the capability of the larger systems, which serve 80% of more of the American people on public water supplies, in defining what level of protection is affordable nationally, it lacks adequate implementation flexibility for small systems. In some instances, tests that have nominal costs per customer for large systems are extremely costly per customer for small systems. While variances and exemptions are permitted under some circumstances, the procedures and requirements to obtain them may be unworkable. It is also important to establish a more coherent and effective means to identify and target technical assistance to those small systems most in need of assistance to comply.

A second area of concern is standard-setting: how contaminants are selected for regulation, and how they are regulated once selected. Current law requires EPA to select and regulate 25 new contaminants every 3 years, regardless of whether or not so many contaminants actually present a health risk that warrants regulating, and regardless of whether scientific data or EPA resources clearly support all such regulations. Instead of the current law's mandatory duty to regulate, EPA should have a

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program.

MCLs as Performance Standards: For example, one concern voiced is to revise SDWA so that compliance with maximum contaminant levels is based on performance not process. In fact, this is already the case. Systems whose finished water (that is, water within their distribution lines) violates an MCL need simply use whatever technology or other means their state will accept to bring their finished water quality into compliance with the MCL (the standard). Neither SDWA nor EPA's regulations require a system to use any specified technology to meet a MCL.

There have been two problems with MCL compliance in practice. One is that, for some contaminants, there is no technology or other means that many smaller water systems can afford that will treat their water to comply with the MCL. This problem is well-known, well understood, and appropriately addressed by providing new affordability variances, as in all three SDWA bills passed by either House of Congress to date.

The second problem is much less known. EPA must (under SDWA) set the MCL by reference to affordable, available technology that comes as close as feasible to the level at which there is "no adverse health effect." While the MCL that results is a numerical performance standard, many states have been unwilling to allow systems to use a different (or packaged rather than custom-engineered) technology than the technology that is the reference point for the MCL. This does not arise from a lack of state flexibility in implementing the law but results from an understandable state reluctance to approve technologies that may lack an extensive track record guaranteeing that systems using them would come into compliance with the MCL. The remedy is the provision in all relevant SDWA bills requiring EPA to list a range of technologies enabling states to presume that a system's use of such technologies will allow it to meet the MCL.

The Good Science Basis for Surface Water Filtration: Some of the more emphatic concerns voiced about SDWA relate to the Surface Water Treatment Rule (SWTR), which requires filtration for all surface waters whose sources are not clean and demonstrably free of the indirect indicators of microbial contamination, and of conditions that would tend to produce such contamination. The concerns are that the costs of filtration in such cases may be substantial and risks may seem relatively low because there may not always be direct evidence of specific existing and measurable contamination. While these concerns may seem troubling, the SWTR is based in sound science and well-established knowledge and practice in public health and sanitary engineering.

The SDWA allows EPA to prescribe a mandatory treatment technique, such as filtration, rather than a performance standard MCL, where it would be "technically or economically infeasible to measure the level of a contaminant." This is the case with microbial contaminants (such as giardia or cryptosporidium), which can be

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dangerous in any concentration and which (unlike most chemical or radiological contaminants) do not tend to dilute relatively evenly in surface water supplies. A system might sample uneconomically large quantities of water, find no waterborne diseases, and still not be able scientifically to be confident that diseases which would pose a serious threat to public health were not present. Thus, because of the nature and unpredictable occurrence of microbial contamination, the fact that samples may be free of direct contamination does not mean, scientifically, that the water is reasonably safe from that contamination where other, related conditions that show safety are not also present.

This is a widely accepted policy in the states and the drinking water and public health professions. Thirty states required filtration for all surface water systems even before the SWTR was promulgated. The American Water Works Association, the water industry's professional organization, has had a policy for three decades that water systems should filter all surface water supplies, without any exception -- even when source waters are well protected. The states and EPA have granted such exceptions to over 140 systems nationally. The late Abel Wolman, a pioneering sanitary engineer and for over six decades the dean of American water supply professionals, long urged surface water systems to use multiple barriers, in which they both protected source waters and filtered. Thus, EPA's allowance of filtration avoidance for source water protection is more lenient than the widely held view among sanitary engineers.

Nonetheless, some small water systems that lack economies of scale may well have difficulty affording filtration of surface water supplies. (It should be noted, however, that some of the claims of high filtration costs often inappropriately include high and unrelated costs of replacing worn out supply infrastructure.) Because surface water filtration is such a basic, essential health protection measure, EPA has advocated, and all three SDWA bills that passed the House or Senate have included, authorization of a State Revolving Loan Fund to help underwrite the cost of filtration, and provisions to authorize less costly, package filtration plants for small systems that states will accept in all cases, without custom engineering.

The challenge to which these measures respond is to find creative ways to afford the necessary level of protection consistent with the SWTR, not to provide less protection in this vital area. Indeed, protection of drinking water against microbial contamination is the most basic public health provision a water system can give its customers.

Water System Monitoring Requirements: While concerns have also been voiced that systems are forced unproductively to spend money on testing, which costs "do not improve water quality," this is true only in a literal sense. Tests of water quality do not literally "improve water quality" but simply tell what that quality is. But if systems do not adequately test the quality of

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their water, on what scientific basis can customers, state regulators, or the systems themselves be sufficiently confident that that water quality is safe? The burgeoning sales of bottled water, which a 1993 survey for the American Water Works Association identified as being about half motivated by concerns for drinking water safety, make complacency about consumer confidence and testing mistaken. Clearly, the appropriate issue for discussion in response to concerns about testing costs is, what constitutes "adequate" testing?

EPA has added testing waiver programs that states can adopt and which can cut testing costs by more than two-thirds. These waivers are given in situations where an anthropogenic (man-made) contaminant was never used in an area, or where hydrogeologic data shows that a system's water source is not vulnerable to contamination. Nearly all states have EPA-approved programs in place, and EPA has frequently given expedited, interim approval to allow many of these states to give systems waivers prior to full approval, specifically to address the cost concern.

However, EPA has recently recognized that even these waiver programs have their limitations. They are more resource-intensive to start than some states can afford without more federal aid, and gradual state implementation has not enabled all eligible systems to get the benefits of such waivers. Thus, as a part of its drinking water program redirection initiative, EPA has been framing and considering alternatives to reduce testing requirements for chemical contaminants (the source of greatest small system cost) to focus on those systems at risk of contamination, and on sampling to be done at the time of the water system's maximum vulnerability.

This approach can be flexible, cost-effective, responsible public health policy if tests are timed and located by good information to be properly indicative. Good information and good science are the foundation of responsible public policy.

<u>Recommendations</u>

Amendments recently approved by the Senate will revise some of the more inflexible provisions in current law, providing for important relief for small systems, risk-based priorities and cost-benefit flexibility in standard-setting, and more implementation authority for states, while retaining SDWA's priority on protecting public health. The Senate amendments also authorize funding for capitalization of state loan funds to reduce costs of compliance and to boost the capability of state drinking water programs, and allow some additional loan subsidies for hardship communities. The amendments thus address the leading concerns voiced by most state and local governments while retaining a baseline of federal standards that meet the justified

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Dan Chenok

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ADMINISTRATIVE MARKING ~~CONFIDENTIAL~~
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Sally —
Civil rights laws
— private right of action
— no mandates [illegible]
— held up [illegible]

The Role of FEDERAL MANDATES in Intergovernmental Relations

An ACIR Report
Based on Section 302, Public Law 104-4

July 1996
US Advisory Commission on Intergovernmental Relations
Washington, DC 20575

Preface

The *Unfunded Mandates Reform Act* (Public Law 104-4) directs the Advisory Commission on Intergovernmental Relations (ACIR) to conduct four studies: 1) a baseline study of costs and benefits related to federal mandates; 2) a review of federal mandates and their impact on intergovernmental relations; 3) a review of the role of unfunded state mandates imposed on local governments; and, 4) an annual review of federal court cases in which a state, local, or tribal government was a party and in which the court order expanded the duties of those governments. ACIR was directed to include in its studies consideration of the competitive balance between state, local, and tribal governments and the private sector and the views of working men and women.

The Commission was forced to limit the studies it conducted and to simplify work plans because only one-third of the $1 million authorized for the studies was appropriated to ACIR. No study funds were appropriated in Fiscal Year 1995 and $334,000 was appropriated for the studies in Fiscal Year 1996. With the available appropriations, ACIR contracted with George Washington University National Law Center for the production of a 1994 court rulings report. The report, *Federal Court Rulings Involving State, Local, and Tribal Governments, Calendar Year 1994*, was published in July 1995. ACIR also conducted a modified study of existing federal mandates and their impact on intergovernmental relations. In January 1996, ACIR released the preliminary report, *The Role of Federal Mandates in Intergovernmental Relations* for public comment.

After holding a "thinkers session" on options for conducting the baseline cost/benefit study, ACIR concluded that it did not have the resources to conduct such an analysis in a meaningful way. So, no further action was taken on this directive. Likewise, it was determined that insufficient resources were available to conduct a review of unfunded state mandates imposed on local governments. Lastly, no funds were available to complete the required second annual review of federal court cases imposing mandates on state, local, and tribal governments.

For its study on existing federal mandates, ACIR relied on information from various sources. In particular, ACIR used information from a National Governors' Association survey, a National Rural Development Partnership survey, and letters or telephone calls from state and local government officials and the general public. In addition, ACIR participated in numerous meetings with federal, state, and local officials and other parties interested in issues related to federal mandates. On March 6-7, 1996, ACIR held a national conference on mandates. On March 26, 1996, ACIR held a public hearing on the preliminary report in Washington, DC. Finally, the Commission solicited and accepted public comments on the preliminary report between January 17 and March 29, 1996. Sources

Over 500 public comments were received on the preliminary report, more than 40 persons submitted testimony during the public hearing, and over 250 persons participated in the conference on mandates. Both supporting and opposing comments were received on all 14 individual mandates discussed in the preliminary report. In addition, comments were received on mandates in general or on the six common issues mentioned in the report. Unfortunately, due to resource constraints, ACIR was unable to systematically solicit the views of working men and women on mandate issues as required by the *Unfunded Mandates Reform Act*. However, ACIR worked closely with Department of Labor staff on labor related mandates and did give full consideration to comments received from working men and women and labor organizations. Lack of resources also made it impossible for the Commission to analyze the relationship of federal mandates to the competitive balance between state, local, and tribal governments and the private sector.

This final report on existing federal mandates focuses on intergovernmental issues associated with federal mandates. The report discusses and makes recommendations on six common issues related to existing federal mandates and on 14 individual mandates selected by ACIR for specific review. The recommendations on both the common issues and the 14 individual mandates reviewed are based on material gathered during the production of the preliminary report and during the public comment period.

As directed by Section 302 of the *Unfunded Mandates Reform Act*, therefore, ACIR is hereby submitting its final report on existing federal mandates to the President and the Congress.

William F. Winter

Chairman

CONTENTS

Introduction ....

Changes in the Federal System ....

Definition of Mandate for ACIR Study Purposes ....

Determining the Appropriate Federal Role ....

Key Questions on Mandate Issues ....

The ACIR Review of Existing Mandates ....

Commission Action on the Preliminary Report ....

Public Comments and Testimony on Preliminary Report ....

Focus on Intergovernmental Issues ....

Common Issues: Discussion and Recommendations

1. Detailed procedural requirements ....
2. Lack of federal concern about mandate costs ....
3. Federal failure to recognize state and local governments as governments ....
4. Lawsuits by individuals against state / local governments to enforce federal laws ....
5. Inability of very small local governments to meet mandate standards and timetables ....
6. Insufficient communication / ineffective coordination on federal policies ....

Individual Mandates: Discussion and Recommendations ....

Fair Labor Standards Act ....

Family and Medical Leave Act ....

Occupational Safety and Health Act ....

Drug and Alcohol Testing of Commercial Drivers ....

Metric Conversion for Plans and Specifications ....

Medicaid: Boren Amendment ....

The Clean Water Act ....

Individuals with Disabilities Education Act ....

Americans with Disabilities Act ....

The Safe Drinking Water Act ....

Endangered Species Act ....

The Clean Air Act ....

Davis-Bacon Related Acts ....

Required Use of Recycled Crumb Rubber (Repealed) ....

The Future Actions Related to Federal Mandates in Intergovernmental Relations ....

Appendix A

ACIR Criteria for Review of Federal Mandates A-1

Criteria for Review of Federal Mandates A-2

Criteria for Identifying Mandates of Significant Concern A-3

Criteria for Formulating Recommendations A-4

Draft: May 30, 1996

ACIR REPORT ON FEDERAL MANDATES

Approved for Submission to the President and the Congress
by the US Advisory Commission on Intergovernmental Relations
_______, 1996

INTRODUCTION

The *Unfunded Mandates Reform Act of 1995* (P.L. 104-4) represents a bipartisan agreement to strengthen the partnership between the federal, state, local, and tribal governments. Section 302 of the law directs the Advisory Commission on Intergovernmental Relations (ACIR) "to investigate and review the role of federal mandates in intergovernmental relations" and to make a final report to the President and Congress on the findings, conclusions, and recommendations of the Commission. This report responds to the law's directive and presents ACIR's findings, conclusions, and recommendations for changes in existing federal mandates to improve intergovernmental relations while maintaining a commitment to national interests.

CHANGES IN THE FEDERAL SYSTEM

The mandate issues examined in this report arose in part because the American federal system is no longer characterized by clearly defined responsibilities for federal, state, and local governments. One result of this lack of defined roles has been increased federal involvement in activities historically considered to be state and local affairs. Often federal involvement began with financial aid to achieve national goals. In recent years, however, federal involvement sometimes has taken a variety of forms including direct orders with no federal financial assistance. The extensive and complex nature of federal involvement in state and local affairs is illustrated by the following points:

- More than 200 separate mandates were identified to ACIR by state and local governments, involving about 170 federal laws.
- The ACIR report *Federal Court Rulings Involving State, Local, and Tribal Governments: Calendar Year 1994*, identified 3,500 decisions involving state and local governments, relating to more than 100 federal laws.
- To receive any non-construction federal assistance, state and local officials must certify that they are in compliance with 27 specific federal laws, 5 executive orders, any nondiscrimination provisions in statutes related to the statute under which the federal assistance is being provided, and all applicable requirements of all other federal laws, executive orders, regulations, and policies governing the program under which federal assistance is being sought.

DEFINITION OF MANDATE FOR ACIR STUDY PURPOSES

Title III of the *Unfunded Mandates Reform Act* recognized the diverse nature of federal involvement in state and local government activities by broadly defining "mandate" for the purposes of ACIR's studies. Section 305 defines the term "federal mandate" for ACIR's purposes as "any provision in statute or regulation or any Federal court ruling that imposes an enforceable duty upon State, local, or tribal governments including a condition of Federal assistance or a duty arising from participation in a voluntary Federal program." [Underlining added.]

Section 4 of the *Unfunded Mandates Reform Act* excludes civil rights and other laws from certain aspects of the Act. These exclusions apply to "any provision in a bill, joint resolution, amendment, motion, or conference report before Congress and any provision in a proposed or final regulation." The exclusions relate to activities described in Title I regarding proposed legislation and in Title II regarding proposed and final regulations. The exclusions do not relate to ACIR's review of mandate provisions in existing federal statutes as required by Title III of the Act.

DETERMINING THE APPROPRIATE FEDERAL ROLE

From the beginning of US history, debate has raged about the meaning of a federal union among the states, and more specifically, about the appropriate roles of federal versus state or local governments. The United States has continued to define and redefine how federalism can best work in a changing world. In *Garcia* v. *San Antonio Metropolitan Transit Authority* (1985), the Supreme Court concluded that clear lines defining the appropriate scope of federal activities could not be drawn once for all times. In the court's opinion, the lines between federal, state, and local activities are developed through the political process and can be expected to change at different times in the nation's history.

At various points in our nation's history, the political process has determined which government activities are so important to national interests that a federal role is generally accepted as necessary. Among the most obvious are national defense, foreign affairs, and the protection of civil rights granted by the Constitution. In an earlier period, the economic emergency of the 1930s produced federal programs to alleviate national economic and social problems. In other instances, national policy is necessary because the problems transcend state lines, such as when dirty air or dirty water from one state intrude on another state. As a result, some federal government mandates on state and local governments are generally accepted as necessary.

The challenge facing the federal government is to exercise power to resolve national needs while, at the same time, honoring state and local governments' responsibility for their own affairs and their own budget priorities. The value of the ambiguity in the situation is to serve as a protection for the citizens of the United States against the potential dangers of a too-powerful central government. In Federalist Paper No. 51, James Madison wrote:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each. Hence a double security arises to

the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

KEY QUESTIONS ON MANDATE ISSUES

The wide diversity of federal mandates makes it difficult to establish uniform ways to determine whether a mandate is proper or improper from an intergovernmental perspective. Nevertheless. ACIR has been charged with making determinations about existing mandates as they affect state and local governments. In reaching its conclusions, the Commission considered several key questions:

- Does the national purpose justify federal involvement in state or local affairs?
- Are the costs of implementing the mandate appropriately shared among governments?
- Is maximum flexibility given to state and local governments in implementing the mandate?
- Are there changes that can be made in the mandate to relieve intergovernmental tensions while maintaining a commitment to national goals?

THE ACIR REVIEW OF EXISTING MANDATES

As required by the *Unfunded Mandates Reform Act*, ACIR began its review process by adopting and publishing two sets of criteria. The first set of criteria was used to identify mandates of significant concern. The second set of criteria identified specific characteristics of mandates to serve as the basis for the Commission's recommendations. These criteria were published in the *Federal Register* on July 6, 1995 (See Appendix A).

The first set of criteria identified mandates of significant concern as those that: (1) require state or local governments to expend substantial amounts of their own resources without regard for state and local priorities: (2) abridge historic powers of state and local governments without a clear showing of national need; (3) impose requirements that are difficult or impossible to implement; and (4) are the subject of widespread objections.

The second criteria identified a number of specific conditions for which ACIR should make relief recommendations. The specific conditions included: requirements not based on a need for national action or, if needing national action, not federally funded; unnecessarily rigid requirements; unnecessarily complex or prescriptive procedures; unclear goals or standards: contradictory or inconsistent provisions; duplicative provisions; obsolete provisions: requirements lacking an adequate scientific or economic basis; provisions lacking in practical value; or, requirements that create undue financial difficulties for state or local governments.

After issuing the criteria for its study of existing federal mandates. ACIR solicited information about mandates from state and local governments, federal agencies, and the public. ACIR also relied on a variety of efforts by others to help in identifying mandates needing attention. For example:

- The National Governors' Association requested each governor's office to list the mandates of most concern in their states.

- A general appeal was made in the magazines and newsletters of national and state groups representing state and local governments.
- A survey of small rural governments was conducted by the National Rural Development Partnership.
- Officials attending national and state association meetings were asked to identify troubling mandates.

Through this process, information was received from over half the states, eight municipal leagues, four state associations of counties, the national associations representing state and local governments and their officials, and directly from a variety of local government officials. More than 200 federal mandates on state and local governments were identified to ACIR. The Commission selected 14 of the mandates for analysis as part of this report. The 14 mandates selected for review all meet one or more of the criteria ACIR adopted for identifying mandates of significant concern.

The selection of the 14 mandates was based on:

(1) The criteria published by the Commission on July 6, 1995;

(2) The preponderance of communications identifying the mandates as troubling to state and local governments; and,

(3) The significance and diversity of issues posed for intergovernmental relations.

Due to time and resource constraints, ACIR was unable to review more than the 14 selected mandates. *Nevertheless, many more of the over 200 mandates identified need to be evaluated and the Commission urges that a review of additional existing federal mandates be authorized as soon as possible.*

COMMISSION ACTION ON THE PRELIMINARY REPORT

The preliminary report on ACIR's review of existing mandates was developed through a series of Commission meetings held on June 13, September 15, and December 19, 1995. Written and oral communications on issues to be included in the preliminary report were exchanged between Commission members or their staff representatives and ACIR staff between formal meetings. Also, working sessions involving Commission members or their staff representatives were held to refine the preliminary report format, language, and concepts.

On December 13, 1995, a draft preliminary report was distributed to Commission members and, on December 19, 1995, a Commission meeting was held to discuss the draft preliminary report. Following the December 19 meeting, the draft preliminary report was amended in accordance with directions from Commission members attending the meeting. On December 28, 1995, a copy of the revised draft was sent to each Commission member along with a ballot to approve or disapprove release of the preliminary report for public comment. It should be particularly noted that the Commission members were voting on the release of the preliminary report for public comment and not on the acceptability of the individual recommendations, per se.

Commissioners, however, were encouraged in the balloting process to express any concerns or suggested changes they may have with language or other issues in the preliminary report.

A majority of Commission members approved release of the preliminary report, as distributed. A *Federal Register* notice announcing the availability of the preliminary report, *The Role of Federal Mandates in Intergovernmental Relations*, was published on January 17, 1996. Also, the release of the preliminary report for public comment was announced at a January 24, 1996, press briefing.

PUBLIC COMMENTS AND TESTIMONY ON PRELIMINARY REPORT

Both the January 17 *Federal Register* Notice and the January 24 press briefing materials on the preliminary report said public comments would be accepted through March 15, 1996. On March 5, 1996, ACIR announced in the *Federal Register* an extension of the public comment period through March 29, 1996. Moreover, as directed by the *Unfunded Mandates Reform Act* and as announced in the February 27 and March 5 *Federal Register*, ACIR conducted a public hearing to accept testimony on specific issues in the preliminary report. The public hearing was held in Washington DC on March 26, 1996.

During the public comment period, ACIR was contacted by federal agencies and other officials in the federal executive branch, state and local government officials, Members of Congress, public interest organizations, and private citizens. ACIR received 538 public comments, 47 testimonies, and several packages of additional mandate information. Both supporting and opposing comments were received on all 14 individual mandates discussed in the preliminary report. Also, comments were received on mandates in general or on the six common issues mentioned in the report. The public comments, testimony, and other materials received are available for public review in the ACIR offices, upon request.

FOCUS ON INTERGOVERNMENTAL ISSUES

The *Unfunded Mandates Reform Act*, directs ACIR to focus its attention on "the role of federal mandates in intergovernmental relations and their impact on State, local, tribal, and Federal government objectives and responsibilities, ..." In view of this directive, the Commission considered the fundamental intergovernmental issues associated with each mandate selected for review, as separate and distinct from the national policy goals, general purposes, or implementation issues related to each mandate.

Moreover, ACIR focused its attention on intergovernmental issues because state and local concerns usually relate to aspects of a mandate that are damaging to intergovernmental comity, not to the national policy goal or general purpose of a mandate. ACIR and state and local governments recognize that most federal laws and their national policy goals have, and are worthy of, broad public support. Furthermore, it would be inappropriate, if not impossible, for ACIR, or any other group doing an overview study of federal mandates, to duplicate the work of federal agencies and congressional committees on individual mandate requirements. *In general, therefore, ACIR recommends that mandate relief studies and related efforts focus on how to restructure federal laws to restore comity between the governments in the American federal system, not on the elimination or repeal of federal laws.*

Also, it should be noted that mandate issues are more than disagreements about which government has the right to make a decision or take an action. Mandate issues relate to the nuts and bolts of government operations—policy-making and service delivery. This is the reason that much of the current proposed legislative changes and regulatory reform actions are specifically aimed at improving relations between the federal government and state, local, and tribal governments. *ACIR encourages all such efforts and urges even more widespread adoption of federal policies that enhance intergovernmental relations.*

COMMON ISSUES: DISCUSSION AND RECOMMENDATIONS

ACIR's review of existing mandates found six common issues in federal mandates that are complicating intergovernmental relations. These issues and ACIR's proposed recommendations to address are listed below.

1. Detailed procedural requirements. State and local governments often are not given flexibility to meet national goals in ways that fit their resources and needs. The imposition of detailed procedural requirements for implementing federal statutes, in many instances, merely increases costs and delays achievement of the national goals. *In general, state and local governments should be permitted, through statutory language, flexibility in choosing the methods used to comply with a federal mandate. Federal agencies should assist state and local governments by providing research and technical advice on implementation approaches and methods to save the state and local governments design and adaptation costs, whenever possible. The focus of federal statutes, regulations, and policies should be on results, not process.* ok

2. Lack of federal concern about and funding of mandate costs. Prior to passage of the *Unfunded Mandates Reform Act*, the federal government often imposed mandates without considering the full magnitude of the mandate cost, including the cost to state and local governments and with little or no federal funding commitment. As a consequence, the federal government had little incentive to weigh costs against benefits or to allow state and local governments to determine the least costly alternatives for reaching national goals. *As required by the Unfunded Mandates Reform Act, the federal government should take federal, state and local costs of policy implementation into consideration before enacting a law containing a federal mandate on state and local governments. In addition, the federal government should assume some share of mandate costs as an incentive to restrain the extent of the mandate and to aid in seeking the least costly alternatives.*

3. Federal failure to recognize state and local governments as governments. State and local governments often are treated as interest groups, as private entities, or as administrative arms of the federal government. Federal policies tend not to recognize state and local governments as government entities subject to public accountability through elections and through the policy processes of a state legislature, county commission, or city council. Views of private entities and non-governmental advocacy groups sometimes have been given more attention than those of state and local governments. *Federal laws and regulatory policies should recognize that state, local, and tribal governments are co-makers of national policy who, in contrast to interest* *groups and private entities, are led by elected officials who must account to the voters within their respective jurisdictions just as do the President and the Members of the US Congress.*

4. Authorization of lawsuits against state and local governments to enforce federal law. Several federal laws authorize individuals or groups to sue state or local governments. Such private rights of action augment the resources of federal agencies and provide an alternative mechanism to enforce compliance for persons dissatisfied with federal agency efforts. These policies, however, create ~~intergovernmental tensions and~~ may weaken federal agency efforts to enforce federal laws. Such provisions allow federal agencies to rely on individual suits rather than their own monitoring and oversight efforts to achieve compliance with federal laws. Moreover, when the federal government is not directly involved in litigation concerning a federal law, it has little incentive to propose amendments to clarify the law or to otherwise reduce the number of costly lawsuits. In effect, provisions authorizing private rights of action shift cost related to federal law enforcement to private individuals or state and local governments.

Also, as indicated by the Supreme Court opinion, *Seminole Tribe of Florida v. Florida et al.*, No. 94-12, issued on March 27, 1996, the issue of federal statutes permitting private rights-of-action against state governments raises potential constitutional questions. The court's decision is based, among other things, on issues related to Congress' power to abrogate the states' Eleventh Amendment immunity. According to one point made in the court opinion:

> The Eleventh Amendment presupposes that each State is a sovereign entity in our federal system and that " ' [i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [a State's] consent.' " *Hans v. Louisiana*, 134 US 1, 13.

NO

The federal government should commission a study to examine the constitutional and intergovernmental issues raised by laws authorizing private rights of action against state and local governments. Such a study should be concluded prior to enactment of any more statutory language authorizing private rights of action against state or local governments and prior to any reauthorization of existing statutes with such language.

5. Inability of very small local governments to meet mandate standards and timetables. The requirements for many federal mandates are based on the assumption that all local governments have the financial, administrative, and technical resources that exist in large governments. In reality, many very small local governments have part-time staffs with little technical capability and very limited resource bases. Some federal laws and regulatory policies have provisions that allow deadline extensions or requirement modifications for very small governments. Such provisions are especially useful in situations where minimal adverse effects on the achievement of overall national goals would result from a deadline extension or requirement modification. *The federal government should increase the number of laws and regulations that allow for deadline extensions or requirement modifications for very small governments that cannot meet existing time limitations or cannot afford full compliance with national standards.* OK

Or other methods

6. Insufficient communication on or ineffective coordination of federal policies. Confusion, uncertainty, and frustration is often created among state and local officials by the lack of good communication on or by ineffective coordination of federal policies between federal and state or local agencies or among federal agencies. There are large information gaps about the details of some federal mandates and, even where technical assistance and information resources may be available from federal agencies or private entities, state and local governments are often unaware of how to obtain such assistance or information. Difficulties also arise when the same federal agency is charged with implementation and enforcement responsibilities and it is unclear which role the agency is in when it responds to questions raised by state and local governments. The situation is aggravated further when multiple federal agencies are responsible for implementing or enforcing a mandate and no single federal agency is empowered to make binding decisions about the mandate's requirements. examples? Finally, when state laws are intertwined with federal requirements, the situation becomes even more complex. *The federal government should establish a coordination mechanism to assist state and local governments through the federal policy maze. The coordination mechanism should be designed to avoid the conflicts of interest that arise in a lead agency process because a lead agency usually has program as well as coordination responsibilities. Desk officers could be assigned for each state as a single point of contact or ombudsperson for questions on federal policies and common rules could be drafted to implement mandates under the jurisdiction of multiple federal agencies. In addition, an arbitration process could be developed to make binding decisions on issues related to federal mandates that arise among federal agencies or between the federal government and state or local governments.* ?

INDIVIDUAL MANDATES: DISCUSSION AND RECOMMENDATIONS

Fair Labor Standards Act

RECOMMENDATION: ***Retain state and local government coverage under the FLSA but amend the Act to allow state and local government compliance with either the policies of the Act or the comparable policies of the federal government under Title 5, USC.***

Description

The *Fair Labor Standards Act* (FLSA) (29 U.S.C. 201, et seq.) was enacted in 1938. The law sets minimum wage requirements and mandates overtime payments for certain employees who work more than 40 hours a week. It also contains requirements governing child labor conditions and other issues related to employer and employee relationships. Nearly every workplace in the United States is covered by the provisions of the FLSA.

Background

The FLSA was enacted to correct or eliminate labor conditions detrimental to the general well-being of workers. In 1974, amendments to the FLSA extended the applicability of the law to state and local governments and to the executive branch of the federal government. In 1995, the Congressional Accountability Act extended the applicability of the FLSA to the legislative branch of the federal government.

The amendments bringing the public sector under FLSA coverage treat state and local governments the same as private entities while the federal government is handled somewhat differently. For example, the FLSA makes state and local governments and private entities subject to Department of Labor oversight and requires them to have employment policies that are equal to or more generous than Department of Labor (DOL) regulations. In contrast, the Office of Personnel Management (OPM) is granted independent FLSA regulatory and enforcement responsibilities within the executive branch and the Office of Congressional Compliance is granted independent FLSA authority within the legislative branch of the federal government. Also, while federal employment policies are required to be consistent with the FLSA, they do not have to be equal to or more generous than DOL regulations as is required of state and local governments.

Furthermore, the executive branch of the federal government is granted numerous exceptions to FLSA requirements through the provisions of Title 5, United States Code. For example, Title 5 allows federal agencies to limit overtime compensation rates for higher pay grades and to limit maximum earnings per pay period. Also, Title 5 allows federal agencies to require employees above certain pay grades to accept compensatory time rather than cash for overtime and allows policies precluding such employees from being compensated when they forfeit compensatory hours. No such limits or requirements may be set by state and local governments under the current provisions of the FLSA.

Intergovernmental Concerns

Questions on applicability of FLSA to state and local governments are not raised out of disputes with the basic goals of the law. Rather, the intergovernmental concerns refer to the appropriateness of having federal mandates on employment policies related solely to state and local government employees (i.e. persons paid through state and local taxes or other resources.) The issue becomes more than philosophical, however, when application of FLSA policies to state and local governments results in conflicts with state laws and employee litigation against state and local governments results in multi-million dollar settlement issues.

For example, state laws requiring annual or sick leave to be accounted for on an hour-for-hour basis, when combined with FLSA policies, often creates a situation where nearly all employees, including those in the highest salaries levels of state or local government, qualify for overtime compensation. Many such state or local employees have won substantial retroactive pay settlements due to a court's interpretation of FLSA overtime compensation requirements. The situation is further aggravated, from a state and local government perspective, because court ordered retroactive pay settlements are usually unanticipated and not accounted for during a state's budget negotiations. Moreover, even if a state or local government successfully defends its employment policies and avoids retroactive pay settlements, substantial costs may have been incurred in the litigation process.

Recommendation Rationale

ACIR recommends retaining basic FLSA protections for state and local public employees; but, suggests amending the law to recognize state and local governments as governments and to provide mandate relief on certain points in the law. The proposed amendments could be implemented by creation of a separate title of the law for state and local governments. The separate title could be written to allow states to develop employment policies that are consistent with either FLSA or Title 5, USC. Such amendments would recognize state and local governments as distinct from private entities and would grant states flexibility similar to that currently granted to the federal government. Moreover, such revisions would provide mandate relief by allowing states to establish employment policies that vary from DOL regulations so long as variances were consistent with the FLSA or the exceptions granted to the executive branch of the federal government in Title 5, USC. The Secretary of Labor, in consultation with the Director of the Office of Personnel Management, could be required to certify that state policies are consistent with FLSA or Title 5, USC provisions.

Family and Medical Leave Act

RECOMMENDATION: ***Retain state and local government coverage under the FMLA.***

Description

The *Family and Medical Leave Act* (FMLA) (29 U.S.C. 2601 et seq.) was enacted in 1993. The law requires employers to provide employees up to 12 weeks of unpaid leave each year to care for a newborn, adopted, or foster child. Leave also must be granted for care of a seriously ill child, parent, or spouse. In addition, employees may use unpaid family and medical leave for personal illnesses. Medical insurance benefits must be continued during the leave and employees must be reinstated into the same or an equivalent position after leave.

Background

The FMLA was enacted to promote family stability and economic security among working men and women. The effectiveness of the FMLA was confirmed in an April 1996 report to Congress issued by the Commission on Leave. The Commission on Leave was established by Title III of the FMLA and was charged with examining the impact of the FMLA and other family and medical leave policies on workers and employers across the country. Their final report, *A Workable Balance: Report to Congress on Family and Medical Leave Policies*, was transmitted to Congress on April 30, 1996. In the Executive Summary, the report makes the following statement.

> The Family and Medical Leave Act has had a positive impact on employees overall. It has succeeded in replacing the piecemeal nature of voluntary employer leave policies and state leave statutes with a more consistent and uniform standard. The FMLA has not been the burden to business that some had feared. For most employers, compliance is easy, the costs are non-existent or small and the effects are minimal. Most periods of leave are short, most employees return to work and reduced turnover seems to be a tangible positive effect. . . .

It should be noted, however, that the Commission on Leave studied implementation of the FMLA in private business settings. While the findings may also apply to public sector settings, there has not been a specific review of the act's implementation in the public sector.

Intergovernmental Concerns

State and local governments are not opposed to the FMLA's purposes or goals. Rather, the concerns raised refer to contradictions with state or local laws, potential conflicts with collective bargaining negotiations, inflexibility in DOL implementation policies, and costs associated with the extension of medical benefits and other aspects of the law's implementation. To some extent, state and local concerns are corroborated by comments in the Commission on Leave report which indicate that larger employers, which would include most state governments, are most likely to experience an increase in costs related to FMLA implementation. According to the Leave Commission report, "this, in part, is due to the fact that they are more likely to have leave-takers and to have larger numbers of leave-takers."

Also, as is true under the FLSA, the FMLA treats state and local governments the same as private entities while granting the federal government independent regulatory and enforcement authority. As a result, state and local governments have less flexibility in designing FMLA policies than the federal government. Again, state and local government policies must be equal to or more generous than DOL regulatory policies while federal policies have to be consistent with the law; but, not equal to or more generous than the DOL policies. In addition, the provisions of the law covering the federal government vary slightly from the provisions covering state and local governments. For example, there is no provision in the FMLA to allow federal employees to pursue a right of action against their employer (i.e. the federal government) even though the provisions covering state or local governments authorize such employee suits.

Recommendation Rationale

ACIR recommends retaining FMLA protections for state and local public employees. This recommendation recognizes the positive contribution the FMLA has made towards the support of family values in our nation. The recommendation also retains the current assurance that state or local government employment policies, at a minimum, will meet DOL family and medical leave requirements. Although, as indicated by comments in the Commission on Leave report, further study of FMLA implementation in state and local government settings may be warranted, there does not seem to be substantial fiscal or other concerns with the law's implementation in the state and local public sector at the present time.

Occupational Safety and Health Act

RECOMMENDATION: ***Make no change in OSHA language regarding state and local government compliance; but, increase DOL consultation activities with state and local governments and increase federal funding sources for state and local government training and technical assistance on OSHA requirements as well as funding for implementation of requirements.***

More money --

Description

The *Occupational Safety and Health Act* (OSHA) (29 U.S.C. 651-678) was enacted in 1970. It establishes standards for safe, healthy, and productive work environments. State governments and their political subdivisions, as well as the United States government, are specifically excluded from the definition of "an employer" under the act. So, state governments and their political subdivisions are not subject to OSHA requirements unless a state volunteers to administer the federal OSHA program within their jurisdiction. When a state volunteers to administer the federal OSHA program, it is required to extend OSHA requirements to all public employees in the state. Such states are required to submit a state plan of operations to the Department of Labor (DOL) for approval prior to taking over administration of the federal OSHA program. If the state plan is approved, the Secretary of Labor is authorized to provide a federal assistance grant of up to 50 percent of costs for administration and enforcement. No funding is provided for program compliance (e.g., training programs. equipment. or facilities modification).

In comparison. for the federal government. the law requires the head of each federal agency to establish and maintain an occupational safety and health program consistent with OSHA requirements. DOL has authority to review the agency occupational health and safety activities: but has no enforcement authority over the federal agency programs. The legislative branch of the federal government is exempt from compliance with OSHA until January 1, 1997. At that time. according to the Congressional Accountability Act of 1995. each employing office in the legislative branch of the federal government is required to comply with certain OSHA provisions.

Separation of Powers issue

Background

OSHA provisions are designed to reduce or eliminate work-related accidents, illnesses. and deaths. Reduction of work accidents. illness. and deaths will enhance the productivity of our nation's workers and will improve the nation's economy. According to DOL. OSHA's protective standards and enforcement program are largely responsible for the 57 percent decline in workplace fatalities over the last 25 years. Each day. however. DOL statistics indicate that more than 6.000 workers still lose time from their jobs as a result of a work related injury. Besides the personal and family tragedies. DOL estimates that job-related injuries cost the economy over $100 million a year and occupational illnesses cost many times more than injuries.

Although most states operate occupational health and safety programs. state and local government employees are not covered by federal OSHA requirements unless their state government volunteers to administer the federal OSHA program in their state. At the current time. public sector employees in 23 states are covered by federal OSHA requirements because their state has assumed responsibility for operating the federal OSHA program and the employees in two additional states are covered by DOL approved OSHA plans for state and local government employees only. States usually do not choose to administer the federal OSHA program solely to gain coverage for their public sector employees. Rather. states choose to assume OSHA responsibilities because they see it as a way to continue using a state occupational safety and health staff established before the 1970 enactment of OSHA. they feel it will allow them to maintain closer relationships with businesses and workers in their state than would be possible with federal government administration of OSHA, or they sense that a state administered OSHA program has more ability than a federally administered program to deal with local conditions.

Intergovernmental Concerns

State and local government concerns with OSHA requirements included the lack of federal funds for compliance costs, the perception that the program is more focused on monitoring measures and the collection of fiscal sanctions than on compliance assistance. and the lack of credible information on the rationale for or the scientific basis of many OSHA standards and requirements. In addition. OSHA's credibility is compromised by the perceived or real complexity of the programs requirements especially for recordkeeping and reporting purposes. Intergovernmental tensions grow when such concerns are combined with the realization that state and local priorities cannot be met because state and local resources have been used to pay for federal OSHA requirements whose purposes are misunderstood or insufficiently supported by good rationale.

The numerous comments received by ACIR from both participating and non-participating OSHA states attest to widespread misunderstanding about the law's coverage. The comments also indicated that there is pervasive misunderstanding as to what is a federal requirement and what is a state or local government policy decision.

Recommendation Rationale

ACIR recommends no changes in OSHA related to coverage of state and local employees. At the same time, the ACIR recommendation recognizes the need for greater communication and interaction between state governments and DOL on OSHA issues to improve understandings about OSHA requirements. Also, there is a need for increased federal technical assistance ~~and fiscal support with the implementation of~~ OSHA requirements in the state and local government sector.

Drug and Alcohol Testing of Commercial Drivers

RECOMMENDATION: ***Amend the law to permit alternative testing requirements or program certification in lieu of testing requirements for small governments. In addition, the federal government should increase technical assistance to state and local governments on transportation safety requirements including the control and monitoring of drug and alcohol abuse by drivers.***

Description

The *Omnibus Transportation Employee Testing Act of 1991* (P.L. 102-143, Title V) directs the Department of Transportation (DOT) to issue regulations establishing a program which "requires motor carriers to conduct preemployment, reasonable suspicion, random, and post-accident testing of the operators of commercial motor vehicles for use . . . of alcohol or a controlled substance."

Background

The primary objective of the rules is to improve transportation safety by deterring misuse of drugs and alcohol by drivers of large vehicles. Benefits derived from alcohol and drug testing include the prevention of transportation accidents, improved worker productivity, decreased health care expenses, and reduced worker absenteeism.

To implement the law, DOT has issued rules requiring alcohol and drug testing for all drivers who are required by federal and state motor vehicle laws to carry commercial drivers licenses (CDLs) and who drive large trucks or passenger vehicles. The rules apply to private companies, state and local governments, and other organizations DOT's random testing requirements provide for the use of certain procedures, devices, and certified personnel to test employees on a regular basis. Although law enforcement officers and emergency response workers are exempt from the drug and alcohol testing requirements, the requirements still cover a substantial number of state and local government employees. Such employees are required to undergo random drug and alcohol testing by certain deadlines.

Intergovernmental Concerns

Concerns expressed by state and local officials, especially as applied to small towns with few employees included disproportionately high costs relative to potential findings and the sense that methods other than random testing would be as effective in controlling and monitoring drug and alcohol abuse. Each year, the number of random alcohol tests conducted by the employer must equal at least 25 percent of all safety-sensitive employers (50 percent for drug tests). Such testing requirements seem particularly inappropriate, and more costly than beneficial, in small towns where only one or two long-time employees are subject to the testing requirements.

Recommendation Rationale

ACIR recommends amending the drug and alcohol testing requirements for commercial drivers to permit alternative testing requirements or program certification in lieu of testing requirements for small governments. ACIR also urges the federal government to increase its technical assistance to state and local governments on transportation safety requirements including the control and monitoring of drug and alcohol abuse by drivers. Providing small towns with alternative means for compliance with the law would be similar to exceptions already made in the Act for law enforcement officers and emergency response workers. Alternative programs and enhanced technical assistance from the federal government may allow small or remote rural areas to make more efficient use of their limited resources while maintaining a national commitment to transportation safety policies.

Metric Conversion for Plans and Specifications

RECOMMENDATION: ***Congress and the President are commended for extending the deadline for metric conversion of plans and specifications to the year 2000.***

Description

The *Omnibus Trade and Competitiveness Act of 1988* requires each federal agency to use the metric system of measurement in its procurement, grants, and other business-related activities, except to the extent that such use is impractical. The act permits the continued use of traditional weights and measures in non-business activities. The *National Highway System Designation Act of 1995* extended the deadline for such conversion to October 1, 2000.

Background

Metric conversion requirements were enacted into federal law because it was recognized that world trade is geared towards metric and US industries may be at a disadvantage if our nation continues to use the English system as its standard form of measurement. Also, it was estimated that cost savings to industries and governments would result from conversion to metric measurements.

To encourage voluntary shifts to the metric system by private businesses, the *Omnibus Trade and Competitiveness Act* required the application of metric measurements to non-business activities related to federal grants to state and local governments. Based on this law, the Department of Transportation (DOT) requires state and local governments to convert local highway construction plans and specifications to the metric system. To accommodate difficulties experienced by state and local governments, DOT has a waiver process to provide exceptions to the metric requirements. Other federal agencies also have metric conversion policies, but, the DOT policies have been the subject of the most intergovernmental concerns.

A number of areas throughout the nation have already taken significant steps towards metric conversion. Further, ACIR received comment from several areas indicating that they intend to continue conversion efforts on a faster schedule than assumed by the recently extended October 2000 deadline. Such activities are encouraging and will add positive support to metric conversion efforts.

Intergovernmental Concerns

The *Unfunded Mandates Reform Act of 1995* required ACIR to include in its review of federal mandates concerns related to metric utilization requirements. The Commission, therefore, indicated a special interest in metric issues when it solicited comments on existing federal mandates. Responses on this issue came primarily from local governments who are required to use metric measurements in the design and construction of federally aided highway projects. Comments from state governments generally indicated support for metric conversion requirements or indicated an unawareness of the requirements.

The concerns cited by local governments included the inability to procure supplies in metric units at the local sites. Also, mentioned was the potential for mistakes in the bidding and construction process because of the unfamiliarity of local contractors and suppliers with metric measurements. In addition, concerns were raised that the use of the metric system could create problems for property owners seeking or providing right-of-way acquisitions, for surveyors, and for local deed registries.

Recommendation Rationale

ACIR commends the Congress and the President for enacting an extended deadline for metric conversion of plans and specifications. The extension acknowledges the value of converting to the metric system of measurement, while providing mandate relief to areas unable to meet the original deadline. DOT's approval of more than 2,200 waivers of metric requirements attests to the difficulties some areas are having with the conversion process. The recently enacted extended deadline retains the requirement for eventual conversion of plans and specifications to the metric system; but facilitates compliance on a more gradual basis in areas of the country that would have had difficulty meeting the 1996 deadline.

Medicaid: Boren Amendment

RECOMMENDATION: ***Repeal the language of the Boren Amendment and insert language specifying that rate determinations are the sole responsibility of each participating state and that such rates must be established to assure that health and nursing home care is provided in conformity with applicable federal and state laws and regulations related to quality of care and safety standards.***

Description

The *Boren Amendment* requires states to establish reimbursement rates to pay hospitals, nursing facilities, and intermediate care facilities for services provided to persons eligible for assistance through the Medicaid program. The law specifies that the reimbursement rates be "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards . . . ."

Background

The intent of the *Boren Amendment* was to give states a means of controlling costs related to reimbursement claims from providers of Medicaid services. Instead of basing reimbursements on a cost-related payment requirement for hospitals and nursing home services, the amendment allows states to pay for services based on a predetermined reimbursement rate, giving states a basis for denying reimbursement for costs determined to be in excess of that necessary to provide "efficiently and economically" delivered services. The language of the law, however, left state rate determinations open to challenge on several grounds.

Intergovernmental Concerns

Intergovernmental concerns with the *Boren Amendment* stem, in part, from the fact that the law gives state governments and the federal government shared responsibility for determining the reimbursement rates. While the state is to determine rates in accordance with methods and standards developed by the State, the federal government is required to approve the rates so established. Federal government approval of a state's rate determination process or established rates, however, does not give a state immunity from litigation over the adequacy of their reimbursement rates or their methods for determining the reimbursement rates.

This lack of immunity, combined with the 1990 Supreme Court ruling in *Wilder v. Virginia Hospital Association*, (496 US 498), has created numerous intergovernmental tensions related to the Boren Amendment. In the *Wilder* case, the Supreme Court declared medical providers (instead of the individuals receiving health care) to be the intended beneficiaries of the *Boren Amendment*. This ruling allows medical facilities and nursing home to obtain judicial review of state reimbursement rates under Section 1983 of the *Civil Rights Act*. In other words, the Supreme Court ruling allows medical facilities and nursing homes to claim that a state is violating their civil rights by failing to pay a certain reimbursement rate.

While some state governments have not had problems related to the *Boren Amendment*, other states have been sued by medical providers or nursing homes in their state and have been found liable for significant sums of money to cover retroactive rate increases ordered by a court. In some cases, retroactive payments are not be eligible for cost-sharing from the federal government even though the federal government may have approved the rate process or the rates used. Retroactive payments must be determined within a certain time period to qualify for cost-sharing from the federal government.

Recommendation Rationale

ACIR recommends repeal of the *Boren Amendment* and adoption of statutory language making it clear that rate determinations are the sole responsibility of each participating state. To acknowledge the relationship between reimbursement rates and the quality care given to individuals participating in the Medicaid program, ACIR suggests that the amended law specify that state determined rates must take into consideration a state's responsibility for assuring that the services provided by medical facilities and nursing homes is in conformity with applicable federal or state statutes and policies related to quality of care and safety standards.

The Clean Water Act

RECOMMENDATION: ***Increase federal funding for states and local governments to support construction of municipal wastewater facilities and amend the Act to give EPA specific authority to extend deadlines for compliance on a case-by-case basis.***

Description

The *Clean Water Act (CWA)* provides a comprehensive national program to protect water quality. The Act requires states to designate the uses of water, to develop water quality criteria to protect those uses, to monitor the condition of waters, and to report on water quality every two years. States may administer a permit program for industrial and municipal pollution discharges and develop programs for the control of pollution from diffuse or nonpoint sources. Local governments are required, either directly by the federal government or indirectly through state implementation of federal laws, to treat sewage to national standards and to control discharges from combined sewers and stormwater drains.

Background

The *Water Pollution Control Act of 1948* was the first federal recognition of water pollution as a national problem. It provided research and technical assistance to state and local governments, but explicitly preserved and protected "the primary responsibilities and rights of the states in controlling water pollution." Eight years later, the condition of the nation's rivers and lakes had not noticeably improved, and in some cases had deteriorated. The *Water Pollution Control Act Amendments of 1956* provided grants to states and interstate agencies for expanded water pollution control projects. While the law reaffirmed the primary responsibility of states over water pollution, it introduced a weak form of federal enforcement through federally-called conferences on pollution. These conferences could ultimately lead to federal court actions against individual polluters.

Municipal interest groups continued to press for more federal funding for sewage treatment plants, and they were successful in the *Water Quality Act of 1965* and the *Clean Water Restoration Act of 1966*. In addition to providing $3.55 billion of grant funds, these laws formally established a national policy for controlling pollution. The concept of "clean waters" was established as federal policy with the directive that interstate waters would be kept "as clean as possible." Most importantly, the Department of Health and Human Services[1] was authorized to apply water quality standards to interstate waters and to enforce them if states failed to set their own standards.

The *Federal Water Pollution Control Act Amendments of 1972* included national minimum standards for control of pollutants from industrial and municipal sources, additional controls in

[1] Formerly the Department of Health, Education and Welfare (HEW)

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permits as needed to meet state standards, and significant grant assistance to support construction of municipal sewage treatment facilities. In effect, states and local governments ceded control over water pollution controls to the federal government in return for federal financial aid. NB

In 1977, some additional amendments were made to the *Federal Water Pollution Control Act* including a provision specifying that law may be referred to as the *Clean Water Act*. Some changes in the law were made in 1981 including changes related to grant assistance for sewage treatment facilities provisions. Then, in the *Clean Water Act Amendments of* 1987, federal financial assistance was changed from direct grants to capitalization of state loan funds. Under the State Water Pollution Control Revolving Funds program, money used for wastewater treatment construction is repaid by loan recipients to the states to be used for future construction loans to other communities. Although states were to have greater flexibility in exchange for a phase-out of federal assistance, the 1987 amendments added several requirements, including requirements for state programs to control nonpoint sources of pollution and requirements for municipalities to remove harmful amounts of toxins from their sewage and to establish stormwater management programs.

Substantial progress has been made under the CWA in preserving and enhancing the nation's water quality. National minimum guidelines are an important means of reducing the chance that downstream communities are not saddled with pollution from upstream communities which may be in another state.

Intergovernmental Concerns

State and local government concerns include issues related to the progressively more stringent requirements on municipalities to meet the statutory goal of zero discharge of pollutants and the adequacy of federal financial assistance for municipal wastewater treatment construction. Although local governments pay a considerable share of the cost for municipal water quality infrastructure, states and localities contend that without increased federal funding small communities will not be able to make needed investments in pollution control to meet the tighter federal standards. It is also argued that ~~that~~ a continued federal funding role is necessary to assure that overall clean water standards are maintained.

In addition, despite strong support for the program, some states have encountered administrative problems with the State Revolving Fund program and some small communities have found it difficult to participate in the program. Also, intergovernmental tensions increase when there are gaps between authorized funding levels and state needs. These tensions are aggravated when federal funding to aid in water pollution cleanup decreases at the same time that federal requirements—such as those dealing with stormwater drainage—are becoming more stringent and more expensive to implement. Sustained financial assistance and implementation flexibility for small communities will be needed to continue meaningful progress towards compliance with federal stormwater and nonpoint source pollution controls and other water quality requirements.

Recommendation Rationale

ACIR recommends retaining a national clean water program while recognizing that increased federal financial assistance and increased authority for EPA to approve alternative program methods, schedules, or standards would facilitate achievement of national goals in many areas unable to meet current law requirements. Adjustment of the implementation provisions of the *Clean Water Act* would give the EPA greater flexibility in addressing priorities. Also, increased federal financial assistance for clean water programs would preserve the partnership between federal, state, and local governments in this important national policy area. State and local governments traditionally have been concerned about reducing pollution and have demonstrated their willingness to work constructively with federal officials to design realistic programs that can be completed within their technical and budgetary constraints.

Individuals with Disabilities Education Act

RECOMMENDATION: ***Increase federal funding to 40% of the excess costs of special education as is authorized by the Individuals with Disabilities Education Act and amend the Act to relieve state and local governments of prescriptive administrative and recordkeeping requirements unrelated to the education of individuals with disabilities. Also, amend the Act to foster increased use of mediation and other forms of alternative dispute resolution.***

Description

The *Individuals with Disabilities Education Act (IDEA)* (P.L. 101-476) requires local school systems to provide a free appropriate public education for children with disabilities in the least restrictive educational setting, to the maximum extent possible with students without disabilities. The act specifies that a free appropriate public education must be directed at the particular needs of the disabled child through an individualized educational program. The law provides that federal aid to states for elementary and high school education will be available only after a state has a federally approved plan for educating children with disabilities. In addition, IDEA requires participating states to establish specific administrative procedures by which parents or legal guardians may challenge the identification, evaluation, or educational placement of the children. Requirements of the law are conditions of federal assistance or duties arising from participation in this voluntary federal program. All states have participated in the IDEA program since its inception in 1975.

Background

In 1972, a federal court decision in a "right to education" case, *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania* [343 F. Supp. 279 (3d Cir. 1972)] required equal protection and due process rights to children with disabilities. In response to this case, Congress passed the *Education for All Handicapped Children Act* in 1975, determining that state and local educational agencies were responsible for educating all students with disabilities, that state and local governments lacked the financial resources to do this, and that the federal government had a national interest to assist in meeting the educational needs of students with disabilities in order to assure equal protection under the law.

The Supreme Court, in 1984, further acknowledged the intergovernmental partnership in the area of special education. *Smith v. Robinson* [468 US 992 (1984)] reiterated that the Act was a "comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children. . . . The [IDEA] was an attempt to relieve the fiscal burden placed on States and localities by their responsibility to provide education for all handicapped children. . . . The responsibility for providing the required education remains on the States."

Since its enactment, the benefits of IDEA have been significant. Through IDEA programs, millions of students with disabilities have been helped to become fully participating, working members of society rather than being dependent on public funds. Before the IDEA, approximately one million children with disabilities were totally excluded from the public school system, and another four million did not receive appropriate educational services to enable them to have full equality of opportunity. Since 1976, the number of disabled children served has increased dramatically.

Intergovernmental Concerns

Despite the success of educating millions of children with disabilities, IDEA has raised administrative and financial concerns among state and local governments. There is concern about the costs associated with administering the program and with complying with the paperwork requirements of this complicated and highly process-oriented law. Prior to the 1975 enactment of IDEA, Congress gave considerable thought to the amount of the federal contribution to be authorized. As enacted, the law authorizes the federal government to reimburse states for 40% of excess cost of special education based on a national average per pupil expenditure. The intergovernmental tensions over IDEA have arisen, in part, because the annual federal appropriation for IDEA has never been sufficient to fund the maximum grants authorized under the law's allocation formula. The federal funding share has never exceeded 12 percent of costs related to special education and the Fiscal Year 1995 appropriation only covered 7 percent of the excess costs of special education.

When IDEA was originally enacted, states were making an effort to comply with the judicial mandates providing for a right to education, but often lacked the financial resources to fully implement them. Congressional intent to provide funding assistance is clear from records on the legislative debate. The House committee report for P.L. 94-142 highlighted this by point by saying:

> The Committee would fail to meet its obligation if it did not assess the full cost of educating a handicapped child and assign some share of the cost as an equitable portion to be borne by the Federal government in carrying out the national policy and objectives of the legislation. To have failed to set any dollar amount to be paid for each handicapped child would have provided no guidance whatsoever to the budget and appropriations committees. The Committee has in fact exhaustively studied the educational needs of handicapped children and has made an informed determination of what should be an appropriate contribution to State and local educational agencies to help meet those needs. In making this determination, the Committee has considered the urgent needs of handicapped children and the large burden borne by State and local educational agencies in meeting those needs.

If a state accepts an IDEA grant, numerous administrative and procedural conditions are attached. States and local governments argue that the requirements under the Grants to States program do not provide enough flexibility and require states to accomplish more than they are able, given the amount of aid provided. States and school districts argue that they have no practical choice but to accept IDEA grants because they need the fund; but, then, they find themselves obligated to serve disabled students according to extensive and detailed specifications. In response to state and local government concerns, the Department of Education has made efforts to consult with parents, educators, and administrators and to solicit proposals for changes as a part of the reauthorization of IDEA.

Finally, the private right of action and due process procedures in IDEA have been cited by states and local education agencies as creating a time-consuming and adversarial atmosphere that draws funds from educational programs and results in school district decision-making that is based on avoidance of costly legal process rather than appropriate education. Currently, local agency decisions may be challenged in either state or federal court, and, in some cases, parents bringing actions on behalf of their children may be entitled to reimbursement for their costs, including attorney and court fees. Mediation, or other types of alternative dispute resolution could have major effects in reducing the adversarial condition of the process, facilitating better communication between the parties, and promoting cooperation.

Recommendation Rationale

ACIR recommends the full amount of funding authorized by IDEA, 40% of the excess costs of special education, be made available to state and local governments. Also, ACIR recommends IDEA be amended to relieve state and local governments of prescriptive administrative and recordkeeping requirements, especially the costly requirements not directly related to the education of individuals with disabilities. Finally, ACIR recommends IDEA be amended to foster increased use of mediation and other forms of alternative dispute resolution. The goal of the amendments should be to reduce the need for due process hearings and court actions and to help state and local governments focus on providing education, rather than issues related to litigation.

Americans with Disabilities Act

RECOMMENDATION: ***Provide increased technical assistance and educational information to state and local governments, as well as increased funding for compliance with mandated ADA requirements. Amend ADA to require the federal government to coordinate enforcement and technical assistance in areas where there are cross-agency issues.***

Description

Title I of the *Americans with Disabilities Act of 1990* (ADA) (P.L. 101-336) compels employers, including state and local governments, to make "reasonable accommodations" for disabled workers, but not changes that would involve "undue hardship."

Title II of the law provides that no qualified individual with a disability shall be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or subjected to discrimination by any such entity. In other words, Title II requires state and local governments to assure "program accessibility" to all persons with disabilities.

Title II also seeks to ensure that people with disabilities have access to transportation by requiring that all new buses are accessible and that transit authorities provide supplementary paratransit services or other special transportation services for individuals with disabilities who cannot use fixed-route services. In the area of rail transportation, the ADA requires that all new rail vehicles and all new rail stations be accessible, and existing rail systems have one accessible car per train.

Background

ADA was enacted to expanded civil rights protection to about 49 million Americans with mental and physical disabilities. Besides enabling many person with disabilities to more fully participate in mainstream of American life, the law has provided important and necessary social benefits that allow persons with disabilities to become self-sufficient and productive members of our nation's society.

Discrimination against disabled persons has been prohibited in state or local government activities using federal funds since the enactment of the *Rehabilitation Act of 1973*. Discrimination in housing programs has been precluded since the enactment of the *Fair Housing Act of 1988*. So, a number of state and local government activities have been subject to non-discrimination provisions similar to the ADA requirements since 1973. ADA, however, significantly extended the requirements by applying non-discrimination standards to all state and local government programs and services.

Furthermore, unlike the provisions in Title I of the law regarding employer responsibilities or the provisions in Title II of the law regarding paratransit, the ADA statutory language concerning program accessibility contains no "reasonable accommodation" or "undue hardship" clauses. Thus, state and local governments essentially have no flexibility in their ADA implementation efforts to assure program accessibility to person with disabilities. The Department of Justice regulations alleviate this situation to some extent; but, the language of the law itself has no provision for exceptions.

Intergovernmental Concerns

Most state and local government concerns with ADA implementation relate to the Title II requirements concerning program accessibility and paratransit issues. Funding and time limit deadlines are the main issues of concern, not the purposes or general goals of the law.

Although various sources of federal funding can be used for ADA compliance activities, virtually no federal funding has been directly appropriated to cover state and local governments ADA compliance costs which can be quite substantial. For example, the American Public Transit Association estimates that total ADA costs exceed $1.4 billion annually, including some $1.1 billion in paratransit costs, creating capacity constraints on existing systems and limiting public transportation service in some cases. This situation has given rise to intergovernmental concerns in many areas especially those that are struggling with state or local budget constraints.

As noted above, federally imposed time limits for ADA compliance are also a source of intergovernmental concern. Changes to existing facilities to meet program accessibility requirements were to be made by January 26, 1995. Many state and local governments were not able to meet this deadline and are now out of compliance with the law.

Moreover, numerous misunderstandings exist about ADA requirements. Despite the efforts of the federal government to disseminate information about ADA, there is still confusion between the federal government and the states and localities about what is required under the Act. The lack of information sometimes causes state and local governments to make costly changes in programs, services, and facilities that are not actually required. Often the changes are made to avoid the threat of potentially expensive litigation under the federal statute.

There are also large gaps in information about assistance available to comply with the ADA. Some educational and technical resources exist in nonprofit service agencies and from private for-profit legal and technical consultants, but obtaining federal technical support has been difficult for small governments. According to the National Council on Disability, without increases in information dissemination and technical assistance services, the demand for assistance and guidance will continue to overwhelm government resources.

Finally, federal enforcement of ADA is sometimes uncoordinated, with eight federal departments having some enforcement power. The Justice Department and the Equal Employment Opportunity Commission have prime responsibility for processing complaints under ADA. The Federal Communications Commission manages telecommunications issues. The National Council on Disability is an independent federal agency that identifies emerging issues and recommends disability policy to the President and Congress. The Architectural and Transportation Barriers Compliance Board (Access Board) provides some educational and technical assistance guidelines regarding accessibility. In summary, there is not a single, clearly designated, primary regulatory and enforcement agency. This creates problems for states and local governments in complying with the law and aggravates intergovernmental concerns. So, clearly there is a need to identify and address ADA definitions and policy conflicts, the limited federal enforcement capabilities, and backlogged federal complaint processing situation.

Recommendation Rationale

The Commission's recommendation supports ADA's policy goals and recognizes the regulatory efforts made to provide flexibility to state and local governments in meeting the program accessibility requirements of the law. ACIR recommends increased technical assistance and educational information to state and local governments on ADA requirements and increased federal funding for compliance. Also, ACIR recommends that the federal government be required to improve the coordination of enforcement and technical assistance in areas where multiple federal agencies are involved in ADA activities. Such changes in the law continue to recognize the rights of persons with disabilities; and, yet, recognize that state and local governments need greater federal support in their compliance efforts.

The Safe Drinking Water Act

RECOMMENDATION: ***Enact amendments to the Safe Drinking Water Act similar to those approved by the Senate in S.1316 (104th Congress) including language permitting states increased flexibility for implementation of national standards.***

Description

The *Safe Drinking Water Act* (SDWA), enacted in 1974, regulates drinking water standards for 58,530 waterworks serving 25 or more persons on a regular basis. The law directs the Environmental Protection Agency (EPA) to establish maximum levels for chemical, radiological, and microbiological contaminants in public water systems. The law also establishes wellhead protection programs, certifies and specifies appropriate analytical and treatment techniques, and establishes enforcement and public notification procedures. It requires drinking water suppliers to assume a wide range of responsibilities, including monitoring of the water supply.

Background

Federal involvement in the safety of drinking water gives greater recognition to the national policy concerns related to the public health aspects of drinking water for residents of communities and to persons visiting or traveling through communities. Prior to the 1974 enactment of the SDWA, the US Public Health Service (PHS) was responsible for developing and setting drinking water standards which could be used by the state and local governments. This situation is not unlike the situation today for restaurant inspections and other public health and safety issues which remain primarily a state or local government responsibility with PHS guidance.

The direct involvement of the federal government in drinking water issues began after a 1969 PHS study found that many of its drinking water standards were based on insufficient data and did not cover many known contaminants. Also, a nationwide study of community water systems revealed widespread water quality and health risk problems resulting from poor operating procedures, inadequate facilities, and poor management of public water supplies in communities of all sizes. These developments provided a basis for the enactment of the 1974 law.

In 1986, the law was amended to identify 83 specific contaminants for which EPA was to set standards and it mandated EPA regulations governing filtration for surface water supplies and disinfecting for systems using surface or ground water. The law requires that 25 additional new contaminants be regulated every three years.

Intergovernmental Concerns

Because the safety of drinking water has long been a state or local government responsibility, these governments generally do not object to assuming the costs of providing safe drinking water. Rather, their concerns over the SDWA hinge on what constitutes safe drinking water and how to achieve it in the most cost-effective way.

The high cost associated with SDWA compliance requirements lead some state and local officials to suggest that local areas should have flexibility to select contaminants to regulate and to set water quality standards. Others argue that requirements to implement the SDWA should focus efforts on the highest priority threats to public health and should encourage cost-effective measures to gain the greatest risk reduction for drinking water dollars invested. The Congressional Budget Office (CBO) reports that "$1.4 billion to $2.3 billion per year should be viewed as a range of estimates of the total cost that water systems will bear to comply with SDWA regulations that went beyond pre-SDWA standards."

Intergovernmental tensions also are raised significantly when federal financial support fails to keep up with the increasing cost to comply with federal drinking water requirements. The lack of federal financial assistance for compliance is particularly troublesome for small systems as is the lack of adequate implementation flexibility. State and local officials allege that, in defining what level of drinking water protection is affordable nationally, the SDWA looks to the capability of the larger systems, which serve 80% or more of the American people on public water supplies. It is noted by those making such arguments that tests which have nominal costs per customer for large systems may, in some instances, be extremely costly per customer for small systems and may be beyond a small system's technical capacity to comply. According to EPA estimates, small systems will require investments of nearly $3 billion through the end of the century to comply with all regulations and an additional $20 billion to repair, replace, and expand the basic infrastructure to deliver drinking water. While variances and exemptions are permitted in some circumstances, the procedures required to obtain such variances or exemptions may be difficult for some communities to meet.

Recommendation Rationale

ACIR's recommendation encourages the Congress and the President to enact SDWA amendments similar to those approved by the Senate in the first session of the 104th Congress (S. 1316). Such amendments, in ACIR's opinion, will alleviate or repeal the provisions of the current law creating the most intergovernmental tensions. Among other things the amendments should reduce the number of mandatory tests for contaminants, eliminate test requirements for contaminants not a threat in certain local areas, and an ease of provisions for treatment of surface water supplies. In addition, as included in S. 1316, ACIR encourages the Congress and the President to approve funding appropriations for state capitalization loan funds to subsidize financing costs on loans taken out by state or local governments to fund SDWA compliance efforts.

S. 1316 reflects a bipartisan effort to reduce regulations imposed on states and public water systems, to increase state authority and flexibility, and to provide federal financial assistance for an unfunded mandates within the SDWA. In addition to directing EPA to consider costs and benefits when setting standards, the legislation gives EPA increased flexibility to target contaminants of particular concern and to provide funds to advance environmental concerns.

In particular, ACIR commends to the Congress and the President the following items in S. 1316. The drinking water State Revolving Fund to help community water systems finance projects to comply with federal mandates. The replacement of the requirement that EPA regulate 25 contaminants every 3 years with a process for identifying contaminants for regulation. The authority given to states to implement alternative monitoring programs. The provisions authorizing EPA to set standards that balance competing health risks and to allow the use of affordable technologies for systems serving fewer than 10,000 persons. The programs for technical assistance, operator training, restructuring, and capacity building for small water systems. The program, based on voluntary partnerships between state and local governments, to protect drinking water sources. The increased flexibility given the federal and state agencies.

Endangered Species Act

RECOMMENDATION: ***Amend the law to give state and local governments an official role in the management and planning decisions affecting the listing process, beyond the traditional consultation and full notice and comment requirements currently in effect.*** Done

Description

The *Endangered Species Act of 1973* (P.L. 97-304) requires every federal agency to ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of listed threatened and endangered species or the destruction or adverse modification of critical habitat. The environmentally protective features of this law are activated by a "listing" of an endangered species, which may be based on any one of a number of statutory factors. The "critical habitat" for a listed endangered species is defined to include areas "essential for the conservation of the species," a designation that protects the habitat as well as the species. The critical habitat standards apply to specific areas "which may require special management consideration or protection." Under the law, state, local, and tribal governments may not obtain a federal permit, license, or grant if the project does not comply with federal standards for protecting endangered species. There is an exemption process allowing consideration of economic factors, but these provisions are rarely utilized.

The heads of federal agency are directed by the law to cooperate with the states in conserving protected species and, if the state endangered species programs meet certain federal standards, the heads of federal agencies must enter into cooperative agreements to assist states in their endangered species programs. After a cooperative agreement is signed, the states may receive federal funds to implement their endangered species program, but the states must normally provide a minimum 25% matching amount.

Background

Federal involvement in endangered species began with a 1966 law that called for saving US wildlife, but provided the federal government little power to take specific actions. Three years later, an international focus on endangered species looked at the problem of preventing extinction worldwide. During the early 1970s, concern with environmental issues swept the country and prompted the federal government to pass the *Endangered Species Act* (ESA). Since its inception, ESA has been credited with helping preserve such nationally symbolic animals as the bald eagle and the grizzly bear. The law is also credited with helping the populations of an estimated 500 species to rebounded. The federal government's list of endangered and threatened animal and plant species now numbers approximately 1,500 and another 3,700 species are being considered for the list.

In 1978, the Supreme Court in *Tennessee Valley Authority v. Hill,* (437 US 153), found that the provisions and restrictions in ESA concerning protection of species are absolute. The Court found an "explicit congressional decision" to afford "first priority" to saving endangered species and a "conscious decision" by the Congress to give endangered species priority over the "primary missions" of federal agencies (i.e. over activities such as programs for economic growth and development.) Shortly after this decision, the law was amended to authorize the consideration of factors other than conservation of endangered species if the federal agency or the state or local government involved in the decision-making process can show that the value of the project jeopardizing an endangered species outweighs the concerns for protection of the species or that modification or dismantling the project would cause undue social and economic hardship. An Endangered Species Committee is charged with reviewing and acting upon the exemption requests; but it has rarely been called on to do so.

Intergovernmental Concerns

Intergovernmental tensions arise in relation to ESA issues because state and local governments often feel they have an inadequate share of decision-making authority in the management and planning decisions affecting the listing of threatened and endangered species. The listing process is perceived as rigid and the Act's provisions concerning exemptions to meet local conditions is thought to be quite limited.

Also, there is concern that valuable public and private economic development activities are being impaired by strict federal regulation. Critics argue that such impairment is causing widespread economic and social hardship in communities throughout the nation. Some state, local, and tribal governments argue that, for the law to work effectively and efficiently, they need incentives to provide habitat for endangered species and the freedom to administer and enforce standards to achieve this goal. State and local governments are pleading for a compromise between economic activity interests and species conservation needs.

Substantial reform efforts are currently underway in both the administration and the Congress to resolve some problems with the ESA. The Department of Interior is building a partnerships with states in endangered species candidate conservation and recovery programs, is implementing uniform "peer review" procedures to ensure that every listing and recovery program is reviewed by independent scientific experts, and developing regulatory relief for small landowners. Proposed legislation amends ESA extensively by, among other things, tightening standards for listing petitions, increasing state involvement at various stages, reviewing various scientific issues under the Act, giving agency heads greater authority in reconciling conflicts between ESA and other laws, and requiring agencies to minimize adverse impacts on private property.

Recommendation Rationale

ACIR recommends the ESA be amended to give state and local governments an official role in the management and planning decisions affecting the listing process, beyond the traditional consultation and full notice and comment requirements currently in effect. State and local governments should be recognized in the law as co-makers of national policy on endangered species protection efforts and authority for species protection should be a shared responsibility between the federal government and state and local governments. In addition, the law should provide flexibility for states to implement their own conservation plans for specific species within their state boundaries. Broader participation by state, local, and tribal governments will improve the data collection process and allow biological science, economic constraints, and available management resources to be taken into account on a regional basis.

The Clean Air Act

RECOMMENDATION: ***Make no change in existing federal standards but increase federal aid and technical assistance to help states comply.***

Description

The *Clean Air Act (CAA)* (P.L. 95-95) enacted a series of related programs designed to protect health and the public welfare from emissions polluting ambient air. The CAA requires states to submit for federal approval a state implementation plan for meeting air quality standards established by the federal government. These plans must include emissions limitations and schedules of compliance. The act specifies how to measure different types of pollution, the standards that must be met for each type of pollution, the specific compliance measures that may be taken, and the deadlines for those actions. Some federal financial assistance for planning and implementation is authorized in the law, but each state must provide assurances that "the State or general purpose local governments will have adequate personnel, funding, and authority under state and, as appropriate, local law to carry out such implementation plan."

Background

The first national air pollution legislation came in 1955 as a reaction to killer smog in Donora, Pennsylvania; New York City; and London, England. Before then, the efforts to control air pollution were made primarily by cities. The first state law was enacted in 1952. Cities experiencing difficulties enforcing local air pollution laws supported national air pollution legislation because local polluting industries threatened to move to other less regulated areas. The federal government was reluctant to enter the pollution control field because such regulation was seen as protecting the health, safety, and welfare of the people, a proper traditional function for the states under their police powers. The committee report on the 1955 bill noted, "The bill does not propose any exercise of police power by the federal government and no provision in it invades the sovereignty of states, counties, or cities." It did provide for research, training, demonstration projects, and grants-in-aid to local governments.

The *Clean Air Act of 1963* signaled the beginning of change in the pattern of federal-state-local relations by authorizing national air quality criteria and permitting federal intervention in the state if the state could not deal appropriately with the problems. It also provided grants to states and recognized their need to develop statewide control laws. With the passage of the *Air Quality Act of 1967*, states were required to develop, set, and implement plans to achieve national air quality standards. Increased federal grants accompanied the new requirements. By 1970, however, only 21 states had developed air pollution control plans and a general consensus grew for an expanded federal government role in the control of air pollution. The growing support for federal involvement in air pollution control culminated in the enactment of the *Clean Air Act* (CAA) of 1977.

By 1990, though, there was still public concern that expected benefits of federal clean air requirements had not been achieved. As a result, the *CAA Amendments of 1990* were enacted. The 1990 amendments required state and local air quality agencies to help implement the act through development and revision of state implementation plans and enactment of state laws to implement required federal programs. Air pollution sources were required to respond to new and more stringent requirements and obtain permits, conduct monitoring, and add pollution controls or change production processes to further reduce emissions. The *CAA Amendments of 1990* also targeted smaller pollution sources, including facilities owned by local governments. Governments in areas with moderate carbon monoxide pollution were required to adopt vehicle inspection and maintenance programs and to use cleaner oxygenated fuels. Areas with moderate ozone pollution were required to set up similar programs and to require use of gasoline-pump devices to capture vapors. As a negative compliance incentive, the CAA allows federal highway construction assistance funds to be withheld from states that fail to implement the law's requirements.

Intergovernmental Concerns

Although the *Clean Air Act* has been effective at bringing nonattainment areas into compliance with national ambient air quality standards, states have expressed concerns regarding the implementation of certain air pollution control programs. A major point of contention has been the degree flexibility that EPA has allowed the states in the development of air pollution control programs. State and local governments have considered some federal requirements more costly and burdensome than necessary to achieve air pollution control goals.

In response to the concerns of state and local officials, the federal government has relaxed rules in several programs, notably those involving employee commute options and inspection and maintenance requirements for auto emission control systems. Nevertheless, state and local officials argue that further flexibilities could allowed in the CAA requirements and in future state implementation plans while still assuring improvement in air quality.

Recommendation Rationale

ACIR recommends retaining existing federal clean air standards as well as incentives for compliance with the standards. Also, ACIR recommends increased federal fiscal assistance to implement air pollution controls and increased federal consultation with, or technical assistance to, state and local governments. These recommendations would facilitate state and local government compliance with federal air pollution standards and would expedite achievement of national goals for air pollution control.

Davis-Bacon Related Acts

RECOMMENDATION: ***Amend the related laws to exempt projects below a higher dollar threshold than exists in most laws and consider exempting projects in which federal participation is a low percentage of total project costs.***

Description

The *Davis-Bacon Act* (40 U.S.C. 276a-7), was enacted in 1931. The act applies to 100 percent federally-funded contracts over $2,000 for construction, alteration, and/or repair work. The law requires such contracts to specify the minimum wages to be paid to various classes of laborers and mechanics employed under the contract. The minimum wages must be based on wage rates determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on similar contracts in the city, town, village, or other civil subdivision of the state in which the work is to be performed.

State and local construction projects are not covered by the *Davis-Bacon Act* itself. However, about 60 other federal laws (known as Davis-Bacon Related Acts) make compliance with *Davis-Bacon Act* provisions a condition-of-aid for grants to state and local governments. For example, laws authorizing grants for construction programs related to low-income housing, highways, and waste water treatment facilities often include a provision requiring compliance with *Davis-Bacon Act* provisions such as the prevailing wage requirements.

Background

The *Davis-Bacon Act* was enacted during the great depression to bring stability to the construction industry by placing a floor under wages for certain types of construction jobs. The law prevents contractors from underbidding other contractors on projects funded with federal dollars by hiring workers willing to accept wages lower than the prevailing wage in the area of a construction project. Davis-Bacon requirements are meant to guarantee that the federal government's vast purchasing power, coupled with a requirement to award contracts to the lowest bidder, will not undercut construction wages in local labor markets or undermine local economies.

The effectiveness of *Davis-Bacon Act* requirements is the subject of considerable debate with both positive and negative opinions being strongly held by various parties. For example, some parties claim repeal of the *Davis-Bacon Act* will save money while others argue that a repeal will make little or no difference in the cost of construction projects. Likewise, some parties claim that Davis-Bacon requirements are still appropriate to assist local economies while other parties allege that Davis-Bacon requirements hinder the growth of local economies by forcing state and local governments to divert resources from their construction priorities to cover the cost of projects subject to Davis-Bacon requirements.

Intergovernmental Concerns

As noted above, state and local governments are only subject to *Davis-Bacon Act* requirements if they receive federal financial assistance through a Davis-Bacon Related Act (i.e. a law that includes language making receipt of federal funds contingent upon compliance with *Davis-Bacon Act* requirements.) When Davis-Bacon requirements are made applicable to a federally-assisted state or local government construction project, the state and local government concerns include the same arguments noted above concerning the effectiveness of the law in federal construction projects. For example, some state and local governments claim that Davis-Bacon requirements increase the cost of projects by mandating wages higher than would otherwise be paid in the area of the construction projects. Also, concerns are expressed about the recordkeeping and reporting requirements related to documentation of *Davis-Bacon Act* compliance.

Intergovernmental issues are aggravated when Davis-Bacon Related Acts apply federal construction requirements with no special exceptions to recognize the nature of the state or local construction project or the percentage of federal funds compared to total project cost. Intergovernmental concerns are relieved in some Davis-Bacon Related Acts with language making the applicability of the requirements subject to certain conditions. For example, in the Housing and Community Development Act of 1974 for the Community Development Block Grant program, the Secretary of Housing and Urban Development (HUD) is authorized to waive *Davis-Bacon Act* provisions in connection with grants to Indian tribes.[Section 107(e)(2)]. In other laws within HUD's jurisdiction *Davis-Bacon Act* requirements do not apply to projects involving less than 8 housing units.

Also, Davis-Bacon Related Acts usually fail to acknowledge that many states have their own version of Davis-Bacon requirements which are applicable to construction projects funded with state money. In these situations, the application of the federal Davis-Bacon requirements may conflict with state requirements and create a situation inappropriately detrimental to intergovernmental comity while not necessarily benefiting working men and women any more than would be true under the state law.

Recommendation Rationale

ACIR recommends that the Davis-Bacon Related Acts be amended to exempt state and local projects with a cost below a higher dollar threshold than exists in most laws. Also, ACIR urges the Congress and the President to consider exempting state and local projects in which the federal funding share is a low percentage of total cost. These recommendations recognize the national interests, which led to making Davis-Bacon compliance a condition-of-aid in 60 plus federal laws, while also recognizing the concerns of local and state governments regarding

Davis-Bacon Related Act requirements. The goal of amendments to Davis-Bacon Related Acts should be to allow state and local governments greater flexibility in federally assisted construction projects to apply state laws concerning working men and women and to use total funding available for a project in a manner which best achieves the state and local governments priorities.

Required Use of Recycled Crumb Rubber (Repealed)

RECOMMENDATION: ***Commend the Congress and the President for repealing this federal mandate.***

Description

Section 1038 of the *Intermodal Surface Transportation Efficiency Act of 1991* (ISTEA) (P.L. 102-240) required states to satisfy a minimum tonnage utilization requirement for asphalt pavement containing recycled rubber on federal-aid projects. The requirement was 5 percent for 1994, 10 percent for 1995, 15 percent for 1996, and 20 percent thereafter. The Secretary of Transportation (DOT) could waive the penalty for any three-year period on evidence of health, environment, and performance problems associated with asphalt pavements containing rubber. Individual state exceptions could also be made if there was an insufficient supply of scrap tires. Section 205(b) of the *National Highway System Designation Act of 1995* repealed this mandate.

Background

This provision was adopted to encourage states to build better, longer lasting roads and to reduce used tire stockpiles.

Although this mandate has been repealed, ACIR has retained a discussion of this mandate in this report on federal mandates because it presents an outstanding example of a mandate that should have been given greater consideration from an intergovernmental perspective prior to enactment.

Intergovernmental Concerns

State and local government concerns with the requirement for including recycled crumb rubber in asphalt pavement on federally aided highway projects varied according to conditions in individual states. In some cases, it was argued that the material was inappropriate for use in the state's roads because of weather and other conditions. In other cases, it was noted that there was no need to recycle crumb rubber in asphalt because other markets exist for the use of crumb rubber. In one instance, a state reported the needed to import old tires into the state just to meet the crumb in asphalt requirements.

Besides the general sense that the law inappropriately infringed on traditional state or local regulated activities, intergovernmental tensions were raised by the law's provision allowing the withholding of highway funds if a state failed to comply with the recycled crumb rubber requirements. The federal intrusion into this area of state operations, along with the withholding of grant money for non-compliance, demonstrate the breakdown intergovernmental comity surrounding this particular issue.

State and local government concerns were corroborated by construction industry concerns about both the integrity of the pavements and the life-cycle maintenance costs of crumb-rubber-mix asphalt. Research had not completely shown any improved life of asphalt pavements using crumb rubber, while the costs doubled in many instances. According to the American Association of State Highway and Transportation Officials (AASHTO), costs vary regionally and from product to product but could result in 20-100 percent higher paving costs for construction of short life and poor quality roads. It was also contended that the law mandated an engineering approach that is still experimental and has unresolved environmental, health, and safety issues.

Recommendation Rationale

ACIR commends the Congress and the President for repealing the mandate requiring the use of recycled crumb rubber in asphalt. The repeal recognizes that most state and local governments and highway user interest groups do not believe there is sufficient benefit in using waste tire rubber in hot-mix asphalt to justify the costs or the need for a federal mandate to create a national policy on this issue.

FUTURE ACTIONS RELATED TO FEDERAL MANDATES AND THEIR IMPACT ON INTERGOVERNMENTAL RELATIONS

Forum for regulatory

Enactment of the *Unfunded Mandates Reform Act of 1995* was the beginning, not the end, of a process to provide mandate relief for state and local governments. The legislative debate preceding enactment of the Act resulted in a compromise regarding prospective vs. retrospective applicability of the law. Under the compromise, Titles I and II of the statute established mechanisms to provide relief from future mandates—as exhibited in the January 1996 legislative debate on the telecommunications bill—but, they provided no relief from existing federal mandates. For existing federal mandates, Title III of the statute directed ACIR to review the impact of federal mandates on state and local governments and to submit a report to Congress and the President with recommendations. Essentially, the law postponed the discussion of existing mandates for one year.

Title III provided no relief!!

During the course of the study, over 200 mandates—mandates being broadly defined under Title III of the Act—were identified to ACIR by state and local governments and other organizations (An inventory of these mandates can be found in ACIR's *Catalogue of Federal Mandates on State and Local Governments*). This report concentrates on 14 specific mandates of concern. Other mandates are also in need of thorough review. For example, requirements for identification, management, and disposal of solid and hazardous waste materials under the *Resource Conservation Recovery Act (RCRA)* and the Superfund program were cited by state and local governments as needing review. Also, components of Medicaid caseload eligibility regulations, job training services, and "Motor Voter" requirements are causing significant concerns for state and local governments. *A review of some of these additional mandates should be authorized as soon as possible.*

The review of existing mandates has already contributed positively to improvements in intergovernmental relations. Advocacy groups on all sides of various mandate issues have started to rethink their positions, to better articulate their concerns, and to discuss issues face-to-face with one another. In addition, several of ACIR's recommendations mirror similar proposals and events unfolding in the executive, legislative, and judicial branches of the federal government. The Administration's Fiscal Year 1997 budget calls for repeal of the *Boren Amendment.* Amendments to the *Safe Drinking Water Act* have passed the Senate with bipartisan support and may be enacted during 1996. A recent Supreme Court decision in *Seminole Tribe of Florida vs. Florida* challenges the power of Congress to create a private right of action against a state if the state has violated a federal right flowing from a federal statute. Further study is needed to examine the issues raised by federal statutes authorizing private rights of action against state and local governments.

Further changes proposed by ACIR in national intergovernmental policy may be realized in the near future. For example, the Department of Interior publicly recognized the need for changes in the *Endangered Species Act* to give it more flexibility in working with state and local governments. The Department of Education is proposing to reduce record-keeping requirements in the *Individuals with Disabilities Education Act* to relieve some of the more onerous provisions of the Act not related to the education of a child with a disability. Numerous changes in the *Fair Labor Standards Act* are being proposed which will relieve mandate burdens on state and local governments. The need for change is evidenced by the actual and potential liabilities of state and local governments soaring into the millions of dollars as a result of lawsuits under the FLSA. It is up to the appropriate federal agencies and Congressional committees to evaluate and propose statutory language related to specific provisions in the various federal laws reviewed by ACIR.

For the *Unfunded Mandates Reform Act* to be truly successful, further study is required on the provisions of the Act that ACIR was not able to accomplish due to resource constraints. Efforts must be made to examine the measurement and definition issues involved in calculating the total costs and benefits to state, local, and tribal governments of compliance with federal laws. In addition, it is imperative to include a discussion of the role of state mandates imposed on local governments in any future discussion of mandate reform. Also, ACIR was not able to evaluate the application of mandates to the private sector or to consider the views of and the impact of these mandates on working men and women. The issues and options related to solutions for private sector mandate relief are significantly different from those related to solutions for public sector relief, and should be examined accordingly. Moreover, ACIR's court ruling report, which also was done in response to a directive of the Act, revealed that there were 3,500 judicial decisions in 1994 involving federal laws and state or local governments. The results of ACIR's studies provide a dramatic picture of the complex relationship between the federal government and state and local governments.

As is now the case with future mandates, the federal government should take a second look at existing federal mandates and the state and local government costs of implementing these mandates. In the future, the challenge facing the federal government will be to exercise its power to resolve national needs while, at the same time, honoring state and local rights to govern their own affairs and set their own priorities. It is not too late to use this same power to correct some of the problems of the past.

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

06-Jun-1996 12:36pm

TO: Elizabeth E. Drye

FROM: Diana M. Fortuna
Domestic Policy Council

CC: Carol H. Rasco

SUBJECT: Latest ACIR draft

You had asked me to comment on the IDEA and ADA sections of the latest ACIR draft on mandates.

Unfortunately, it still seems really problematic to me.

1. On the ADA: They recommend amending the ADA. This is something we should not endorse unless there was a very compelling reason. ACIR's reason is that more than one Federal agency has responsibility for enforcing the ADA (DOJ, EEOC, FCC, Transportation), and this has created "coordination" problems. So their amendment would require the Federal government to coordinate enforcement and TA.

I have never heard there is any need for this. The different Federal agencies have very clearly defined responsibilities: if it's employment, it's EEOC; if it's a public accommodation, it's DOJ; etc. I can't imagine,if there is a problem here, that it would rise to the level of warranting an amendment to this law. And advocates would feel (with justification) that opening the law to amendments could be very dangerous.

2. On IDEA: It is less an issue of the recommendations than of tone. It doesn't reflect any understanding of what the battle to get disabled kids educated has been all about, and that this is a civil rights issue. It suggests states and school districts are perfectly happy to have this responsibility but because we won't come up with the money they are stuck with this big unfair burden. Sample problematic quote, with particular problems in caps:

- "States and local governments argue that the requirements [of IDEA] do not provide enough flexibility and require states to accomplish MORE THAN THEY ARE ABLE, GIVEN THE AMOUNT OF AID provided. State and school districts argue that they have no practical choice but to accept IDEA grants because they need the funds; but, then, THEY FIND THEMSELVES OBLIGATED TO SERVE DISABLED STUDENTS according to extensive and detailed specifications."

The views of states and locals is not balanced with the views of parents.

I would have to talk to Education to find out if the technical language of their recommendations is OK -- it might be.

I think ACIR should just drop these 2 issues altogether. They have nothing to say that is not either problematic or meaningless.

207-646-5473

THE WHITE HOUSE

WASHINGTON

June 12, 1996

MEMORANDUM TO LEON PANETTA

FROM: Marcia Hale
Carol Rasco
Sally Katzen

SUBJECT: Advisory Commission on Intergovernmental Relations (ACIR) Draft Report

Governor Winter, ACIR's Chairman, has asked Marcia Hale to confidentially review a new draft of ACIR's unfunded mandates report. Although this draft addresses some of our previous concerns and is apparently acceptable to Governor Winter and possibly to other Democratic Commission members, we recommend that the three Administration officials on the Commission -- Marcia Hale, Secretary Riley, and Administrator Browner -- oppose the report and work to ensure other Democratic members oppose it. This memo seeks your approval of this approach.

Background

- <u>ACIR's Congressional Charge</u> -- The Unfunded Mandates Reform Act directs ACIR to "review the role of Federal mandates in intergovernmental relations," including establishing a framework and measurement tools for evaluating mandates and identifying specific mandates that should be addressed.

- <u>Previous Administration Position</u> -- In January, the Commission voted to release a draft report for public comment. Federal Agencies commented extensively on the draft. In addition, on March 1, 1996 Marcia Hale wrote to Governor Winter stating the Administration's strong objections to the report's analytic approach and policy conclusions (letter attached). The letter indicated the draft report:

  - did not adequately speak to ACIR's Congressional charge to establish a broad conceptual framework for considering individual mandates;

  - did little to further consensus on fundamental questions such as how to measure the costs and benefits of mandates;

  - presented misleading analyses of 14 Federal health, safety, environmental, worker protection, and civil rights laws and recommended unacceptable changes to most of these laws;

  - failed in its analyses to consider the views of or effects on working men and women as directed by Congress; and

- o went beyond the scope of the Act by suggesting changes to disability civil rights statutes excluded by the Act.

Revised Draft

o Content -- The new draft, although less egregious in its recommendations (attached), contains the same fundamental flaws. For example, the report:

- o still largely fails to consider benefits (the final page acknowledges ACIR did not consider the benefits of mandates on working men and women);

- o to mitigate what ACIR characterizes as costly mandates, recommends increased Federal spending and/or technical assistance for 7 statutes -- Occupational Safety and Health Act (OSHA), Omnibus Transportation Employee Testing Act (drug and alcohol testing), Clean Water Act (CWA), Individuals with Disabilities Education Act (IDEA), Americans with Disabilities Act (ADA), Safe Drinking Water Act (SDWA), and Clean Air Act (CAA) -- and recommends new bureaucratic structures to assist states;

- o argues (unconvincingly) that two disability civil rights statutes -- ADA and IDEA -- are within the Commission's scope and recommends unacceptable changes to ADA;

- o proposes more moderate but still problematic changes to 5 statutes -- the Fair Labor Standards Act (FLSA), Transportation Employee Testing Act, CWA, ADA, and Davis-Bacon related acts; and,

- o recommends a study of laws that provide private rights of action against state and local governments and recommends that the study be concluded prior to reauthorizing any existing statutes (e.g. environmental laws) with such provisions or enacting new statutes with such language.

o Status -- Governor Winter is ready to ask Commissioners to vote to approve the report. The Commission sunsets at the end of this fiscal year, is short on funds, and is eager to conclude its work.

Recommendation

Administration officials should oppose the revised draft and urge other Democratic members to oppose it.

pros o This document is not good government and is not consistent with the Administration's message on unfunded mandates. It is a one-sided presentation of a complicated issue that stresses costs and calls for more

Federal spending.

- o We are being urged by labor, environmental and disability groups to repudiate the report; fiscal conservatives could also criticize us for supporting it.

- o The Administration already has a strong record on unfunded mandates. We've issued executive orders and taken strong actions to implement the Unfunded Mandates Reform Act. We've also proposed changes to address certain specific burdens identified in the report (e.g. reporting requirements in IDEA) and have provided enhanced technical assistance and flexibility under numerous statutes.

cons

- o Some Democratic Commission members may support the report, isolating Administration Democrats.

- o We could be criticized for not acting aggressively to address the burden of unfunded mandates.

- o We could be criticized as being inflexible given improvements in this draft.

Attachments

ADVISORY COMMISSION
ON INTERGOVERNMENTAL RELATIONS

Members of the Commission

Private Citizens

Peter Lucas, Director of Legislative Affairs,
Massachusetts Bay Transportation Authority, Boston, MA
Richard P. Nathan, Director, Nelson A. Rockefeller Institute of Government, Albany, NY
William F. Winter, CHAIRMAN, Senior Partner, Watkins, Ludlam & Stennis, Jackson, MS

Members of the U.S. Senate

Bob Graham, Florida
Dirk Kempthorne, Idaho
Craig Thomas, Wyoming

Members of the U.S. House of Representatives

James P. Moran, Virginia
Donald M. Payne, New Jersey
(Vacancy)

Officers of the Executive Branch, Federal Government

Carol M. Browner, Administrator,
U.S. Environmental Protection Agency
Marcia L. Hale, Assistant to the President
and Director of Intergovernmental Affairs
Richard W. Riley, Secretary,
U.S. Department of Education

Governors

Arne H. Carlson, Minnesota
Howard Dean, Vermont
Michael O. Leavitt, Utah
Bob Miller, Nevada

Mayors

Victor H. Ashe, Knoxville, TN
Gregory Lashutka, Columbus, OH
Edward G. Rendell, Philadelphia, PA
Bruce M. Todd, Austin, TX

State Legislators

Paul Bud Burke, President, Kansas Senate
Art Hamilton, Minority Leader, Arizona House of Representatives
(Vacancy)

Elected County Officials

Randall Franke, Commissioner, Marion County, OR
Gloria Molina, Supervisor, Los Angeles County, CA
John H. Stroger, Jr., Commission President, Cook County, IL

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The Role of
FEDERAL MANDATES
in Intergovernmental Relations
(Draft: May 30, 1996)

RECOMMENDATIONS ON INDIVIDUAL MANDATES:

1. Fair Labor Standards Act:

Retain state and local government coverage under the FLSA but amend the Act to allow state and local government compliance with either the policies of the Act or the comparable policies of the federal government under Title 5, USC.

2. Family and Medical Leave Act:

Retain state and local government coverage under the FMLA.

3. Occupational Safety and Health Act:

Make no change in OSHA language regarding state and local government compliance; but, increase DOL consultation activities with state and local governments and increase federal funding sources for state and local government training and technical assistance on OSHA requirements as well as funding for implementation of requirements.

4. Drug and Alcohol Testing of Commercial Drivers:

Amend the law (ISTEA) to permit alternative testing requirements or program certification in lieu of testing requirements for small governments. In addition, the federal government should increase technical assistance to state and local governments on transportation safety requirements including the control and monitoring of drug and alcohol abuses by drivers.

5. Metric Conversion for Plans and Specifications:

Congress and the President are commended for extending the deadline for metric conversion of plans and specifications to the year 2000.

6. Medicaid: Boren Amendment:

Repeal the language of the Boren Amendment and insert language specifying that rate determinations are the sole responsibility of each participating state and that such rates must be established to assure that health and nursing home care is provided in conformity with applicable federal and state laws and regulations related to quality of care and safety standards.

7. The Clean Water Act:

Increase federal funding for states and local government to support construction of municipal wastewater facilities and amend the Act to give EPA specific authority to extend deadlines for compliance on a case-by-case basis.

8. Individuals with Disabilities Education Act:

Increase federal funding to 40% of the excess costs of special education as is authorized by the Individuals with Disabilities Education Act and amend the Act to relieve state and local governments of prescriptive administrative and recordkeeping requirements unrelated to the education of individuals with disabilities. Also, amend the Act to foster increased use of mediation and other forms of alternative dispute resolution.

9. Americans with Disabilities Act:

Provide increased technical assistance and educational information to state and local governments, as well as increased funding for compliance with mandated ADA requirements. Amend ADA to require the federal government to coordinate enforcement and technical assistance in areas where there are cross-agency issues.

10. The Safe Drinking Water Act:

Enact amendments to the Safe Drinking Water Act similar to those approved by the Senate in S.1316 (104th Congress) including language permitting states increased flexibility for implementation of national standards.

11. Endangered Species Act:

Amend the law to give state and local governments an official role in the management and planning decisions affecting the listing process, beyond the traditional consultation and full notice and comment requirements currently in effect.

12. The Clean Air Act:

Make no change in existing federal standards but increase federal aid and technical assistance to help states comply.

13. Davis-Bacon Related Acts:

Amend the related laws to exempt projects below a higher dollar threshold than exists in most laws and consider exempting projects in which federal participation is a low percentage of total project costs.

14. Required Use of Recycles Crumb Rubber (Repealed)

Commend the Congress and the President for repealing this federal mandate.

RECOMMENDATIONS ON COMMON ISSUES:

1. Detailed Procedural Requirements:

In general, state and local governments should be permitted, through statutory language, flexibility in choosing the methods 3used to comply with a federal mandate. Federal agencies should assist state and local governments by providing research and technical advice on implementation approaches and methods to save the state and local governments design and adaptation costs, whenever possible. The focus of federal statutes, regulations, and policies should be on results, not process.

2. Lack of Federal Concern About and Fund of Mandate Costs:

As requires by the Unfunded Mandates Reform Act, the federal government should take federal, state, and local costs of policy implementation into consideration before enacting a law containing a federal mandate on state and local governments. In addition, the federal government should assume some share of mandate costs as an incentive to restrain the extent of the mandate and to aid in seeking the least costly alternatives.

3. Federal Failure to Recognize State and Local Governments as Governments:

Federal laws are regulatory policies should recognize that state, local, and tribal governments are co-makers of national policy who, in contrast to interest groups and private entities, are led by elected officials who must account to the voters within their respective jurisdictions just as do the President and the Members of the US Congress.

4. Authorization of Lawsuits Against State and Local Governments to Enforce Federal Law:

The federal government should commission a study to examine the constitutional and intergovernmental issues raised by laws authorizing private rights of action against state and local governments. Such a study should be concluded prior to enactment of any more statutory language authorizing private rights of action against state or local governments and prior to any re-authorization of existing statutes with such language.

5. Inability of Very Small Local Governments to Meet Mandate Standards and Timetables:

The federal government should increase the number of laws and regulation that allow for deadline extensions or requirement modifications for very small governments that cannot meet existing time limitations or cannot afford compliance with national standards.

6. Insufficient Communication on or Ineffective Coordination of Federal Policies:

The federal government should establish a coordination mechanism to assist state and local governments through the federal policy maze. The coordination mechanism should be designed to avoid the conflicts of interest that arise in a lead agency process because a lead agency usually has program as well as coordination responsibilities. Desk officers could be assigned for each state as a single point of contact or ombudsperson for questions on federal policies and common rules could be drafted to implement mandates under the jurisdiction of multiple federal agencies. In addition, an arbitration process could be developed to make binding decisions on issues related to federal mandates that arise among federal agencies or between the federal agencies or between the federal government and state or local governments.