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MEMORANDUM

Date: July 3, 1996

From: Gary Bass

To: Bill White

Subject: ACIR June 25 Draft Report on Federal Mandates

Citizens for Sensible Safeguards, a coalition of more than 300 national organizations, has obtained a June 25, 1996 draft of an ACIR report on federal mandates. While CSS has not had time to fully evaluate the report, I would like to share with you some preliminary conclusions. As CSS members review the draft report, we will refine our conclusions about the June 25 draft.

In its current form, CSS would strongly oppose the report and actively urge a negative vote by Commissioners. This draft demonstrates that the ACIR staff have lost nearly all objectivity in researching and writing a final report. Furthermore, the ACIR efforts to develop a final report have not met the statutory requirements of the Unfunded Mandates Reform Act of 1995 (P.L. 104-4) with respect to addressing certain subjects (Sec. 302(a)(3)) or holding more than one hearing on the preliminary report (Sec. 302(c)(2)).

Our preliminary review indicates two types of problems with the June 25 draft report. The first type concerns the tone of the report and the biased nature of the introductory and conclusionary sections. The second type deals with the specific recommendations.

Type I Problems

1. **The report does not address the conflict between a citizen's right and the definition of mandate; ACIR should advise Congress on the need to narrow the definition of "federal mandate" to not include voluntary programs and laws guaranteeing basic civil and constitutional rights** . During the single ACIR public hearing, witnesses repeatedly testified that what is perceived to be a mandate by state and local governments is a critical right to citizens that live in that state. The report fails to address this dilemma. As a result, the report is skewed heavily to the viewpoint of state and local governments, instead of the public. For example, how can the Individuals with Disabilities Education Act (IDEA) be classified as a mandate when the courts have ruled that a free, appropriate public education is a constitutional right. If ACIR decides to cover IDEA as a mandate, then why not every other constitutional decision that has an impact on state and local governments (e.g., due process requirements).

   Even though Sec. 305 of the Unfunded Mandates Reform Act defines "Federal mandate" broadly, it is irresponsible of ACIR not to raise the need for Congress to narrow the definition. Federal programs in which a state or local government -- or any other recipient -- voluntarily chooses to participate in, should not be considered a mandate. A number of court decisions have concluded that the federal government has the right to impose restrictions on recipients of federal funds as a condition of receipt of those funds (see, for example, *Rust v. Sullivan*). By including laws such as the Occupational Safety and Health Act or Medicaid, in which states choose to voluntarily participate, the ACIR June 25 draft presents a false perception of intergovernmental issues.

2. **The ACIR draft is devoid of any reference to the benefits of federal laws.** The June 25 draft emphasizes intergovernmental difficulties with implementing federal mandates, but does not discuss the benefits derived from these public protections. This type of analysis significantly biases the report, adding to its credibility problems.

3. **The ACIR would have us believe that state and local governments should be treated differently than other regulated entities.** Of course there are times when the federal government should work in partnership with state and local governments in designing and implementing initiatives, such as information data collection efforts or service integration activities. However, state and local governments are also employers and polluters. They are no different than any other regulated entity in this respect. (In fact, that is why the U.S. Congress has made federal laws that apply to other Americans also apply to itself.) Providing preferential treatment to state and local governments unfairly tilts the regulatory playing field. Suddenly, employees of state and local governments may receive fewer workplace protections than those workers in the private sector.

   Already state and local governments are not required to comply with important federal safeguards. For example, one of the most successful environmental laws, the Emergency Planning and Community Right-to-Know Act, which requires annual disclosure of toxic chemicals to the environment, does not apply to state and local governments, but does apply to federal agencies and many businesses. Instead of providing preferential treatment for state and local governments, the ACIR should be concentrating on where gaps in public safeguards exist and offering recommendations on how to address the unmet need without imposing unnecessary burdens.

4. **The ACIR does not describe why the federal protections were developed in the first place.** The reason federal law is created is to address a felt need -- one that is openly debated and chronicled. The ACIR June 25 draft does describe why "federal mandates" are created in the first place. In many cases, it is because state and local governments are not addressing the problem. In other cases, it is to develop uniformity throughout the country to ensure that citizens, no matter where they live, are afforded equal protection. Once again, the ACIR bias makes the report sound as though it has become a trade association for state and local governments instead of applying an analytical framework to a difficult issue.

5. **The ACIR draft has enormous credibility problems beyond those identified above.** The June 25 draft is filled with inaccuracies that makes it difficult to give the

recommendations any credibility. For example, on page 4 of the draft, it states that "ACIR was unable to review more than the 13 selected mandates." On its face this is inaccurate since the preliminary report reviewed 14, not 13, mandates.

The description on page 5 of the public comments and testimony on the ACIR preliminary report is woefully inadequate. There is no mention about the types of comments that were received and that the preponderance of them were in opposition to ACIR's preliminary report.

Probably most extreme is the bold conclusionary statement on page 30: "The [ACIR] 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 face-to-face with one another." This is simply a self-serving statement that defies the fact that our coalition continues to publicly oppose the ACIR actions, not to rethink our positions. There has been no face-to-face communication with the ACIR staff, nor initiative on their part to engage us on our views. ACIR may be correct in stating that it has helped us to "better articulate their concerns," but solely because of the outrageous actions taken by this governmental agency and the lack of empirical evidence to justify its conclusions.

6. **The process for developing a final report is inadequate and inappropriate.** Federal agencies received the ACIR report no sooner than June 26 and were asked to submit comments to the ACIR by July 3. Thus, most agencies had less than one week to react to the June 25 draft -- and at a time that was nearing a federal holiday. This is the same approach the ACIR took in releasing it preliminary report -- allowing agency staff to review the report during the holiday season, which also happened to be during a government shutdown.

   The public also has not been adequately included in this process. We criticized the ACIR for initially announcing that a $400 per person conference would serve the statutory requirement for public hearings. ACIR relented and held one public hearing. The statute, however, requires ACIR to hold "public hearings" -- that is, more than one. This has not been done.

   During the public hearing Governor Winter made several statements about public notification of future ACIR actions on this subject. OMB Watch followed up with a letter to the Governor for clarification on several points. The ACIR responded in a letter that stated that future meetings regarding the development of the final report would be posted in the *Congressional Monitor*, a private publication. We encouraged them to make such announcements in the *Federal Register* in addition to the private publication. To date there has been no notice in either publication about a July 23 meeting of the ACIR Commissioners to discuss the final report. We find this unacceptable.

7. **The recommendation "to restructure federal laws to restore comity between the**

governments" needs clarification, and the ones to conduct further studies must be deleted. On page 2 of the June 25 draft, it states: "ACIR recommends that mandate relief studies, and related efforts focus on how to restructure federal laws and restore comity between the governments in the American federal system, not on the elimination or repeal of federal laws." We are pleased that ACIR is not recommending elimination or repeal of federal laws, but, of course, ACIR did not propose such ideas in its preliminary report. What we opposed in the preliminary report was the notion of exempting state and local governments with compliance of federal laws and protections, thereby creating what CSS called "a crazy quilt of public protections for some, but not for others." This general recommendation must affirmatively state that ACIR is not recommending a policy of exempting state and local governments from compliance with federal laws and protections.

Additionally, the June 25 draft recommends a review of "additional existing federal mandates," further study of "laws authorizing private right-of-action against state and local governments," and a review of the Resource Conservation Recovery Act, Superfund, Medicaid, job training services, and "Motor Voter" requirements is needed "as soon as possible." Given the sloppy, one-sided nature of the June 25 draft, we believe these ACIR recommendations should be dropped. On what basis is ACIR mentioning RCRA, Superfund, Medicaid, job training, and Motor Voter. Motor Voter, for example, has been subjected to court review and has been upheld. Congress has an appropriate means for reviewing these laws and will debate them in the public eye when up they are up for reauthorization.

We strongly object to the conclusion on page 7 that a study be commissioned to examine issues raised by laws authorizing private rights-of-action. The private right-of-action is the only way individuals can enforce their rights under the law. Rights that are not enforceable are meaningless. We also strongly oppose the recommendation that there should be a moratorium on new laws and reauthorization of existing laws that grant private rights-of-action against state and local governments until this study be completed. This section of the ACIR June 25 draft should be dropped.

__Type II Problems__

We are pleased to see some of the recommendations on specific "mandates" change. However, even those that have acceptable recommendations, the descriptions, background, and intergovernmental concerns that provide the rationale for the recommendation have significant problems.

Although we have not had time to review the recommendations in detail, several of the 13 specific recommendations are unacceptable, such as the Fair Labor Standards Act and other labor issues, the environmental recommendations, and IDEA. Organizations within the coalition are now reviewing the ACIR specific recommendations and will be prepared to express more detailed concerns.

EMBARGOED UNTIL 9:30 A.M.
JANUARY 24, 1996

The Role of FEDERAL MANDATES in Intergovernmental Relations

A Preliminary ACIR Report
For Public Review and Comment
January 1996

U.S. Advisory Commission on Intergovernmental Relations
Washington, DC 20575

CONTENTS

Appendix A

Appendix B

PRELIMINARY ACIR REPORT ON FEDERAL MANDATES

Approved for Public Review and Comment
by the U.S. Advisory Commission on Intergovernmental Relations
January 5, 1996

INTRODUCTION

The *Unfunded Mandates Reform Act of 1995* (P.L. 104-4) represents a bipartisan agreement that something is wrong with American federalism as it has evolved in recent years. 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 recommendations to the President and Congress as to how the federal government should relate to state, local, and tribal governments. In this preliminary report, ACIR proposes for public review and comment recommended changes in federal policies to improve intergovernmental relations while maintaining a commitment to national interests.

CHANGES IN THE FEDERAL SYSTEM

The mandate issues examined in this report arose because American federalism no longer has 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. Federal involvement usually began with financial aid to achieve national goals. In recent years, federal involvement has taken the form of direct orders to meet federal requirements, often with no federal financial assistance. The extensive and complex nature of this involvement is illustrated by the following examples:

- More than 200 separate mandates were identified to ACIR by state and local governments, involving about 170 federal laws reaching into every nook and cranny of state and local activities.
- 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.
- State and local officials must comply with 33 federal laws to receive non-construction federal grants.

These numbers provide a dramatic picture of the cumulative effects of federal laws on state and local governments. They also confirm the need for better definition of the appropriate working relationships between the partners in the federal system. Relief from existing federal mandates will be especially important if state and local governments are to assume greater responsibilities from federal devolution.

DETERMINING THE APPROPRIATE FEDERAL ROLE

In *Garcia* v. *San Antonio Metropolitan Transit Authority* (1985), the Supreme Court made it clear that constitutionally the Congress is responsible for determining the precise scope of national authority over state and local governments. The court recognized that clear lines defining the appropriate scope of federal activities could not be drawn and, instead, left it to the political process to determine appropriate governmental roles.

Historically, the political process has 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 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 an acceptable feature of the U.S. federal system.

In recent years, however, the Washington tendency has been to treat as a national issue any problem that is emotional, hot, and highly visible. Often, this has meant passing a federal law that imposes costs and requirements on state and local governments without their consent and without regard for their ability to comply. Such actions, even though they may have broad public support, are damaging to intergovernmental comity. The challenge facing the federal government is to exercise power to resolve national needs while, at the same time, honoring state and local rights to govern their own affairs and set their own budget priorities.

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 intrusion 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 started its review process by adopting criteria describing mandate issues of significant concern and the types of problems to be analyzed. These criteria were issued on July 6, 1995 (see Appendix B). Information about mandates meeting the criteria were solicited 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:

- 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.

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.

ACIR selected 14 mandates for analysis. The 14 mandates selected constitute only a small portion of the over 200 identified, but they illustrate the diverse, complex, and troubling challenges that federal mandates pose for the intergovernmental system. *While only 14 mandates are reviewed in this report because of time and resource limitations, the Commission believes that many more of the over 200 mandates identified need to be evaluated. ACIR urges that a review of additional mandates be authorized as soon as possible.*

The selection of the 14 mandates was based on:

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

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

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

BASIS OF RECOMMENDATIONS

In considering its recommendations on the intergovernmental role of federal mandates, the Commission was guided by the published criteria. The criteria defined 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 14 mandates subjected to intensive review in this report meet one or more of these criteria.

The criteria also identified a number of specific conditions for which ACIR should make relief recommendations. The specific conditions were: requirements not needing national action or, if needing national action, not federally funded; unnecessarily rigid; unnecessarily complex or prescriptive; unclear goals or standards; contradictory or inconsistent provisions; duplicative provisions; obsolete provisions; lacking in adequate scientific and economic basis; lacking in practical value; or would create undue financial difficulties for the governments.

ACIR recognizes that mandate issues are more than disagreements between political scientists about which government has the *right* to make a decision. Instead, mandate issues relate to the nuts and bolts of government operations that are necessary to provide effective protection and efficient services. This means evaluating how the mandate will affect not only costs but routine government operations as well.

In examining the individual mandates, the Commission considered the fundamental intergovernmental issues associated with the mandate, and did not evaluate the specific mandate requirements. We urge those reviewing these analyses and the accompanying recommendations to give similar attention to the roles of federal, state, and local governments as they relate to the mandate.

COMMON ISSUES

ACIR's review of existing mandates found a number of common issues that are troubling federal, state, and local government relations. These issues and ACIR's proposed recommendations to address them include:

1. Detailed procedural requirements. State and local governments are not given flexibility to meet national goals in ways that best fit their needs and resources. The imposition of exact standards or detailed requirements, in many instances, merely increases costs and delays achievement of the national goals. *The federal role in implementation should be to provide research and technical advice for those governments that request it, but, in general, state and local governments should be permitted to comply with a mandate in a manner that best suits their particular needs and conditions.*

2. Lack of federal concern about mandate costs. When the federal government imposes costs on another government without providing federal funds, the magnitude of costs is often not considered. If the federal government has no financial obligation, it has little incentive to weigh costs against benefits or to allow state and local governments to determine the least costly alternatives for reaching national goals. *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' public accountability. 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 derived from the U.S. Constitution. Local governments, despite the important role they play in delivering government services, have been given even less consideration. Non-governmental advocacy groups' views have sometimes been given more attention than those of state and local governments. *Federal laws should recognize that state and local governments are led by elected officials who must account to the voters for their actions, just as the President and Members of Congress.*

4. Lawsuits by individuals against state and local governments to enforce federal mandates. Many federal laws permit individuals or organizations to sue state and local governments over questions of compliance, even though a federal agency is responsible for enforcement. Federal laws, however, are often written in such broad terms, it is not clear what is required of federal, state, and local officials. In these circumstances, permitting litigation brought by individuals subjects state and local governments to budgetary uncertainties and substantial legal costs. Because the federal agency is not directly involved with the costs and problems of this litigation, it has little incentive to propose amendments that would clarify the law's requirements. *Only the federal agency responsible for enforcement of a law should be permitted to sue state and local governments.*

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. Many very small local governments have only part-time staffs with little technical capability and very limited resource bases. Extending deadlines or modifying requirements for these small governments may have minimal adverse effects on the achievement of overall national goals but may make it possible for such governments eventually to comply. *Deadlines should be extended and requirements modified for very small local governments.*

6. Lack of coordinated federal policy with no federal agency empowered to make binding decisions about a mandate's requirements. There are mandates that involve several federal agencies. This has resulted in confusion about what the law requires and how state and local governments can know when they are in compliance. In addition to making state and local governments aware of mandate requirements, federal agencies should explain the reasons for the mandate and should assist in taking the actions necessary for implementation. *A single federal agency should be designated to coordinate each mandate's implementation and to make binding decisions about that mandate.*

SUMMARY OF RECOMMENDATIONS ON INDIVIDUAL MANDATES

ACIR's proposed recommendations for individual mandates can be summarized into three categories.

The Commission finds that the following mandates as they apply to state and local governments do *not* have a sufficient national interest to justify intruding on state and local government abilities to control their own affairs. While the Commission does not take issue with the goals of these mandates, it believes that achieving those goals can be left to elected state and local officials. **Thus, ACIR recommends repealing the provisions in these laws that extend coverage to state and local governments.**

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

Required Use of Recycled Crumb Rubber

The Commission finds that the following mandates are necessary because national policy goals justify their use. However, the federal share of the costs should be increased or the stringent requirements and deadlines imposed on state and local governments should be relaxed. These mandates impose substantial costs on state and local governments as a result of requirements that are unnecessarily burdensome. **Thus, ACIR recommends retaining these mandates with modifications to accommodate budgetary and administrative constraints on state and local governments.**

The Clean Water Act

Individuals with Disabilities Education Act

Americans with Disabilities Act

The Commission finds the following mandates are related to acceptable national policy goals, but they should be revised to provide greater flexibility in implementation procedures and more participation by state and local governments in development of mandate policies. **Thus, ACIR recommends revising these mandates to provide greater flexibility and increased consultation.**

The Safe Drinking Water Act

Endangered Species Act

The Clean Air Act

Davis-Bacon Related Acts

SUMMARY OF EACH MANDATE

Listed below are summaries of each mandate reviewed. For each individual mandate, *Appendix A* contains a full description of the requirements imposed, a discussion of its background and history, a listing of the concerns expressed by state and local governments, and recommendation options that were considered.

Fair Labor Standards Act

The *Fair Labor Standards Act* (FLSA) (29 U.S.C. 201, et seq.) establishes minimum standards for wages, overtime compensation, equal pay, recordkeeping, and child labor for nearly every workplace in the United States. In 1974, amendments to the FLSA extended the applicability of the law to the public sector and treated state and local governments as if they were private entities. So, unlike the federal government, a state or local government cannot amend its personnel policies to accommodate situations unique to government employment or to reduce budgets.

Considerable contention has also arisen over the proper implementation of FLSA in the state and local public sector. The overtime pay provisions, in particular, have resulted in substantial litigation, with many state or local employees winning retroactive pay for work deemed by a court to qualify as overtime. The liability for many states and localities is in the millions of dollars and could go much higher. Moreover, even if a state or local government is successful in defending its employment policies as consistent with FLSA, there are often substantial litigation costs.

The employment policies of state and local governments should be set solely by the employment policies of those governments. The public accountability of elected officials and the collective bargaining powers of employee unions will provide adequate protection for workers.

RECOMMENDATION: ***Repeal provisions of FLSA covering state and local government employees.***

Family and Medical Leave Act

The *Family and Medical Leave Act of 1993* (FMLA) (29 U.S.C. 2601 et seq.) 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.

The law forced state and local governments to revise long-standing personnel policies and created unfunded costs related to extending medical insurance coverage to employees on family and medical leave, to temporary hiring of replacement workers, and to additional training and personnel counseling activities. While the law contains special provisions for federal government employees, state and local governments are treated the same as private entities.

Leave policies of state or local governments should be determined solely by the employment policies of those governments. The public accountability of elected officials and the collective bargaining powers of employee unions will provide adequate protection for workers.

RECOMMENDATION: ***Repeal the provisions of FMLA that cover state and local government employees.***

Occupational Safety and Health Act

The *Occupational Safety and Health Act of 1970* (OSHA). (29 U.S.C. 651-678) 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. In the case of state governments and their political subdivisions, OSHA has no requirements unless a state volunteers to participate in the federal program. States that volunteer to administer the federal OSHA program within their jurisdiction are required to extend federal requirements to all public employees in the state.

Twenty-three states have assumed responsibility for operating the federal OSHA program. Two additional states have federally approved OSHA plans only for state and local government employees. Even in the remaining states, however, there may be an impact, or a perception of an impact, because some OSHA requirements are replicated in state laws or are perceived as mandatory even though they are not.

Numerous complaints expressed about OSHA policies in both participating and non-participating states attest to the widespread misunderstanding about the law's coverage and the substantial compliance costs. Making all states, not just the non-participating states, exempt from OSHA would allow all states to set their own health and safety standards, taking into consideration their priorities and budgetary constraints. Such a policy would give states flexibility similar to that given federal agencies.

RECOMMENDATION: ***Repeal the provisions extending OSHA coverage to public employees in participating states.***

Drug and Alcohol Testing of Commercial Drivers

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." The motor carrier requirements cover a substantial number of state and local government employees who have commercial drivers licenses, and require them to undergo random drug and alcohol testing by certain deadlines. The law is inconsistent in that it includes some employees, such as public works drivers, but excludes law enforcement and emergency workers from testing requirements.

Strict drug and alcohol testing requirements for small rural communities and transportation systems with few employees create situations where costs of compliance are disproportionately high relative to potential findings. State and local governments are concerned about drug and alcohol problems and will take their own measures to insure that their drivers are not a threat to public safety.

RECOMMENDATION: ***Repeal provisions making some state and local employees subject to the federal drug and alcohol testing requirements for commercial drivers.***

Metric Conversion for Plans and Specifications

The *Omnibus Trade and Competitiveness Act of 1988* requires that each federal agency 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. Based on this law, the Department of Transportation (DOT) requires state and local governments to convert to metric for local construction plans and specifications by October 1, 1996.

The *Unfunded Mandates Reform Act of 1995* specifically requires ACIR to con requirements that state, local, and tribal governments utilize metric systems of measurement. The principal concern, expressed primarily by local governments, is the requirement to use metric measurements in the design and construction of federally aided projects. While most local governments may be technically able to prepare plans and specifications in metric by the deadline, they cite several problems, including substantial costs. Another problem is that local contractors and suppliers are not used to working with metric measurements. As a result, the potential for mistakes in the bidding and construction process is significantly increased. In addition, metric will create problems for right-of-way acquisitions with property owners, surveyors, and local deed registries.

States have made considerable progress in the transition to metric, but more than 2,200 waivers have been necessary to relieve hardship situations. Despite the waivers, the deadline for conversions will create substantial problems for many local governments without corresponding benefits. Rather than require all states to implement metric requirements on the same timetable, a better approach is to encourage states that are well along on their conversions to continue assisting their local governments with the process. Successful implementation in these states will provide support for others to complete the conversions voluntarily.

RECOMMENDATION: ***Repeal requirements that state and local governments convert to metric on a federal timetable as a condition of receiving federal aid.***

Medicaid: Boren Amendment

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 mandated federal criteria provide that the reimbursement rates must 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 . . . ."

The intent of the Boren Amendment was to give states a means of controlling costs related to reimbursement claims from providers of Medicaid services. Rather than 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.

Although flexibility was intended, the use of vague and undefined terms in the amendment created problems that were compounded by the federal government's decision not to issue regulations defining the vague terms. To add further confusion, the law, while requiring reimbursement rates to be "determined in accordance with methods and standards developed by the State," also requires the federal government to be satisfied with the state-determined rates. To implement this requirement, the federal government requires state processes for determining rates and the rates themselves to be a part of Medicaid State Plans, subject to approval by the Secretary of Health and Human Services.

The vagueness of the statutory language, combined with the lack of regulatory definitions, has resulted in substantial litigation, with some courts viewing the Boren Amendment as a cost based payment standard in which *all* cost incurred by the providers must be reimbursed. In these instances, states may be liable for significant sums to cover the retroactive rate increases ordered by the court for the group of providers involved in the suit even if their rate schedule was approved by the federal government. In some cases, the additional payments made as a result of a court-ordered retroactive rate increase are not eligible for cost-sharing from the federal government.

Because Medicaid is a state administered program and states are responsible for the quality and safety of medical services, states should be allowed to conduct reimbursement rate negotiations with Medicaid service providers without preconditions set by federal law. Litigation against states by medical service providers should be limited to matters related solely to the state's own laws and policies.

RECOMMENDATION: ***Repeal the language of the Boren Amendment and insert language making states solely responsible for determining Medicaid reimbursement rates.***

The Clean Water Act

The *Clean Water Act* requires states to designate the uses of water, develop water quality criteria to protect those uses, monitor the condition of waters, and 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.

In the *Water Pollution Control Act Amendments of 1972*, Congress provided for a comprehensive national program to protect water quality. Key provisions included national minimum standards for control of pollutants from industrial and municipal sources, additional controls in 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 substantial federal financial aid.

In 1987, the federal government changed the arrangement by a transition from direct grants to capitalization of state loan funds. Loan funds reduce interest costs for some projects, but they still require local governments to pay virtually the entire costs of future pollution control projects. In addition, the 1987 amendments required municipalities to remove harmful amounts of toxins from their sewage and to establish stormwater management programs. A national program originally supported and encouraged by state and local governments is no longer a balanced partnership to clean up the nation's waterways. Federal requirements, especially those dealing with stormwater drainage, have become increasingly stringent and expensive to implement. At the same time, the federal funding to aid in the cleanup has virtually disappeared.

Fully restoring the successful partnership requires either a return to substantial federal sharing in the costs of clean-up, or a relaxation of inflexible standards and deadlines on state and local governments. If there is not a sufficient national priority to justify federal spending, then state and local governments should be able to use the least costly alternatives and to work within their fiscal constraints. State and local governments traditionally have been concerned about reducing pollution, and they should be given authority to work constructively with federal officials to design realistic programs that can be completed within technical and budgetary constraints.

RECOMMENDATION: ***Either restore direct federal sharing of costs or give state and local governments greater authority to develop their own control methods and timetables for implementing federal standards for clean water.***

Individuals with Disabilities Education Act

The *Individuals with Disabilities Education Act (IDEA)* (P.L. 101-476) requires local school systems to provide a free appropriate education for children with disabilities. 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.

IDEA has provided millions of students with disabilities access to a free and appropriate education, but the law imposes significant costs and administrative burdens on state and local governments. Although the Act currently includes a provision authorizing the federal government to pay up to 40 percent of services to be provided under the law, only about 8 percent is currently appropriated. The law also limits the flexibility of states and local governments to combine *IDEA* funds with other funding streams to meet the unique needs of their children.

The resolution of disputes under the Act also has become overly litigious and has added to implementation costs. 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. ACIR's *Federal Court Rulings Involving State, Local, and Tribal Governments: Calendar Year 1994* emphasizes the litigious nature of this law.

RECOMMENDATION: ***Either increase federal funding to the 40 percent authorized level or relieve states from prescriptive and costly administrative mandates. Alternative dispute resolution practices should be required, and any court challenge based on the federal law should be brought by state or federal agencies, not by individuals.***

Americans with Disabilities Act

The *Americans with Disabilities Act of 1990* (ADA) (P.L. 101-336) prohibits discrimination against individuals with disabilities in employment, public services, and public accommodations.

Any state or local government policies found to be inconsistent with ADA provisions are to be modified as soon as feasible. Each government program is to be examined for physical barriers to access and for remedial measures that need to be taken.

ADA provides important and necessary social benefits, but it is creating problems for state and local governments because of expensive retrofitting and service delivery requirements, confusing and ambiguous statutory language, and insufficient technical assistance provided by the federal government. Further, virtually no federal funding has been appropriated to cover most state and local compliance costs. With tight budgets and limited time to correct structural obstacles to improve public accommodation, it has been difficult for many governments to implement the extensive changes required. Structural changes to existing buildings to meet "program accessibility" requirements were to be made by January 26, 1995, a deadline not met by many state and local governments.

Also, the use of the terms "reasonable accommodation," "undue hardship," "readily achievable," and countless other broad expressions in the law has subjected state and local governments to numerous lawsuits over legal interpretations of ADA. The penalties for noncompliance are severe, and legal costs can be substantial.

Federal enforcement of ADA is uncoordinated, with eight federal departments having some enforcement power. The prime responsibility for processing complaints under ADA are the Justice Department and the Equal Employment Opportunity Commission. 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 provides some educational and technical assistance regarding accessibility.

RECOMMENDATION: ***Either provide increased federal funding to state and local governments to assist in compliance, including funding for paratransit, or modify some deadlines and requirements to let state and local governments meet ADA goals in a manner that recognizes state and local technical and budget constraints without abridging the national commitment to the rights of individuals with disabilities. In addition, a single federal ADA enforcement and assistance agency should be designated to coordinate enforcement and technical assistance and legal action against state and local governments should be limited to actions brought by the federal government.***

The Safe Drinking Water Act

The *Safe Drinking Water Act* (SDWA) regulates drinking water standards for the 58,530 waterworks serving 25 or more persons on a regular basis. It establishes maximum levels for contaminants known to occur in public water systems, establishes wellhead protection programs, certifies and specifies appropriate analytical and treatment techniques, and establishes public notification procedures. It requires drinking water suppliers to assume a wide range of responsibilities, including monitoring of the water supply.

The safety of drinking water is a public health issue. Prior to 1974, states had responsibility for the safety of drinking water, but they generally relied on standards set by the Public Health Service. Since drinking water endangers not only the residents of a local community and state but also those traveling interstate, the regulation of drinking water may be justified as a national concern. It should be recognized, however, that other vital public health concerns, such as restaurant inspections, are the responsibility of state and local governments.

State and local concerns over the *Safe Drinking Water Act* hinge on what constitutes safe drinking water and how to achieve it in the most cost-effective way. These governments do not object to assuming the costs of providing safe drinking water, but some do object to incurring costs that in their opinion do not improve water quality. The existing law overreached in the standards and compliance requirements it imposed on local water systems.

Amendments recently approved by the Senate will repeal some of the most onerous provisions, including mandatory additional tests for contaminants, tests for contaminants not a threat in local areas, and eased provisions for treatment of surface water supplies. The Senate amendment also authorizes funding for state capitalization loan funds to reduce interest costs of compliance. The amendments, however, do not alter intergovernmental relationships in the SWDA.

RECOMMENDATION: ***Enact amendments similar to those approved by the Senate and establish a long-term goal of returning to the states full responsibility for safe drinking water standards.***

Endangered Species Act

The *Endangered Species Act of 1973 (ESA)* (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. 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.

State and local governments 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 rigid and limits state and local flexibility to apply the Act's provisions in their jurisdictions to meet local conditions. There is concern that valuable economic development activities within their boundaries, both public and private, are being impaired by strict federal regulation.

State, local and tribal governments should be full partners with the federal government in the preservation of threatened and endangered species. These governments should be granted shared authority for species protection, as well as flexibility to implement conservation plans for specific species within their 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.

RECOMMENDATION: ***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. In addition, exemptions to ESA should be applied more extensively to minimize social and economic impact on state, local, and tribal governments of recovery planning and listing procedures.***

The Clean Air Act

The *Clean Air Act of 1977* (P.L. 95-95) requires states to submit for federal approval a plan for meeting air quality standards established by the federal government. These plans must include emissions limitations and schedules of compliance. The federal government will prepare a plan for any state that fails to comply. The act spells out 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."

The initial demand for federal help in controlling air pollution came from cities that were unable to act effectively on an individual basis. Because the federal government recognized the need to act on regional bases, and in recognition of the federal system as viewed at that time, the states were encouraged by the federal government to assume responsibility for controlling air pollution and were given federal grants to assist in implementing such controls. By 1970, only 21 states had submitted implementation plans, and the federal government decided it was necessary to set standards (including vehicle emissions) and to enforce state implementation.

In 1990, amendments to the law 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. Failure to implement these programs can result in the loss of federal highway funds.

As the requirements have become increasingly detailed and specific, states have become implementers of federal laws with less and less discretion over how to implement them and with less federal financial assistance for their administration. As a result, the requirements often do not reflect conditions and citizens' preferences in the state.

RECOMMENDATION: ***Permit states to develop their own ways of meeting federal air quality standards, and eliminate financial aid penalties if states are making good faith efforts to comply.***

Davis-Bacon Related Acts

The *Davis-Bacon Act* (40 U.S.C. 276a-7) only applies to federal government 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 the wages 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.

About 60 other federal laws make compliance with Davis-Bacon provisions a condition-of-aid for grants to state and local governments (e.g., construction programs related to low-income housing, highways, and waste water treatment facilities). Some of the Davis-Bacon related laws contain special exceptions concerning the way in which a grantee must comply with Davis-Bacon requirements, but most of them apply the law without modification. Compliance with the provisions is generally required even if the dollar amount of the federal grant is a minimal share of the total project costs.

State, local, and tribal governments should be able to manage their construction project costs without Davis-Bacon pre-conditions when the major share of the project is being funded by the state or local government. Besides potentially increasing costs, Davis-Bacon requirements impose extensive reporting and recordkeeping that may be especially burdensome for small projects, and may make it difficult for small local businesses to compete.

To protect the national interests, which led to the inclusion of Davis-Bacon compliance requirements in about 60 federal laws, while recognizing state and local concerns, each related act should be amended to limit application of Davis-Bacon provisions to state and local construction projects over a certain dollar level and to projects where federal funding exceeds more than half of the total project costs. For example, a related act could be amended to apply Davis-Bacon provisions only in projects with a total dollar cost in excess of $1 million and in which the federal grant funding for the project exceeded 50% of total project costs.

RECOMMENDATION: ***Amend Davis-Bacon related laws to exempt projects below a larger dollar cost than now prevails and below a certain federal percentage of cost sharing from compliance with Davis-Bacon provisions in state and local construction projects.***

Required Use of Recycled Crumb Rubber (Repealed)

The requirement for including a percentage of waste-tire (crumb rubber) in asphalt pavement on federally aided highway projects was intrusive and infringed on traditional state-regulated activities. If states did not comply with the percentages, they were penalized by the withholding of an equivalent percentage of highway funds. The federal intrusion into this area of state operations, along with the withholding of grant money for non-compliance, demonstrate the intergovernmental breakdown surrounding this particular issue.

In addition, the construction industry had concerns about both the integrity of the pavements and the life-cycle maintenance costs of crumb-rubber-mix asphalt. Research has not shown any improved life of asphalt pavements using rubber, while the costs double. This provision mandated a particular engineering approach that is still experimental and has unresolved environmental, health, and safety issues. In a few states, highway projects have failed due to crumb rubber use. In general, 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 cost.

RECOMMENDATION: ***The Commission commends the Congress and President for repealing this unwarranted federal mandate.***

APPENDIX A

Staff Reviews of Mandates

FAIR LABOR STANDARDS ACT

Mandate

The *Fair Labor Standards Act* (FLSA) (29 U.S.C. 201, et seq.) establishes minimum standards for wages, overtime compensation, equal pay, recordkeeping, and child labor for nearly every workplace in the United States. In 1974, amendments to the FLSA extended the applicability of the law to the public sector. Under the amendments, state and local governments are subject to the same requirements as private entities. Although state governments may enact their own labor laws for public employees, such laws may be no less stringent than FLSA standards.

Background

The 1974 Amendments were challenged by the National League of Cities in *National League of Cities v. Usery.* In that case, the U. S. Supreme Court ruled that the 10th Amendment to the Constitution rendered the application of the FLSA's minimum wage and overtime compensation provisions to state and local governments unconstitutional. This ruling was reversed in 1985 in *Garcia v. San Antonio Metropolitan Transit Authority.*

The 1974 Amendments also extended coverage of FLSA to the executive branch of the federal government. Rather than treating the federal government as a private entity, however, the amendments provided independent regulatory and enforcement authority to the Civil Service Commission (now the Office of Personnel Management). The decision to allow the Civil Service Commission to administer FLSA for the executive branch recognizes that federal employment policies are within the purview of the federal legislative process (Title 5 of the United States Code), and can be amended at any time. Coverage under the FLSA was not extended to legislative branch employees until 1995, with an effective date of January 1, 1996. As in the case of the executive branch, the law allows an office within the legislative branch itself to administer FLSA provision for congressional employees.

Considerable confusion has arisen since the *Garcia* decision over the proper implementation of FLSA in the state and local public sector. The overtime pay provisions, in particular, have resulted in substantial litigation, with many state or local employees winning retroactive pay for work deemed by a court to qualify as overtime. The liability for many states and localities is in the millions of dollars and could go much higher. Moreover, even if a state or local government is successful in defending its employment policies as consistent with FLSA, there are often substantial litigation costs.

In an effort to reduce litigation, the Department of Labor (DOL) tries to provide assistance and guidance to state and local governments with respect to their obligations under FLSA. Also, according to a 1989 DOL letter to various governors, the department will not file a suit against a state to enforce compliance without at least 30 days written notice. These DOL actions, however, do not limit an employee's right under section 16(b) of the law to file suit independently against the state on FLSA issues. Individual employees may go to court to seek back wages as well as liquidated damages, attorney fees, and court costs.

In 1992, the Department of Labor acknowledged the public accountability aspects of state and local governments in its regulations concerning overtime pay, which made an exception to the salary basis test for state and local governments. This exception recognized state constitutional or statutory provisions prohibiting any employee from being paid for time not actually worked, or not covered by some type of paid leave. The regulations have been subject to a number of court suits that have resulted in conflicting opinions.

Concerns

Questions of applicability of FLSA to state and local governments generally are not raised out of dispute with the basic goals of the law. Rather, questions have been raised over the intrusiveness of the federal law into matters that fall exclusively within the jurisdiction of a state or local government (i.e., employment policies for their own employees).

FLSA is considered by many state and local governments to be an unfunded federal mandate because it requires state and local governments to implement some employment policies that would not have been implemented without the federal law. It is also argued that FLSA, in some cases, thwarts a state or local governments' efforts to control its own fiscal condition. In contrast, the federal government can set its own employment policies. The federal government has frequently considered, and sometimes enacted, changes in employment policies to increase or reduce federal spending.

Recommendation Options

1. Delete FLSA provisions extending coverage of the law to state and local government employees. The employment policies of state and local governments would be subject solely to collective bargaining agreements and public accountability in each state. Prior to the 1974 amendments to the FLSA, wages and working conditions for public employees were the responsibility of their respective state and local government jurisdictions.

2. Amend the FLSA to provide state governments with regulatory and enforcement authority similar to that granted to the federal government. State and local employees would continue to be covered by the FLSA, but state governments would be responsible for implementation in the state. In other words, the state governments would be granted authority similar to that given to the Office of Personnel Management (OPM) or the Congressional Office of Compliance. As in the case of federal agencies, state policies would be required to be consistent with FLSA principles and would still be subject to judicial review. If taken to court, however, states would be defending policy decisions made by the state.

This option grants states more latitude than currently provided to define actions "consistent with" FLSA. For example, state governments may able to enact flexi-time options, such as those offered in federal agencies, and still be "consistent with" the FLSA. The inability of states to enact flexi-time provisions is of particular concern because such a constraint conflicts with the Clean Air Act and other environmental laws that require state and local governments to develop commuter option plans to improve their ambient air quality.

3. Replace the FLSA provision allowing individuals to sue state and local governments over FLSA issues with language restricting FSLA suits to those brought by the federal government as a part of its enforcement responsibilities. To alleviate the current litigious situation, and in recognition of the federal government's FLSA enforcement role, the law could be amended to make the federal government the only party able to bring a suit against a state for non-compliance. The Department of Labor could bring a suit against a state or local government based on its own findings or in response to an individual's complaint. Individuals would still be able to bring a FLSA suit against the federal government.

4. Amend the FLSA to resolve the issues most often subject to intergovernmental controversies. There are instances where state and local costs related to FLSA implementation could be reduced or avoided if a closer working relationship existed between the Department of Labor and state and local governments. In other cases, there are FLSA issues that cannot be resolved without statutory changes. For example, although the department made a change in the salary basis test for public entities to relieve one of the difficult problems facing state and local governments, some courts have not upheld the validity of the regulation. Thus, consideration could be given to making specific changes in the law to alleviate the most troublesome aspects of the law from a state and local government perspective.

FAMILY AND MEDICAL LEAVE ACT

Mandate

The *Family and Medical Leave Act of 1993* (FMLA) (29 U.S.C., 2601 et seq.) 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

FMLA was enacted to promote family stability and economic security among working men and women. At the time of enactment, the General Accounting Office (GAO) calculated that the primary costs associated with FMLA would relate to extending medical benefits and hiring and training temporary replacement workers, or other measures taken to maintain an employee's production output during the unpaid leave period. Some cost avoidance was anticipated for employers based on reduced employee turnover rates, anticipated higher productivity, and reduced need for hiring and training permanent replacement workers. It was thought that the cost of implementation would be mitigated by the fact that many employers, including 11 states and the District of Columbia, followed similar practices.

Concerns

State and local governments raise several concerns with the FLSA. First, they argue that the law sometimes contradicts state or local government leave provisions. In fact, rather than exempting jurisdictions that had family and medical leave policies, the federal law preempted those policies, except in the case of more generous benefits. Also, some claim that FMLA compromises collective bargaining negotiations between state and local governments and public employee unions.

A second issue is the inflexibility of the Department of Labor's interpretation of the law. Rather than allowing variable family and medical leave policies that are consistent with FMLA, state and local governments have been required to match the department's regulations. For example, even though the law does not specify the length of time an employee must return to work to avoid repayment of medical premiums, states are required to abide by the federal regulatory provision that sets the return-to-work period at 30 days. So, if an employee is absent for the allowable 12 weeks, a state may pay 3 months worth of medical premiums and the employee is only required to return to work for 30 days to avoid having to reimburse any portion. Some states have suggested that employees be required to return to work for at least as long as they were absent or 30 days, whichever is greater, to avoid reimbursement charges. Such a policy could be considered consistent with the law but is not allowed under federal regulations.

Finally, FMLA is seen by state and local governments as an unfunded federal mandate because of the cost associated with the extension of medical insurance benefits and other factors. As noted above, these costs were anticipated by GAO prior to the law's enactment. Unanticipated, however, were the reportedly significant costs related to training personnel specialists on the law's provisions and the time spent counseling individual employees. In addition, record-keeping requirements related to tracking of FMLA leave have added costs, especially in cases where both spouses work for the same employer.

Recommendation Options

1. Make no significant changes in the law. FMLA grants a significant benefit to employees struggling to balance family and work responsibilities. The act makes a positive contribution toward the national policy objective of strengthening family stability and improving economic security for working men and women. Thus, it could be argued that the benefits to the nation are worth the costs and that it is the rightful responsibility of employers—public and private—to fund the act's implementation. Nevertheless, some changes in the law could be made to allow for closer conformity between the federal law and state or local policies.

2. Exempt state and local governments from FMLA provisions. The family and medical leave policies of state or local governments would be a matter of concern solely within the respective jurisdictions. This would recognize the public accountability aspects of state and local governments, and it would acknowledge the authority of these governments to conduct collective bargaining with public employee unions unhindered by federal preconditions.

3. Give state governments independent regulatory and enforcement responsibility for compliance with the law in the public sector. State governments would be granted the same authority as the federal government to set their own family and medical leave policies consistent with FMLA. Currently, the law allows the Office of Personnel Management rather than the Department of Labor to issue regulations and enforce FMLA policies for the executive branch. Likewise, there are special provisions for congressional employees. Such an approach would not exempt a state from complying with the law, but would allow it flexibility to set its own policies consistent with the law. If challenged by an employee, the state would be responsible for the defense of its own policies and not those of the federal government.

OCCUPATIONAL SAFETY AND HEALTH ACT

Mandate

The *Occupational Safety and Health Act of 1970* (OSHA). (29 U.S.C., 651-678) 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. In the case of state governments and their political subdivisions, OSHA has no requirements unless a state volunteers to participate in the program under the provisions of Section 18 of the law. In the case of the federal government, the law requires the head of each agency to establish and maintain an effective and comprehensive occupational safety and health program "consistent with" the standards promulgated by the Department of Labor (DOL) for non-government workplaces.

If a state does not participate in the federal OSHA program, DOL is responsible for all aspects of the program as it applies to businesses within the state. At the same time, since state and local governments are not considered employers under the law, DOL neither develops nor enforces occupational safety and health standards for employees in state or local government workplaces.

If a state assumes responsibility for development and enforcement of the federal OSHA standards, the law mandates state standards that "are or will be at least as effective" as the DOL standards. Also, to the extent permitted by state constitutions, the federal law requires these states to establish and maintain an effective and comprehensive occupational safety and health program for state and local government employees.

Background

Twenty-three states have assumed responsibility for operating the federal OSHA program (which extends coverage to state and local government employees). Two additional states have federally approved OSHA plans only for state and local government employees (see attached list). The remaining states may have their own occupational safety and health programs covering their state and local government employees and, in some cases, these state efforts may have standards or requirements similar or identical to OSHA.

Even in states not volunteering to participate in the federal OSHA program, there is an impact, or a perception of an impact, as a result of OSHA requirements. Safety and health procedures with the OSHA imprimatur sometimes are perceived as mandatory for the public sector even though there may be no federal law requiring them.

States choose to assume responsibility for the federal OSHA program for a variety of reasons. Some states had occupational safety and health programs before 1970 and wished to continue their role by assuming responsibility for the federal program. Many states desire to maintain closer relationships with businesses and workers on occupational safety and health issues than would be possible a with federally operated program. The states also can deal more appropriately with local conditions when they are responsible for program administration. Several states have been able to commit more resources than the federal government to the program.

OSHA authorizes the Secretary of Labor to provide grants up to 50 percent of costs for administration and enforcement to states that assume responsibility for the federal OSHA program. Although no funding is available for program compliance (e.g., training programs, equipment, or facilities modification), the Department of Labor recently took several steps to improve OSHA procedures and make the program more effective. The reform initiatives are directed primarily at business, but they also could help situations related to coverage of public employees in states participating in the federal program.

Concerns

- First, there is pervasive misunderstanding as to what is a federal mandate and what is a state or local government policy decision.
- Second, there is considerable lack of understanding or doubt over the rationale or scientific basis for many of the standards.
- Third, the credibility of the program is seriously compromised by the perceived rigidity, complexity, and burdensome nature of the rules and reporting requirements.
- Fourth, the perception is that the program has been more focused on punitive measures than compliance assistance.
- Fifth, the lack of federal funds for compliance costs creates situations in which state and local priorities are sometimes preempted in order to comply with federal program requirements.

Recommendation Options

1. Make no significant changes in the law. OSHA's protective standards and enforcement program are largely responsible for the 57 percent decline in workplace fatalities over the last 25 years. In Fiscal Year 1995, federal and state OSHA inspections helped make almost 70,000 workplaces safer for nearly four million workers. According to DOL statistics, however, each day more than 6,000 workers still lose time from their job as a result of a work related injury. Besides the personal and family tragedies, job-related injuries cost the economy over $100 billion a year, and occupational illnesses cost many times more. Some statutory changes could be made to relieve the most burdensome aspects of OSHA program operations on state or local governments.

2. Amend OSHA to give participating state governments as much flexibility in regard to public employees as is authorized for federal agencies. The current law allows the heads of federal agencies to develop an occupational safety and health program that is "consistent with" the federal OSHA program for businesses. Arguably, this allows the heads of federal agencies to have occupational safety and health standards that are more *or* less stringent than the standards for others. Moreover, there is no requirement that programs developed by federal agency heads be approved by the Secretary of Labor.

In contrast, states must establish an occupational safety and health program for their public employees with standards that are "as effective as the standards contained in the approved plan." Furthermore, the standards developed by the states must be submitted to the Secretary of Labor for approval as a part of the state plan process mandated in the law. The requirement that states operating the federal OSHA program have DOL approved occupational safety and health standards for public employees is difficult to defend when public employees in non-participating states are not covered by any federal standards.

3. Delete language in law regarding coverage of public employees. This option would allow all states to establish their own occupational safety and health standards for public employees independent of the federal program. Deletion of the language concerning public employees in states that volunteer to operate the federal OSHA program would treat public employees in those states in a manner consistent with the treatment of public employees in states that do not volunteer to operate OSHA.

STATES WITH APPROVED PLANS
TO OPERATE FEDERAL OSHA PROGRAM

Alaska	New York *
Arizona	North Carolina
California	Oregon
Connecticut *	South Carolina
Hawaii	Tennessee
Indiana	Utah
Iowa	Vermont
Kentucky	Virginia
Maryland	Washington
Michigan	Wyoming
Minnesota	
Nevada	Puerto Rico
New Mexico	Virgin Islands

*Plan covers only state and local government

Staff Working Paper
December 1, 1995

DRUG AND ALCOHOL TESTING REQUIREMENTS OF COMMERCIAL DRIVERS

Mandate

The *Omnibus Transportation Employee Testing Act of 1991* (P.L. 102-143, Title V) requires alcohol and drug testing of safety-sensitive employees in the aviation, motor carrier, railroad, and mass transit industries. This law amends Sec. 5 (a)(1) of the *Commercial Motor Vehicle Safety Act of 1986* (P.L. 99-570) by directing 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." The motor carrier requirements cover a substantial number of state and local government employees, and require them to undergo random drug and alcohol testing, effective January 1, 1996, for state and local governments with fewer than 50 drivers and January 1, 1995, for governments with more than 50 drivers.

In addition to the testing requirements, the law requires employers to (1) adopt a written policy and testing procedure, (2) provide for random selection by the use of a random number generator, (3) offer supervisory training in reasonable suspicion testing, (4) provide a substance abuse professional or employee assistance program, (5) conduct split sample testing with a laboratory that is certified by the U.S. Health and Human Services Administration (HHS), and (6) provide employees with information about the effects of drugs and alcohol. States and local governments forfeit federal grant money by not complying with the testing requirements.

Background

The law was enacted because alcohol and illegal drug use pose significant dangers to the safety and welfare and some effort must be made to eliminate the abuse of these substances by those individuals involved in the operation of heavy trucks and buses. Citizens depend on these operators to perform in a safe and responsible manner, and the use of alcohol and drugs has been demonstrated to affect the performance of individuals significantly and is a critical factor in transportation accidents.

There are significant safety benefits derived from the alcohol and drug testing policy. These rules help to prevent tragic, costly transportation accidents as well as help to improve worker productivity, decrease health care costs, and reduce worker absences. Despite the costs of testing large numbers of employees, the U.S. DOT believes that potential safety benefits to employees, employers, and the public outweigh the costs.

Issues of Concern

Some local governments believe this mandate is too expensive relative to the potential protection provided. Random testing requirements provide for testing employees on some regular basis, regardless of the probability of detecting a violation. Each year, the number of random alcohol tests conducted by the employer must equal at least 25 percent of all the safety-sensitive employees (50 percent for drug tests). In small rural areas with few employees, only one or two employees may be tested. The costs for the actual test and loss of service to the community can be very expensive and disruptive to operations.

There are several other issues. Rules are inflexible regarding approved testing procedures, devices, and certified personnel. The law also is inconsistent because certain personnel, such as law enforcement officers and emergency response workers, are exempt from drug and alcohol testing requirements, while others must be tested.

State and local governments are required to pay for all related costs including testing, employee time off from work, Medical Review Officer (MRO) costs, legal costs, and medical costs out of their operating assistance block grants, reducing the amount of funding left for other purposes such as paying operator salaries, buying fuel, and other costs of doing business. Federal drug/alcohol testing requirements have also led to additional paperwork and recordkeeping demands. Finally, local governments must transport employees to specialized testing centers or contract for expensive on-site test administration.

Recommendation Options

State and local governments support the concept of removing impaired operators from the nation's highways, but question whether federal requirements imposed on some of their workers is justified, especially in view of their rigid and costly nature. The following are possible alternative recommendations:

1. Retain the requirements under the *Omnibus Transportation Employee Testing Act of 1991* for drug and alcohol testing of state and local government commercial drivers. The purpose of the act, to establish programs designed to help prevent accidents and injuries resulting from misuse of alcohol and controlled substances by drivers of commercial motor vehicles, is reasonable. Local governments that are experiencing unusual problems can work out alternative arrangements.

2. Exempt all state and local employees from federal drug and alcohol testing requirements for commercial drivers, as is now done for some employees. Specifically exempt all state and local employees from application of testing requirements as is now done for emergency service drivers (law enforcement, firefighters, ambulance drivers). Strict drug and alcohol testing requirements for small rural communities and transportation systems with few employees create situations where costs of compliance are high relative to potential findings.

3. Make drug and alcohol testing requirements for state and local government commercial drivers more flexible. The federal government should permit states to design their own programs for identifying and correcting drug and alcohol abuse problems in state and local employees. For example, the *Drug-Free Workplace Act of 1988* (P.L. 100-690) requires only certification by all federal grantees and contractors of a drug free workplace. By using drug-free certification requirements instead of drug/alcohol testing procedures, state and local governments could provide accountability without following detailed prescriptive procedures.

Staff Working Paper
December 1, 1995

METRIC CONVERSION

Mandate

The *Omnibus Trade and Competitiveness Act of 1988* (P.L. 100-418, section 5164) amended the *Metric Conversion Act of 1975* to, among other things, require that each federal agency use the metric system of measurement in its procurements, 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. Based on this law, the Department of Transportation (DOT) will require metric measurement in plans and specifications for construction work done by state and local governments after October 1, 1996.

Background

The *Unfunded Mandates Reform Act of 1995* requires ACIR to consider requirements that state, local, and tribal governments utilize metric systems of measurement. ACIR received objections from state and local governments to the DOT requirements to convert their transportation activities to metric measurements.

A review of the findings in the 1988 law provides little support for the DOT requirements. The law makes five findings: (1) world trade is geared towards metric; (2) industry may be at a disadvantage without metric; (3) the simplicity of metric will lead to savings in certain industries; (4) the federal government has a responsibility to assist industry as it "voluntarily converts to the metric system of measurement;" and (5) the metric system will provide advantages for the operation of the federal government. It is clear from the findings in the law that the principal purpose of the law is to facilitate business interests.

The law does not specifically require that state and local governments convert to metric measurements, but the requirement to apply metric measurement to grants indirectly requires their application to federally funded state and local projects. Another provision of the law specifically exempts non-business activities. This provision might provide a basis for exempting state and local governments, but DOT has determined that all transportation projects must comply.

Concerns

The principal concern, expressed primarily by local governments, is the requirement to use metric measurements in the design and construction of federally aided projects. While most local governments may be technically able to prepare plans and specifications in metric by the deadline, they cite several problems, including substantial costs. The largest non-cost problem is that local contractors and suppliers are not used to working with metric measurements. Their employees who prepare bids and who do the construction work are not familiar with metric and do not have metric measures. In addition, metric will create problems for right-of-way acquisitions with property owners, surveyors, and local deed registries.

As a result of these types of problems, local governments may have to convert metric plans and specifications back to English measure for some uses. In addition to the additional costs of preparing plans and specifications in both metric and English measurements, local officials are concerned that the existence of two sets of documents using different numbers creates a significant potential for confusion and mistakes.

Alternatively, local contractors and others who are unfamiliar with metric may be forced by state and local governments to use only metric measurements on federally funded projects. Such a requirement may reduce the number of bidders on projects. The lack of familiarity with metric measurements by the contractor and employees may also result in errors. This will be true especially if other private and local government projects continue to use English measures.

Recommendation Options

While it is possible that metric requirements for local construction plans and specifications may eventually result in local highway contractors and suppliers converting to metric, these hardly seem the types of businesses that are targeted by the law as deriving benefits from conversion. As a consequence, the Commission believes one of the alternative recommendations below is justified:

1. Leave the law as it is, and rely on federal waivers to ease problems of individual governments. States have made considerable progress in the transition to metric, and any changes now would create more confusion than help. Over 2,200 waivers have been given to relieve hardship situations, and more waivers can be granted if necessary.

2. Amend the law to specify that state and local governments can continue to use traditional weights and measures in federally funded projects. The metric requirements are aimed at business conversions to facilitate international trade. State and local conversions to metric will have only indirect and minor effects on business conversions and international trade. The deadline for conversions will create substantial problems for many local governments without corresponding benefits to them or to the goal of metric conversion.

3. Delegate to states discretion over the extent to which metric conversion should occur in state and local activities and the timetable for implementation. Many states are well along on their conversions and are actively working with local governments to aid them in their conversions. For states with less progress, successful implementation by other states will provide an incentive for them to proceed. There is no reason that all states have to implement on the same timetable.

BOREN AMENDMENT

Mandate

The Boren Amendment,[1] 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 mandated federal criteria provide that state-determined 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. Rather than 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 law is seen by many states as more of a burden than a benefit. One problem is the use of vague, undefined terms to describe the federally mandated criteria for reimbursement rates. Further, the federal government has made a conscious decision not to issue regulations defining the vague terms in the statutory language. Moreover, while the law requires reimbursement rates to be "determined in accordance with methods and standards developed by the State," it also requires the federal government to be satisfied with the state-determined rates. To implement this requirement, the federal government has decided to require state processes for determining rates and the rates themselves to be a part of Medicaid State Plans. These plans are subject to approval by the Secretary of Health and Human Services.

The vagueness of the statutory language, combined with the lack of regulatory definitions, has resulted in substantial litigation, with some courts viewing the Boren Amendment as a cost based payment standard in which *all* cost incurred by the providers must be reimbursed. In these instances, states may be liable for significant sums to cover the retroactive rate increases ordered by the court for the group of providers involved in the suit. In some cases, the additional payments made as a result of a court-ordered retroactive rate increase are not eligible for cost-sharing from the federal government.

[1] Section 962 of the Omnibus Budget Reconciliation Act of 1980 (P.L. 96-499) as amended by Section 2173(a)(1) of the Omnibus Budget Reconciliation Act of 1981 (P.L. 97-35).

n Amendment litigation, however, does not relate directly to vagueness of the Rather, the issue is a state's procedure for determining reimbursement rates. procedure is ruled by a court to be flawed due to lack of adequate public factors, a state may be liable for substantial retroactive reimbursements based on a rate determination procedure. Again, depending on the situation, the additional payments made as a result of the court order may not be eligible for cost-sharing from the federal government, even though the rate determination methodology was approved as a part of the state's plan for the Medicaid program.

Concerns

Many states feel the Boren Amendment handcuffs their ability to constrain the growth in Medicaid spending during times of fiscal crisis. Requiring that Medicaid reimbursement rates be established within the limits of federally mandated criteria restricts the scope of a state's negotiations with providers of medical and nursing home services. Further, the threat of potential litigation often causes a state to increase rates merely to avoid legal actions. States are concerned about the extensive and expensive work necessary to substantiate compliance with the and to protect against suits by nursing home or hospital providers.

This situation is especially true since the 1990 Supreme Court ruling in *Wilder v. Virginia Hospital Association*, (496 US 498). The Supreme Court declared that medical care providers (instead of Medicaid recipients) are the intended beneficiaries of Boren Amendment. This ruling allows medical facilities and nursing homes to obtain judicial review of state reimbursement rates under the *Civil Rights Act*, Section 1983. In effect, the Court ruling allows hospitals and nursing homes to claim that a state is violating the hospital's civil rights by failing to pay "cost incurred to provide services."

Recommendation Options

1. Retain current provisions with no significant changes. Retention of a federal government role in the determination of Medicaid reimbursement rates would recognize that the law provides a means for the federal government to assure a minimum level of solvency for providers. This, in turn, gives some assurance of access to medical facilities for low-income persons. Also, in a sense, the Boren Amendment is used as a proxy to assure minimum standards of quality in medical and nursing home services.

While retaining a federal role in rate determinations, some changes could be made to clarify the statutory language to reduce litigation. The federal government's liability for court ordered retroactive rate increases could be specified especially in cases where the state's procedures had been approved by the Department of Health and Human Services (HHS). Besides alleviating state cost liabilities, such specificity may give HHS a greater incentive to continue improving its review practices.

2. Delete the federally mandated criteria and make states solely responsible for Medicaid reimbursement rate determinations. Deleting the federally mandated rate criteria and declaring states solely responsible for establishing Medicaid reimbursement rates would give states greater latitude in negotiations with medical service providers. However, it would also make states responsible for defending their established rates and could make states fully liable for retroactive rate increases.

While this option would clarify intergovernmental lines of accountability for Medicaid rate determinations, it would not necessarily significantly change rates. Under current law, while the federal government is responsible for declaring state determined rates satisfactory, it is not responsible for setting national reimbursement rates. On the other hand, with greater negotiating latitude, some states may be able to institute cost controls over rates of reimbursement as a result of voluntary agreements between states and medical providers. The success of the state governments in controlling costs will depend on their ability to maintain good working relationships with institutional providers and not on conditions or approvals given by the federal government.

3. Limit litigation actions to enforce the Boren Amendment. The number of litigation cases pursued in relation to the Boren Amendment could be reduced if the *Civil Rights Act* provision under which many of the suits are brought were narrowed to exclude institutions, such as hospitals and nursing homes, from being considered individuals under the provisions of Section 1983.

Alternatively, the law could be amended so that the federal government would be the only party eligible to bring suits against states for Boren Amendment violations. In this situation, once the federal government approved a state plan for setting reimbursement rates, any complaints on the rates would have to be brought to the federal government for resolution. A suit against a state would take place only if the federal government determined such action necessary to enforce compliance. On the other hand, individuals could bring suit against the federal government over questions related to the approval of a state's plan.

CLEAN WATER ACT

Mandate

States are required by the *Clean Water Act* to designate the uses of water, develop water quality criteria to protect those uses, monitor the condition of waters, and 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 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 in 1956, 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 Secretary of HEW was authorized to apply water quality standards to interstate waters and to enforce them if states failed to set their own standards.

In the *Water Pollution Control Act Amendments of 1972*, Congress provided for a comprehensive national program to protect water quality. Key provisions included national minimum standards for control of pollutants from industrial and municipal sources, additional controls in 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 substantial federal financial aid.

In 1987, the federal government changed the arrangement by a transition from direct grants to capitalization of state loan funds. Loan funds reduce interest costs for some projects, but they still require local governments to pay virtually the entire costs of future pollution control projects. In addition, the 1987 amendments required municipalities to remove harmful amounts of toxins from their sewage and to establish stormwater management programs.

Concerns

The principal concerns of state and local governments are that a national program they originally supported and encouraged is no longer a balanced partnership to clean up the nation's waterways. Federal requirements, especially those dealing with stormwater drainage, have become increasingly stringent and expensive to implement. At the same time, the federal funding to aid in the cleanup has virtually disappeared.

Some state and local governments are particularly troubled by federal requirements for local National Pollutant Discharge Elimination System (NPDES) permits for their stormwater run-off. These permits require compliance with standards that have detailed numerical limits that, in many cases, may not be feasible to attain.

State and local governments also are concerned that many requirements are not based on adequate scientific research and that the law does not require cost-benefit analysis. In the earlier years of this program, the federal government worked closely with state and local officials to set plans, standards, and timetables. Concerns were expressed that this consultation has substantially diminished.

Recommendation Options

The joint federal-state-local efforts to clean-up waterways has been very successful, but since the changes in federal policies in the late 1980s, there have been increasing strains between the governments in this effort. To restore the successful partnership will require either a return to substantial federal sharing in the costs of clean-up, or a relaxing of inflexible imposition of standards and deadlines on state and local governments. Some possible recommendations to achieve this may be:

1. Amend the existing law to relieve some specific problems, but otherwise make no changes in the existing intergovernmental relationship. There are a few specific problems that can be legislatively addressed, but most of the concerns expressed by state and local governments do not require changes in the law. EPA has embarked on efforts to improve communications and understanding by state and local officials, and these efforts should relieve most concerns.

2. Reinstate direct federal sharing of costs, especially in cases of demonstrated local government hardships in financing improvements. While such a proposal may appear unworkable in view of federal budget constraints, the budget constraints on state and local governments are also severe. If there is a clear national need for additional spending, then the cost of doing so should not be imposed unilaterally on hard-pressed state and local governments.

3. Relax strict requirements and allow state and local governments discretion in developing standards, control methods, and timetables for state and local governments. If there is not a sufficient national priority to justify federal spending, then the requirements should be relaxed. State and local governments have traditionally been concerned about reducing pollution, and they should be trusted to work constructively with federal officials to design realistic programs to continue the progress that has been made.

INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Mandate

The *Individuals with Disabilities Education Act* (IDEA) P.L. 101-476 (originally the 1975 *Education for All Handicapped Children Act*) requires all local school systems to provide a free appropriate education for children with disabilities. 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.

States also are required to incorporate specific equal opportunity guarantees and due process protections into their state education plans. 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 and requires school districts to educate students with disabilities in the least restrictive environment, to the maximum extent possible with students without disabilities. In addition, IDEA requires all participating states to establish specific administrative procedures by which parents or legal guardians may challenge the identification, evaluation, or educational placement of the children.

Background

Nearly 20 years after *Brown v. Board of Education* declared that equal access and educational opportunities should be bestowed upon children of color, an equally important "right to education" case, *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania* [343 F. Supp. 279 (3d Cir. 1972)] opened these equal protection and due process rights to children with disabilities. Congress then passed the *Education for All Handicapped Children Act* in 1975, finding 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 U.S. 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."

Concerns

Since the passage of the original act and its subsequent amendments, state and local education agencies have resisted federal involvement in education, an area normally reserved for state and local authority. Numerous due process hearings in the local and state sector, recurring litigation of special education issues in state and federal courts, and congressional efforts to instill national special education policy on state and local governments indicate turbulence in the original intergovernmental cooperative effort in this area. Despite the success of educating millions of children with disabilities, IDEA creates administrative and financial burdens on state and local governments.

A major concern is the funding responsibilities of the federal and state governments. In 1975, Congress authorized appropriations at the maximum level of 40 percent of the excess costs of special education by 1982, but the federal portion has never exceeded 12 percent. As of Fiscal Year 1995, Congress has appropriated funds for only a maximum of approximately 8 percent of these excess costs. Funding was always an essential component of IDEA; the original intent was to assist states in meeting their obligations to provide equal protection under the law to students with disabilities. Federal contributions were to help fund state and local provision of special education and related services, as well as personnel preparation, operational research, and instructional media. Without this allocation, state and local governments have become liable for almost all IDEA expenses.

A second problem with IDEA is the funding allocation process. Lack of guidelines in providing and allocating funds, and financial incentives to "label" more students as "special education" students, are driving up the size and cost of the system. Appropriations are allocated to states based on the number of students identified as requiring special education in each state. A state retains a maximum of 25 percent of the federal money and passes the remainder to local education agencies based on the number of students receiving special education. The financial incentives to misidentify and overidentify children as "special" in order to receive more funding for state and local education agencies are costly and may hurt the children through stigmatizing special education labels.

Third, local education agencies are prohibited from combining IDEA funds with other federal funding streams to provide non-categorical support for children with disabilities. Inability to coordinate IDEA funds with other federal education programs reduces state and local flexibility to meet students' needs.

Fourth, the resolution of disputes under IDEA has become overly litigious and adversarial, stemming from the statute's imposition of a legal enforcement mechanism to guarantee children and their parents the education rights outlined in the act. As stated earlier, IDEA directs states to establish explicit administrative procedures for parents or guardians of students with disabilities to dispute the classification, assessment, or educational position of the child. When a local educational agency receives a complaint, the parents or guardian must be given timely, impartial due process hearing. In addition, the complaining party may bring the action in state or federal court if the case is not brought to an administrative conclusion. Recovery of attorney fees if parents prevail adds to the costs of IDEA.

Finally, one of the primary concerns of state and local governments regarding IDEA is the usurpation of the states' authority in the area of education, a traditional domain of the state and local government. Federal funding for primary and secondary special education programs are contingent on a state's adoption of the provisions outlined in IDEA, allowing the federal government to involve itself in local school issues. IDEA forces states to submit their special education service plans to the federal government for approval, cutting into a policy area in which they may not be best suited to issue specific rules and regulations.

Recommendation Options

1. Retain the provisions of the *Individuals with Disabilities Education Act*, but examine and modify the funding structure. IDEA has allowed millions of students with disabilities access to a free and appropriate public education. The goals, purposes, rights, and protections offered by the act justify its mandate requirements. IDEA should be modified to remove funding provisions that encourage and reward the overclassification and segregation of students with disabilities.

2. Provide funding assistance to state and local governments for compliance. The federal government should increase funding for IDEA. Only about 8 percent of a special education student's cost is repaid by the federal government, well below the 40 percent intended by Congress when the law was enacted. The intergovernmental financial partnership in special education has been weakened by this funding problem. The act should be amended to relax some of the most costly requirements if the federal government fails to meet its funding commitments.

3. Defer implementation decisions to the state and local governments. State and local education agencies are better equipped than the federal government to determine an "appropriate education", and how to specially meet a student's needs through an individualized education program (IEP) that is nondiscriminatory and beneficial. Education policy implementation is a traditional responsibility of state and local governments. The federal government should provide state and local education agencies the flexibility to administer their special education programs in a manner that is effective in their own jurisdiction and good for their own children. The federal Department of Education should retain a formal monitoring presence.

4. Eliminate the statutory right of individuals to bring court actions or require alternate dispute resolution alternatives before use of due process procedures. IDEA provides a procedural structure for determining how the educational needs of each student should be met by state and local educational agencies. The decisions of the agencies 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. Alternative dispute resolution practices should be required and any challenge in state or federal court should be brought by state or federal agencies, not by individuals.

AMERICANS WITH DISABILITIES ACT

Mandate

The *Americans with Disabilities Act of 1990* (ADA) (P.L. 101-336) prohibits discrimination against individuals with disabilities in employment, public services, and public accommodations, and requires state and local governments to ensure that individuals with disabilities are able to participate in the programs and services that they provide. Modifications in policies and practices are required to facilitate participation by individuals with disabilities. The act requires that telecommunications be made available to those with speech and hearing impairments through the use of telecommunication relay services. The law also compels employers to make "reasonable accommodations" for disabled workers, but not changes that would involve "undue hardship." State and local governments are required to make new and renovated facilities accessible to the disabled and to make "readily achievable" changes in existing facilities.

State and local governments have been covered by employment nondiscrimination requirements since January 26, 1992. Structural changes to existing buildings to meet "program accessibility" requirements were to be made by January 26, 1995, a deadline not met by many state and local governments.

Background

The law expanded civil rights protection to about 49 million Americans with mental and physical disabilities. Discrimination against the disabled was prohibited in federally funded activities by the 1973 *Rehabilitation Act* and in housing by the 1988 *Fair Housing Act*, but the disabled were not among the groups covered by the 1964 *Civil Rights Act*, which prohibited discrimination in employment and public accommodations on the basis of race, sex, religion, or national origin.

ADA requires that state and local governments review all policies, programs, services, and practices to ensure that they do not discriminate against people with disabilities. Procedural requirements established under Section 504 of the Rehabilitation Act are extended to state and local government programs not receiving federal assistance. Any policies found to be inconsistent with ADA provisions are to be modified as soon as feasible. Each program is to be examined for physical barriers to access and remedial steps necessary. Required self-evaluation and transition plans mandate that these governments designate an ADA Coordinator; consult with persons with disabilities; notify the public about ADA; establish an ADA grievance procedure for filing and mediation of informal complaints; establish timelines for modification of policies, programs, services, activities, and facilities; implement the modifications; justify any policies and practices not to be modified; establish a system for evaluation; and maintain the plans on file for public inspection.

State and local governments are required to develop grievance procedures to resolve disputes in a timely and equitable manner. The Department of Justice (DOJ) encourages alternative dispute resolution before any legal procedures are needed (e.g., settlement negotiations, conciliation, facilitation, mediation, fact finding, minitrials, and arbitration). Emphasis is on alleviating tensions and grievances before litigation becomes necessary.

ADA is significantly different in its effects than the *Civil Rights Act* because it requires often expensive changes in physical barriers. This difference in the costs of compliance was noted by Senator Tom Harkin, chief sponsor of the ADA, "before the 1964 act if you were black, you couldn't sit at the lunch table, or you had to sit at the back of the bus. All businesses had to do to accommodate was to let them sit wherever they wanted. But disabled people can't even get on the bus, . . . so over time, the impact is greater."

Concerns

The greatest concern with ADA is the cost of compliance. No federal funding has been appropriated to cover most state and local compliance costs. With tight budgets and limited time to correct structural obstacles and to improve public accommodation, it is difficult for these governments to implement the extensive changes required.

Another concern is the use of the terms "reasonable accommodation," "undue hardship," "readily achievable," and countless other broad expressions. The law contains so many vague or overly broad provisions that state and local governments have been subjected to numerous lawsuits over legal interpretations of ADA. ADA provisions are complex, ambiguous, and difficult to interpret and administer, and they may result in unintentional discrimination. The penalties for noncompliance are severe, and legal costs can be substantial.

There are large gaps in information about ADA and the assistance available to comply with it. Some educational and technical resources exist in nonprofit service agencies and 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 strategies, the demand for assistance and guidance will continue to overwhelm government resources. The federal government needs to sponsor and promote dialogue between state and local governments and technical assistance organizations to address and expedite compliance and to reduce the number of complaints that arise under the act.

Federal enforcement of ADA is uncoordinated. Eight federal departments have some enforcement power, including: Agriculture, Education, Health and Human Services, Housing and Urban Development, Interior, Justice, Labor, and Transportation. It is the responsibility of these agencies to implement the ADA policies established by the Department of Justice. The prime responsibility for processing complaints under ADA are the Justice Department and the Equal Employment Opportunity Commission. 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 provides some educational and technical assistance regarding accessibility. In effect, there is not a single, clearly designated, primary regulatory and enforcement agency.

Recommendation Options

In 1989, a year before ADA was enacted, ACIR made several recommendations on disability mandates in its report *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal.* ACIR recommended that "federal, state and local governments work in closer partnership to pursue mandates for removing architectural barriers and enhancing employment opportunities for persons with disabilities." Several of the recommendations in that report are still pertinent. The following possible recommendations for change may reduce the problems of compliance placed on state and local government without abridging the rights of persons with disabilities:

1. Retain the *Americans with Disabilities Act* provisions, but modify implementation elements of the law. ADA presents a social benefit to society through the integration of individuals with disabilities into society. While the basic provisions may be retained, there is a need to examine the implementation components of the act. Implementation problems can be addressed by a better focused federal response, including:

a. **Providing increased technical assistance and educational information to state and local governments.** The law is in its early stages, and most problems have arisen due to lack of sufficient federal staff and resources to respond to the demand for information. As state and local governments progress in implementing ADA, their questions will become increasingly technical, requiring complex and detailed responses.

b. **Providing a fair share of federal funding for retrofitting existing facilities.** The federal government should provide funding to state and local governments to assist in compliance with requirements that require extensive retrofitting or additions to existing facilities. Paratransit funding should be retained.

c. **Designating a single federal ADA enforcement agency.** Federal efforts should be coordinated into one or two agencies to improve enforcement visibility, educational dissemination, and technical assistance. The lack of a clearly designated and visible ADA enforcement agency with clear and evident compliance standards adds to the confusion. The federal government, through the Department of Justice and/or the Equal Employment Opportunity Commission could be responsible for planning, coordinating and funding accurate ADA information dissemination.

2. Provide flexibility to state and local governments and federal flexibility in the use of federal grants to comply. The law should be modified to change its orientation from rigid requirements toward a focus on goals and goal attainment schedules, allowing state and local governments the opportunity to develop their own means for achieving them. State and local governments have a better understanding of their specific accessibility problems and how to meet, or exceed, ADA goals at lower cost without following strict and rigid provisions.

ADA requirements should be temporarily or permanently suspended, or made voluntary, for communities without the fiscal capacity to comply. Standards of accessibility should be reviewed within distinctive urban and rural communities and counties, and these governments should be allowed voluntary compliance with federal goals. The ADA should take into account individual needs of the state and local governments as well as financial hardship and economic concerns.

Also, the federal government should extend or negotiate timelines for compliance based on mutual agreements between the governmental entities. If longer periods were allowed to comply with the structural modification requirements and the rules for accessibility of services and programs, it would allow opportunity for state and local agencies to spread out the expense.

3. Require that all legal action against state and local governments to enforce ADA be brought only by the U.S. Attorney General. Aggrieved citizens should be able to petition the Attorney General to act. Individuals currently have the option to file suit in federal court to seek remedies including compensatory damages for unlawful and intentional discrimination. These individual lawsuits could be minimized by modifying ADA language to clarify and simplify the goals and methods needed to achieve those goals so there is less left to judicial interpretation. The ability of individuals to sue state or local governments pursuant to enforcement of broadly worded, vague mandates creates enormous litigation costs and administrative uncertainties for these governments, and should be prohibited. If the Attorney General believes the case has sufficient merit to warrant a court action, it should be brought by the federal government, not by an individual.

SAFE DRINKING WATER ACT

Mandate

The *Safe Drinking Water Act* (SDWA) regulates drinking water standards for all waterworks serving 25 or more persons on a regular basis. It establishes maximum levels for contaminants known to occur in public water systems, establishes wellhead protection programs, certifies and specifies appropriate analytical and treatment techniques, and establishes public notification procedures. It requires drinking water suppliers to assume a wide range of responsibilities, including monitoring of the water supply.

Background

There are an estimated 58,530 water systems, with more than 25 customers each, providing water to about 219 million people. Approximately 37,425 of these systems are very small and serve less than 500 customers. While 15,740 systems are privately owned, 82 percent of the urban systems are government owned.

The *Safe Drinking Water Act of 1974* directed the Environmental Protection Agency (EPA) to impose standards applicable to all public water systems to protect human health from organic, inorganic, and microbiological contaminants and for turbidity in drinking water. This act was the beginning of direct federal requirements for local drinking water to meet national standards. Prior to 1974, states generally required local water systems to adhere to the U.S. Public Health Service drinking water standards for regulation of water used by interstate carriers.

The direct involvement of the federal government came after a 1969 Public Health Service study noted that many of its drinking water standards were based on insufficient data and did not cover many known contaminants. There were also concerns that some pollutants in drinking water were linked to cancer. These developments provided a basis for Congress to enact the 1974 law.

In 1986, Congress amended the law to identify 83 specific contaminants for which EPA was to set standards, and it mandated EPA regulations governing filtration for surface water supplies and disinfection for systems using surface or ground water. The law requires that 25 additional new contaminants be regulated every three years. 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." While the Department of Agriculture has provided grants for water supply systems, SDWA provides no compliance grants.

CBO recently examined benefits associated with SDWA, and based on the limited information available, found that the cost per cancer case avoided averaged for all water systems varied between $0.5 million to $4.3 billion, depending on the contaminant. CBO concludes that these high costs relative to benefits mean that states probably would never have undertaken all the required treatments without the federal mandate. The CBO estimates also raise questions about whether the federal government would have imposed the requirements if better information about cost-benefits had been available when the law was enacted.

Concerns

Prior to the imposition of federally mandated requirements, most states were already imposing Public Health Service Standards on local water systems. State and local government comments indicate that they continue to be willing to comply with standards that directly relate to eliminating reasonable health risks. The problems arise because of what are perceived as requirements to test for contaminants or treat surface water in instances where the risks are relatively low and the costs are significant. Because there is no federal participation in the costs, it is felt that requirements are being imposed for a wide variety of risks regardless of cost.

There also are substantial concerns about the lack of recognition in SDWA of the technical problems and high costs faced by small water suppliers. In some instances, tests that have nominal costs per customer for large systems are extremely costly per customer for small systems and may be beyond their technical capacity to comply. While variances and exemptions are permitted under some circumstances, the procedures required to obtain them may be unworkable.

Concerns also are expressed about being held equally accountable for violations that are genuinely health related and for failure to follow exactly prescribed schedules or testing procedures. States lack flexibility and discretion in implementing the law. Alternative, less expensive technology to address specific risks is not permitted in some instances. Sometimes, the treatment requirements do not relate directly to specific existing and measurable contamination.

Recommendation Options

The safety of drinking water is a public health issue that prior to 1974 was addressed by states relying on standards set by the Public Health Service. Bad drinking water endangers not only the residents of a local community and state, but also those traveling interstate, and thus regulation of drinking water may be justified as a national concern. However, in some other areas of vital public health concerns, such as restaurant inspections, the responsibility is left to state and local governments.

The disagreements over the Safe Drinking Water Act hinge on differences over what constitutes safe drinking water and how to achieve safe drinking water in the most cost-effective way. State and local governments do not object to assuming the costs of providing safe drinking water, but some operators of water systems do object to incurring costs that in their opinion do not improve water quality.

1. Adjust the existing law to meet some of the specific objections. The law is making drinking water safer throughout the country and is not causing unnecessary costs or hardships for most water systems. However, proposed amendments, approved by the Senate, would relieve some of the most onerous provisions, or would delay their implementation until there is a better scientific basis for them. While the existing law overreached in both its standards and compliance requirements, it is basically sound in its approach. By addressing specific problems but leaving the structure of the law intact, there would continue to be federal oversight to insure the safety of drinking water.

2. Return to the issuance of national public health standards for drinking water, but leave the imposition and implementation of those standards to states. The federal government should provide basic standards for healthy drinking water. States should determine how to achieve those standards within their states. The pressure of public opinion would force the states to either comply or prepare a reasonable plan for complying with the national standards. In any event, the standards should be based on performance and not process. If a state is meeting the standards, it should not matter to the federal government how compliance is achieved. The burden of proof should rest with the federal government to determine whether a state is in compliance with national standards.

Staff Working Paper
December 1, 1995

ENDANGERED SPECIES ACT

Mandate

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."

The requirements of the law apply to all state, local, and tribal projects that must obtain one or more federal permits or approvals. Under the law, state, local, and tribal governments may not be able to obtain a federal permit, license, or grant if the project does not comply fully with very specific uniform standards for protecting endangered species. Regulations provide for detailed consultation, conference, and biological assessment procedures. If the Secretary of Interior concludes that a species or its habitat will be jeopardized, the Secretary is to suggest "reasonable and prudent alternatives" to be implemented by the federal agency or the state/local applicant for a federal license or funding.

Background

The first endangered species legislation was a 1966 bill that called for saving U.S. wildlife, but provided the federal government little power to do so. Three years later, a new international focus on endangered species looked at the problem of preventing extinction worldwide. During the early 1970s, a new age of environmentalism swept the country, prompting the Congress to pass the *Endangered Species Act of 1973* (ESA), giving the federal government sweeping powers to conserve and recover listed species.

Under ESA, The Fish and Wildlife Service (FWS) and the National Marine Fisheries Service are responsible for reviewing the status of species to see if they warrant listing as either threatened or endangered. The decision is to be based solely on scientific data, not on economic and political factors. These agencies sometimes target federal lands and other public domains, such as state parks, to carry out protection and recovery efforts The federal government also has authority to restrict actions on private property where federal permitting authority applies.

In 1978, the Supreme Court in *Tennessee Valley Authority v. Hill*, (437 U.S. 153), found that the provisions and restrictions in ESA 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. Shortly after this decision, Congress authorized an exemption from the statutory prohibition if the federal agency or the state or local government can show that the value of the project outweighs the protection of the species, or if modifying or dismantling the project would cause undue social and economic hardship. The Endangered Species Committee is charged with reviewing and acting upon the exemption of ESA Section 7 rules, but has rarely been called on to do so.

Since its inception, ESA has been credited with helping preserve such nationally symbolic animals as the bald eagle and the grizzly bear, but critics charge that federal regulators have gone beyond the original intent of the law, causing widespread economic and social hardship. Supporters of the law assert that critics ignore the ecological role of the lesser known animals and plants that ESA protects, as well as the medicinal uses of some rare plants on the endangered species list.

Issues of Concern

Sometimes, there is little coordination and agreement between affected governments before or after a species is listed as threatened or endangered, whether the action is of regional or national significance. The Act does not require the federal implementing agencies to identify quickly and clearly activities on state, local, and tribal lands that may be affected by a listing decision. There is little incentive for the Fish and Wildlife and National Marine Fisheries services to discuss options with other federal agencies; state, local, and tribal governments; and private groups before listing is made. Instead, Fish and Wildlife biologists and other federal government employees often make choices for entire regions, favoring the interests of species over the interests of individual state, local, or tribal governments. By contrast, there have been highly successful federal programs involving states in the conservation of game species, specifically the Pittman-Robertson and Dingell-Johnson acts, which direct federal excise taxes to the states in support of game conservation.

From a state and local government perspective, significant development and construction projects are being halted and modified due to findings of "jeopardy" to endangered species and/or their habitats. If consultation or mitigation between the state or local government and FWS does not provide acceptable alternatives, the project may be completely terminated.

The listing process is very rigid and limits the flexibility of state, local and tribal governments to apply the Act's protections selectively where they are most needed. The Fish and Wildlife Service uses the "best available scientific and commercial data" on species, creating a relative standard for data that sometimes is not conclusive, verifiable, or sufficient. Biologists from federal agencies often have the last word on what species is threatened or endangered. State, local, and tribal governments are concerned about the poor condition of scientific peer review and the unrealistic criteria for the recovery of endangered species.

Finally, there is state and local government concern about the encroachment of the federal government's requirements on private property because of the adverse consequences for valuable economic development activities in their jurisdictions.

Recommendations Options

There is a need to restore an economic and ecological balance under the *Endangered Species Act*. The federal government's powers are broad and discretionary while the rules for state, local, and tribal governments are rigid and inflexible. For the law to work effectively and efficiently, state, local, and tribal governments need incentives to provide habitat for endangered species and the freedom to administer and enforce standards to achieve this goal.

The issue of compromise between economic activity and species conservation needs to be addressed and coordinated. Although the original intent of Congress, according to *Tennessee Valley Authority v. Hill*, was to "halt or reverse the trend toward species extinction, whatever the cost," economic impacts of critical habitat designation and of recovery plans need to be assessed by state, local, and tribal governments. A balance must be struck so that neither conservationists nor developers win all the time, and this balance must be agreed on by all levels of government.

1. Retain the provisions of the *Endangered Species Act,* but improve federal funding allocations and the implementation process. Protecting endangered species is a national priority. It is a task that should be maintained at the national level and placed alongside other basic values such as protecting health, maintaining the nation's defense, and fostering education. Weaknesses in ESA are due to inadequate funding and poor implementation. The federal government should increase actual funding levels significantly to aid state, local, and tribal governments in implementing the *Endangered Species Act.*

2. Amend the *Endangered Species Act* to make state, local, and tribal governments full partners with the federal government in the preservation of endangered species. State, local, and tribal governments should be consulted and have a consent role before a species is listed, and should be included in the management and planning decisions affecting the listing process. These governments should be allowed authority for species protection as well as flexibility in the implementation of conservation plans for specific species within their jurisdictional boundaries. State, local, and tribal representatives should be allowed to advise the Secretary of Interior on biological, economic, and intergovernmental considerations in conservation matters.

3. Policies of the *Endangered Species Act* should be modified to minimize the social and economic impact on state, local, and tribal governments of recovery planning and listing procedures. If implemented properly, ESA could produce better conservation decisions and cost society less, winning more public support. The goal should be to reduce the likelihood of economic disruption while ensuring species recovery. A range of incentives for conservation agreements needs to be offered to avoid the need for listing. There needs to be greater emphasis on the affects of listing of species and designation of critical habitats on individuals, their communities, and their social and economic futures.

Scientific review procedures for listing and recovery decisions need to be examined and modified to ensure that decisions made under the *Endangered Species Act* represent the best available scientific information, that has been peer reviewed. Broader participation by state, local, and tribal governments will improve the data collection process and allow biological science, economic constraints, sociological factors, and available management resources to be taken into account on a regional basis. This expanded consultation in the scientific review process will distribute decision making responsibility and decrease some of the absolute power of the Fish and Wildlife Service.

CLEAN AIR ACT

Mandate

The *Clean Air Act of 1977* (P.L. 95-95) requires states to submit for federal approval a plan for meeting air quality standards established by the federal government. These plans must include emissions limitations and schedules of compliance. The federal government will prepare a plan for any state that fails to comply. The act spells out 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 legislation in air pollution came in 1955 as a reaction to killer smogs 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." What it did do was provide for research, training, demonstration projects, and grants-in-aid to local governments.

The *Clean Air Act of 1963*, noting a continued decline in the nation's air quality, 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*, the transition from local to state responsibility for air pollution control was established. States were required to develop, set, and implement plans to achieve national air quality standards. Increased federal grants accompanied the new requirements.

By 1970, only 21 states had submitted implementation plans, and the federal government decided it was necessary to set standards (including vehicle emissions) and enforce state implementation. Some of these strict requirements were deferred in the 1977 law. Nevertheless, the role of the federal government as principal promoter of strict air pollution standards was firmly established.

The 1990 amendments targeted smaller pollution sources, including facilities owned by local governments. By December 1995, governments in areas with moderate carbon monoxide pollution must adopt vehicle inspection and maintenance programs and require use of cleaner oxygenated fuels. Within another year, areas with moderate ozone pollution must set up similar programs and require use of gasoline-pump devices to capture vapors. Failure to implement these programs can result in the loss of federal highway funds.

Since the 1977 Act, and especially in the 1990 amendments, the requirements have become increasingly detailed and specific, and the role of states has become detailed as the implementer of federal laws with little discretion over them and less federal financial assistance. As early as 1981, ACIR reported "Many state governments have expressed concern over their roles as implementors of federal pollution programs. They complain that such programs have created financial hardship due to inadequate federal funding and administrative involvement."

Concerns

The states have expressed a wide variety of concerns about policies contained in the current *Clean Air Act.* These concerns range from automotive emission controls to retrofitting state air conditioning units, and many of them relate to highly technical provisions and how they will affect the states' ability to implement the requirements. While costs do not seem to be the overriding concern, several states noted that federal aid is totally inadequate in relation to the responsibilities that have been delegated. A basic problem seems to be the extremely detailed and complex requirements that states must enforce, regardless of their technical capabilities or whether they agree with the actions required.

Recommendation Options

The initial demand for federal help in controlling air pollution came from cities that were unable to act effectively on an individual basis. Because the federal government recognized the need to act on regional bases, and in recognition of the federal system as viewed at that time, the states were encouraged by the federal government to assume responsibility for controlling air pollution and were given federal grants to assist in implementing such controls.

However, because it was believed that states were not acting swiftly or effectively enough, federal laws have become increasingly detailed and prescriptive. This has distorted what started as a partnership into a mandate. There are several possible recommendations that will recognize the need for a federal role, but reduce state and local concerns.

1. Make no changes in the law, but increase federal financial aid and technical assistance, and relax some deadlines. The law has evolved over a number of years and addresses an important national problem. The concerns of state and local governments are primarily with the details of implementing the law and meeting the deadlines, not with the existing premises of the law.

2. Amend the law to provide only performance goals that states are required to meet within reasonable time periods, with federal technical assistance to states. Each state should be permitted to develop its own ways of meeting general standards. The methods chosen should reflect the conditions and the citizen's preferences in the state. Because states often lack technical expertise, the federal government should provide free assistance to any state requesting help.

3. The penalties for failure to comply should be changed to positive incentives to comply. As states increase the effectiveness of their control activities, they should receive increasing amounts of federal financial aid. There should be no reductions in aid for failure to comply.

DAVIS-BACON RELATED ACTS

Mandate

The *Davis-Bacon Act* (40 U.S.C 276a-7) applies to federal government 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 the wages 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.

About 60 other federal laws make compliance with Davis-Bacon a condition-of-aid for grants to state and local governments (e.g., construction programs related to low-income housing, highways, and waste water treatment facilities). These laws are known as Davis-Bacon related acts.

Background

The *Davis-Bacon Act* was enacted in 1931 during the Great Depression. The primary purpose was to bring stability to the construction industry and place a floor under downward spiraling wages. It prevented non-local contractors from underbidding local contractors for work on federal public works projects by hiring workers from other areas willing to accept lower wages than those prevailing in the local area. The law is not intended to reduce costs. Instead, 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.

To determine prevailing wages in an area, the Department of Labor (DOL) seeks information from various sources including voluntary responses from local contractors on their wage and benefit rates for various classes of mechanics and laborers. The Department computes either a "majority rate" or a "weighted average rate" for an area. If a single wage and benefit rate is paid to more than 50 percent of the workers in a job category, that rate is used as the prevailing wage for the area. If there is not a standard area wage and benefit rate for more than 50 percent of workers, the prevailing wage will be determined by dividing the hourly wages of all workers in a certain job classification by the number of workers. Although the law allows prevailing wages to be computed for different types of political subdivisions, DOL normally issues the rates on a county basis. A multicounty area can be used if insufficient data are available from the county where the work is to be performed.

The *Davis-Bacon Act* allows the federal government to suspend application of the Act in emergency situations. Most recently, a suspension was made in the aftermath of the 1992 hurricanes in Florida and Hawaii. According to Proclamation 6491 issued by the President on October 14, 1992, the wage rates imposed by Davis-Bacon increased the cost of federal assistance to the disaster areas. Thus, a suspension was ordered to allow greater assistance to the devastated communities within the available funds and to permit the employment of thousands of additional individuals.

Concerns

Concerns expressed by state, tribal, and local governments include:

(1) Reporting and recordkeeping to document compliance with Davis-Bacon provisions are burdensome and may make it difficult for small businesses to compete.

(2) Some governments report significantly increased costs because the prevailing wage is usually higher than some actual wages paid in the area.

(3) Compliance with Davis-Bacon requirements may divert resources from other needed public works projects.

(4) Davis-Bacon requirements may reduce the hiring of persons with limited experience because contractors who are required to pay the prevailing wage are more likely to choose an experienced worker. Contrary to its original intent, therefore, Davis-Bacon may discourage hiring local persons if the area where the work is to be performed has a heavy concentration of persons with limited experience.

(5) Problems with the DOL method of determining prevailing wages include the voluntary and sporadic nature of the survey and the scarcity of construction project wage and benefit data in some areas. Conducting the survey on a voluntary basis potentially allows union rates to skew the data. The scarcity of data in some areas means that wage rates from distant areas often must be used in small communities with infrequent construction projects.

Recommendation Options

1. Make no significant changes in the current laws. The federal government's purchasing power through direct contracts or through the provision of grants and loans to state, tribal, and local governments is substantial. Thus, there continues to be a need to assure that government requirements for acceptance of the lowest bid are not used to undercut local economies.

2. Repeal provisions in related acts making compliance with Davis-Bacon a condition-of-aid. Davis-Bacon compliance provisions would no longer be in numerous federal grant and loan programs, but the act would continue to apply to federal government contracts. Under this option laborers and mechanics on state and local projects would be covered by the same protections as other workers. The same marketplace constraints that control wages and benefits for professions other than construction workers would be in effect, including the FLSA and other laws in effect within the jurisdiction in which the construction project is being performed. At the present time, 31 states have Davis-Bacon type laws.

3. Revise threshold and other provisions in Davis-Bacon related acts to reduce the administrative, recordkeeping, and reporting requirements imposed on small contracts. Unless otherwise specified, the general provisions requiring compliance with Davis-Bacon as a condition of aid seem to take effect even if as little as one dollar of federal money goes into a project costing over $2,000. Raising the dollar threshold that defines applicable contracts would reduce the number of state and local contracts subject to Davis-Bacon while assuring that major contracts for publicly funded construction projects still contain basic Davis-Bacon protections. Other amendments could be made to simplify recordkeeping and reporting requirements. Finally, the related acts could be revised to require a certain percentage of federal funds for a project before compliance with Davis-Bacon is required.

Precedent for such revisions in related acts exists in many laws. For example, some laws change the $2,000 threshold for applicable contracts to another measure (e.g., square footage in a project). Other provisions allow areas to identify the use of federal and non-federal moneys separately in a contract so that non-federal moneys are not subject to Davis-Bacon rules.

RECYCLED CRUMB RUBBER

(Note: Although this provision was repealed before ACIR considered its recommendations, it is still included for consideration because it represents a good example of the type of mandate that needs to be given greater attention by federal officials before enactment.)

Mandate

Section 1038 of the *Intermodal Surface Transportation Efficiency Act of 1991* (ISTEA) (P.L. 102-240) requires states to satisfy a minimum tonnage utilization requirement for asphalt pavement containing recycled rubber on federal-aid projects. The requirement is 5 percent for 1994, 10 percent for 1995, 15 percent for 1996, and 20 percent thereafter. The Secretary of Transportation (DOT) may 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 can also be made if there is an insufficient supply of scrap tires. The penalty for non-compliance is withholding of highway funds, other than Interstate funds, in an amount related to the noncompliance.

Background

This legislation was born out of a desire to "find a useful home" for whole scrap tires or shredded tire material taken from automobiles, trucks, or other equipment. For 1994 and 1995, Congress suspended application of this requirement. In November 1995, the requirement was permanently repealed.

Concerns

Requirements for asphalt pavement containing recycled rubber has been identified as a major issue by such diverse groups as the National Governors' Association, American Association of State Highway and Transportation Officials, and the National Rural Development Partnership (NRDP), as well as several states. Rubberized asphalt has been shown by some states to cost 50-100 percent more than conventional asphalt mixes. This mandate would increase the cost of highway projects, particularly major rehabilitation jobs.

Other markets for scrap tires exist and there is no need to mandate their use in asphalt. Connecticut operates a tire-to-energy plant, which consumes annually 20-30 times the number of tire carcasses that could be used in pavement; in turn, benefits are accrued from the energy produced. Minnesota recycles most waste tires in other ways and would have to import waste tires from other states to meet the percentage requirements. In Virginia, the requirement will use only 4 percent of the waste tires generated each year.

Recommendation Options

1. Repeal the requirements for the use of crumb rubber in asphalt. Most state and local governments suggest outright repeal of Section 1038 of ISTEA as a primary option. The provisions in Section 1038 appear to have been enacted with inconclusive scientific research of the environmental, safety and health aspects of using crumb rubber in asphalt mix. At the very least, the federal government should retain the moratorium on implementation until adequate scientific research and pilot projects show that crumb rubber is a feasible and successful product for asphalt pavement use in most conditions and climates or until technical concerns about the integrity of the pavement are alleviated.

2. Provide incentives for utilizing crumb rubber in asphalt rather than penalties. Delete Part (d)(4) regarding "Penalty." There is no reason for major federal highway funds to be withheld. An incentive would better encourage states to seek cost-effective methods for dealing with the environmental problems associated with rubber tire disposal.

APPENDIX B

ACIR Criteria for Review of Federal Mandates

CRITERIA FOR REVIEW OF FEDERAL MANDATES

by the Advisory Commission on Intergovernmental Relations

Approved by the Advisory Commission on Intergovernmental Relations
June 28, 1995

The Advisory Commission on Intergovernmental Relations (ACIR) is charged in Sec. 302 of the *Unfunded Mandates Reform Act of 1995* (P.L. 104-4, 109 Stat. 67) with investigating and reviewing the role of Federal mandates in intergovernmental relations [Sec. 302(a)(1)] and with making recommendations for improving the operation of mandates [Sec. 302 (a)(3)]. The law defines "Federal mandate" very broadly for the purposes of the ACIR review as "any provision in statute or regulation or any Federal court ruling that imposes an enforceable duty on State, local, or Tribal governments including a condition of Federal assistance or a duty arising from participation in a voluntary Federal program."

For purposes of reviewing the role of Federal mandates under Sec. 302(a)(1), ACIR will take into account the positive attributes of mandates and the rationale for their adoption, as well as the characteristics of mandates that present problems. For purposes of making the recommendations required under Section 302(a)(3),ACIR will select for review only Federal mandates that are generally recognized as creating significant concerns within the intergovernmental system. In accordance with P.L. 104-4, ACIR will give review priority to mandates that are subject to judicial proceedings in Federal courts.

Prior to making recommendations under Sec. 302(a)(3), the Commission is required to issue criteria. The following criteria will fulfill that requirement.

The Commission will make the final decisions about which mandates it will review and what recommendations it will make. The Commission's decisions will be based on two types of criteria:

(1) those that provide a basis for identifying mandates of significant concern; and

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

These criteria are intended solely to help the Commission make its recommendations.

CRITERIA FOR IDENTIFYING MANDATES OF SIGNIFICANT CONCERN

In general, Federal mandates will be selected for intensive review if they have one or more of the following characteristics:

1. **The mandate requires State, local, or Tribal governments to expend substantial amounts of their own resources in a manner that significantly distorts their spending priorities.** This addresses mandates that require more than incidental amounts of spending. It will not include all Federal mandates that require governments to spend money.

2. **The mandate establishes terms or conditions for Federal assistance in a program or activity in which State, local, or Tribal governments have little discretion over whether or not to participate.** This will include mandates in entitlements and discretionary programs. It will exclude conditions of grants in small categorical programs that are distributed on the basis of annual or periodic applications and that are received only by a limited number of governments unless the conditions effectively limit access to such programs by small governments.

3. **The mandate abridges historic powers of State, local, or Tribal governments, the exercise of which would not adversely affect other jurisdictions.** This will include mandates that have an impact on internal State, local, and Tribal government affairs related to issues not widely acknowledged as being of national concern and for which the absence of the mandate would not create adverse spillover effects. This also will include mandates that abridge the power of State, local, or Tribal governments to impose taxes within the limits of the U.S. Constitution and that provide particular tax treatment to particular classes of taxpayers.

4. **The mandate imposes compliance requirements that make it difficult or impossible for State, local, and Tribal governments to implement.** Implementation delays, issuance of court orders, or assessment of fines may be indicative of mandate requirements that go beyond State, local, or Tribal fiscal resources, or administrative or technological capacity, after reasonable efforts at compliance have been made.

5. **The mandate has been the subject of widespread objections and complaints by State, local, and Tribal governments and their representatives.** This will include mandates that are based on problems of national scope, but are not Federally funded.

CRITERIA FOR FORMULATING RECOMMENDATIONS

ACIR will investigate the specific characteristics of each Federal mandate causing significant concern in order to formulate specific recommendations to retain, modify, suspend, or terminate the mandate. In making these recommendations, ACIR also will consider the beneficial and non-beneficial effects of mandates. For purposes of formulating such recommendations, ACIR will focus on specific provisions in laws, regulations, or court orders.

When a mandate affects a State, local, or Tribal program that directly competes with a comparable private sector activity, ACIR will consider the effects of the mandate and the Commission recommendation on both the government and private sector. ACIR also will consider (1) impacts of mandates on working men and women and (2) mandates for utilization of metric systems.

ACIR will investigate each mandate selected for intensive review to determine whether or not they have one or more of the following characteristics that should be considered by ACIR in making its recommendations:

1. Federal Intrusion

Requirements are not based on demonstrated national needs.

Requirements are related to issues not widely recognized as national concerns or as being within the appropriate scope of Federal activities.

Requirements are based on problems of national scope, but which State, local, or Tribal governments have demonstrated ability or willingness to solve effectively, either independently or through voluntary cooperation.

Requirements are based on problems of national scope, but are not Federally funded.

These mandates should be terminated, retained, funded, or modified to express non-binding national guidelines.

2. Unnecessarily Rigid

Provisions do not permit adjustments to the circumstances or needs of individual jurisdictions.

Provisions restrict flexibility to use less costly or less onerous alternative procedures to achieve the goal of the mandate.

Provisions do not allow governments to set implementation or compliance priorities and schedules, taking into account risk analysis, greatest benefit, local capacity, or other factors.

These mandates should be modified to provide options, waivers, or exemptions, or be terminated.

3. Unnecessarily Complex or Prescriptive

Requirements are unnecessarily detailed and difficult to understand.

Provisions are too process-specific rather than results-oriented.

These mandates should be simplified, clarified, or otherwise revised to facilitate understanding and implementation, or be terminated.

4. Unclear Goals or Standards

Goals or standards are too vague, confusing, or poorly written to permit clear or consistent implementation of requirements or measurement of results.

These goals or standards should be rewritten or the mandate should be terminated.

5. Contradictory or Inconsistent

Provisions in one mandate may make it difficult or impossible to comply with other provisions in the same or other Federal, State, local, or Tribal laws.

Requirements use conflicting and confusing definitions and standards.

These mandates should be modified to bring conflicting requirements into conformance. In some instances, it may be appropriate to terminate one or all of the requirements. Where possible, common definitions and standards should be used, especially in planning and reporting requirements.

6. Duplicative

Provisions in two or more Federal mandates may have the same general goals but require different actions for compliance.

These mandates could be terminated, consolidated, or modified to facilitate compliance.

7. Obsolete

Provisions were enacted when conditions or needs were different or before existing technologies were available.

Provisions have been superseded by later requirements.

These mandates should be modified to reflect current conditions or existing technology. If a mandate is no longer necessary or has been superseded, it should be terminated.

8. Inadequate Scientific and Economic Basis

Provisions were enacted based on inadequate or inconclusive scientific research or knowledge.

Provisions are not based on current, peer-reviewed scientific research, when applicable.

Provisions are not justified by appropriate risk assessment or cost-benefit studies.

These mandates should be terminated or modified to reflect current science. In some cases, suspension of the mandate may be appropriate to provide time for additional research.

9. Lacking in Practical Value

Requirements do not achieve the intended results.

Requirements are perceived by citizens as unnecessary, insignificant, or ineffective, thereby producing credibility problems for governments.

Requirements have high costs relative to the importance of the issue.

These mandates should be evaluated to determine whether or not they are effective. If they cannot be shown to be effective and worthy of public support, they should be terminated. If they are effective, it still may be appropriate to suspended the mandates to allow time for public education and consensus building on their value.

10. Resource Demands Exceed Capacity

Requirements for compliance exceed State, local, and Tribal governments' fiscal, administrative, and/or technological capacity.

These mandates should be terminated or modified to reduce compliance problems, or assistance could be provided to upgrade capacity. In some instances, compliance schedule extensions or exemptions may be appropriate.

11. Compounds Fiscal Difficulties

Compliance with the requirements of any one mandate or with multiple mandates compounds fiscal difficulties of governmental jurisdictions that are experiencing fiscal stress.

In these situations, certain of the mandates affecting the jurisdictions—exclusive of those that are vital to public health or safety—should be considered for partial or total suspension until the government experiencing fiscal stress is able to comply. The conditions triggering consideration of such suspensions should include:

a. *Governments faced with costs dramatically out of line with their revenue bases, as determined by comparisons with other similar governments that are complying.* This may result from local and Tribal governments experiencing fiscal stress due to depopulation, loss of tax base, or inability to raise matching funds from user fees due to low average household income or small population base; or

b. *Governments that are experiencing severe fiscal distress for reasons not immediately within their control.* There should be some definitive evidence of severe problems, such as State receivership, State declaration of distress, Chapter 9 bankruptcy, or a debt rating below investment grade. This should not include annual budget balancing problems.

ABOUT THIS REPORT

This report would not have been possible without the support of the more than 150 national organizations that constitute Citizens for Sensible Safeguards. For more information about the Coalition, see Appendix C.

CSS has been following the unfunded mandates fight since the 104th Congress began. We recognize that in some cases, state and local governments have a legitimate concern about lack of funding to carry out various mandates. The answer, however, does not lie in eliminating the federal protections but in producing the necessary funding to ensure comprehensive compliance.

The Contract with America called for a "no money, no mandate" policy, where if the federal government does not provide enough money to carry out the mandate, the state or local government would not be required to comply. Congress rejected this plan as too extreme. Instead, the *Unfunded Mandates Reform Act (P.L. 104-4)* established procedural hurdles to overcome in order to minimize future mandates.

The law calls for the ACIR to conduct a study on madates and to make the study's preliminary findings subject to public review. This report is CSS's response to the ACIR preliminary report.

Our report concludes that ACIR should discard its initial recommendations. The ACIR report is similar to the extremist principals the the Contract with America — and in seven cases goes beyond the Contract by recommending that state and local government be exempt from complying with vital federal protections.

A number of people helped produce this report. We would like to thank Patrick Lester, Nick Stengel, Kelly Dougherty, Sharon Bucchino, Marge Allen, Donna Lenhoff, Judy Waxman, Peter Lehner, Erik Olsen, Heather Weiner, Curt Decker, and Celane McWhorter.

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March 5, 1996

TABLE OF CONTENTS

❖ Shirking Responsibility ❖

Section I — Overview of ACIR's Preliminary Report

On January 24, 1996, the U.S. Advisory Commission on Intergovernmental Relations (ACIR) released a preliminary report, entitled "The Role of Federal Mandates in Intergovernmental Relations," which recommended drastic reductions in state and local governments' responsibilities with respect to many of the nation's most important environmental, workplace, health, and civil rights laws.

Though presented as the balanced recommendations of a bipartisan, nonpolitical panel, the ACIR report is in fact a highly political, one-sided document whose goals are scaling back or eliminating many of our most significant public protections. The Commission's preliminary recommendations should be disregarded.

In brief, there are six major problems with ACIR's preliminary report:

- **The report is based on an extreme ideological agenda to dismantle federal protections.** The report's recommendations mirror many of the ideas in the *Contract With America.* These same proposals were rejected by Congress last year.

- **The report's recommendations lack or ignore empirical evidence in order to justify its conclusions.** For example, the ACIR report ignores scientific research from the Family Leave Commission about costs of implementing the Family And Medical Leave Act (FMLA). Such research showed, among other things, that 89% of employers experienced only a small increase or no increase at all in administrative costs to comply with the law. The ACIR offers no other facts or statistics to support its recommendation that state and local governments be exempted from the FMLA. Virtually every recommendation has the same problems as the one on FMLA.

- **The report's recommendations would create a crazy quilt of public protections for some, but not for others.** Just when Congress subjected itself to the same federal laws that apply to other Americans, the ACIR would now exempt state and local governments from critically important laws. The ACIR report recommends, for example, that state and local governments be exempted from the Fair Labor Standards Act. If this recommendation were followed, workers in publicly owned and operated hospitals could be denied the same workplace protections, including minimum wage and overtime restrictions, enjoyed by similar workers in private hospitals.

- **The report does not present responsible alternatives that give state and local governments flexibility in implementing federal standards.** In fact, the report does not acknowledge the enormous flexibility already granted state and local governments. For example, under the Clean Air Act, the EPA has already relaxed a number of requirements, such as installing new methods for testing automobile exhaust systems in the most polluted cities and requiring work car pooling. Under the Americans With Disabilities Act, state and local authorities are not required to take certain actions if they would produce undue financial or administrative burdens—and courts have enforced such flexibility.

- **Even when the report's recommendations do not call for outright repeal of the law, its proposed modifications would have a devastating impact.** The report recommends dropping key enforcement provisions of the Clean Air Act, important testing and treatment requirements in the Safe Drinking Water Act, and unhindered federal authority to designate new species under the Endangered Species Act. These are just examples of a broader, and damaging, deregulatory agenda.

- **The Commission's actions in developing the preliminary report were extremely troubling.** Even though the ACIR December 19, 1995 meeting at which the preliminary report was discussed did not have a quorum, the Commission went forward. A mail ballot was conducted while the government was shut down, and ACIR will not officially release the results of the balloting. Furthermore, several Commissioners have indicated that they thought the vote was on whether to print the preliminary recommendations of the Commission in the *Federal Register*, not on the merits of the recommendations. There still has been no meeting for the Commission members to discuss the preliminary report.

  The Unfunded Mandates Act requires ACIR to conduct public hearings on the preliminary report, yet the ACIR planned a conference that costs at least $400 to register as a substitute. Even as the ACIR relented and agreed to a public hearing, it posted notice of the public hearing in the *Federal Register* only 12 days before the event, making it very difficult for the public to respond. And one week prior to the hearing, speakers received a notice that the event had been postponed. ACIR has not indicated its next steps to develop a final report.

ACIR'S 14 RECOMMENDATIONS

In its report the Commission examined 14 out of more than 200 laws and regulations called to its attention, and recommended that seven be repealed and seven be retained "with modifications." The report calls for exempting state and local governments from having to comply with the following laws:

- ***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***
- ***Boren Amendment to Medicaid***
- ***Required Use of Recycled Rubber*** (already repealed)

The report calls for retaining the following seven laws with "modifications":

- ***Clean Water Act:*** "[E]ither a return to substantial federal sharing in the costs of clean-up, or a relaxation of inflexible standards and deadlines".
- ***Individuals with Disabilities Education Act:*** "Either increase federal funding to the 40 percent authorized level or relieve states from prescriptive and costly administrative mandates."
- ***Americans With Disabilities Act:*** "Either provide increased federal funding ... or modify some deadlines and requirements."
- ***Safe Drinking Water Act:*** "[R]epeal some of the most onerous provisions, including mandatory additional tests for contaminants."
- ***Endangered Species Act***: "[E]xemptions to ESA should be applied more extensively to minimize social and economic impacts."
- ***Clean Air Act:*** "Permit states to develop their own ways of meeting federal air quality standards, and eliminate financial aid penalties if states are making good faith efforts to comply."
- ***Davis-Bacon Related Acts***: "[A]pply Davis-Bacon provisions only in projects with total dollar cost in excess of $1 million and in which the federal grant funding for the project exceeded 50% of the total project costs."

The Commission's recommendation that seven laws be repealed, and seven retained "with modifications" conveys a false sense of balance. Recommendations for the first three of the seven laws to be retained "with modifications" amount to "no money, no mandate." In times of reduced availability of federal resources, these recommendations must be viewed as further exemptions. The last four recommendations also involve outright repeal of important protections. The report, as a result, is not balanced in any sense of the word, and should be recognized as such.

COMMON CONCERNS UNDERLYING ACIR'S RECOMMENDATIONS

The Commission outlined six broad concerns with what it terms unfunded mandates, each of which contributed to its conclusions for the particular laws it reviewed. These general concerns include:

(1) Detailed procedural requirements: According to the report, the federal government should stop imposing "exact standards and detailed requirements" and instead limit its involvement to providing "research and technical advice." State and local government are best suited to determine how to achieve program goals, and would do so if only the federal government would allow them much needed flexibility.

Unfortunately, this benign view of state and local intentions ignores reality. Many of the laws reviewed by the Commission were applied to state and local governments precisely because, when left to their own devices, they chose to do nothing. Several environmental programs, including the Clean Air Act and Clean Water Act, came into existence only after states refused to participate in earlier voluntary programs.

The recommendation also ignores the high degree of flexibility that many of these programs already contain. The Safe Drinking Water Act, for instance, includes a state waiver process that allows certain states to opt out of testing for certain contaminants that are not likely to be found in a particular region. The Commission, moreover, falsely claims in its report that "alternative, less expensive technology to address specific risks is not permitted in some instances. Sometimes, the treatment requirements do not relate directly to specific existing and measurable contamination." This simply is not true. Virtually none of EPA's rules require the use of specific technologies to address drinking water contaminants. Instead, the EPA sets general water quality standards and lets state and local governments determine the best ways to reach them.

(2) Lack of federal concern about mandate costs: According to the report, too many laws are developed with little or no regard for the costs imposed on state and local governments.

Again, for several of the reviewed laws, this simply isn't true. The Safe Drinking Water Act requires all EPA drinking water standards to be based upon "feasible" technologies, explicitly "considering costs." The law also authorizes variances and exemptions for systems facing economic or other compliance difficulties.

The costs associated with these programs are also often overstated. The report cites a Congressional Budget Office review of the Safe Drinking Water Act to support its attack on that program. In doing so, however, it failed to note one of the study's central findings: "To date, the SDWA has resulted in fairly modest costs for most households. Although the SDWA has been cited as a particularly burdensome mandate, available data do not indicate that it has imposed high costs."

What about program benefits? In a era when regulations are routinely subject to cost-benefit analysis, the report completely ignores this half of the equation. One review of the Occupational Health and Safety Act (OSHA) found that OSHA coverage of all public and private employees would save state and local governments at least $600 million annually through reduced medical and workers' compensation costs. The Endangered Species Act, singled out by the Commission for its adverse impacts on development and construction, also increases biodiversity and, as a result, reduces crop loss and is a significant source of cures for human disease.

(3) Federal failure to recognize state and local governments' public accountability: According to the report, "[f]ederal laws should recognize that state and local governments are led by elected officials who must account to the voters for their actions, just as the President and Members of Congress."

This sounds wonderful in theory, but ignores the reality that caused many of these laws to be applied to state and local governments in the first place. When Congress applied the Fair Labor Standards Act to state and local governments in 1974, several responded by going to court, temporarily succeeding in having the law overturned. At present there are 13 states that either do not have a minimum wage that applies to state and local workers, or have one that is less than the federal minimum wage. There are also 32 states that lack overtime provisions for these workers.

State and local irresponsibility was the primary reason the Safe Drinking Water Act was enacted — a response to widespread disease and contamination problems which were caused by states failing to voluntarily adopt safe drinking water standards.

On other issues states and local governments have little incentive to address particular issues because the benefits apply broadly, beyond their borders. Midwestern states have less incentive to alleviate air pollution caused by coal-burning power plants because many of the benefits accrue not to their residents, but those in adjoining states. In the case of the Endangered Species Act, particularly with respect to migratory birds, poor conservation efforts in one state can have significant negative impacts even if the efforts by its neighbors are exemplary.

The strength of being the *United* States is that we have common standards that apply across the country. We know the drinking water will be safe wherever we travel, that those with disabilities will have equal opportunity in all states, and that workplace conditions are responsible and safe. Without these common standards we become a Balkanized nation, where quality of life vastly differs from state to state.

(4) Lawsuits by individuals against state and local governments to enforce federal mandates: The report recommends that "only the federal agency responsible for enforcement of a law should be permitted to sue state and local governments." Unfortunately, federal enforcement is not always enough to ensure full compliance with the law. Sometimes federal enforcement is lacking due to resource constraints, and in some instances, regrettably, enforcement shortfalls are deliberate. Provisions allowing ordinary citizens to sue state and local governments are, thus, critical to continued proper enforcement of many of our most important public protections. Proper enforcement of the Individuals with Disabilities Education Act (IDEA), for instance, is in large part dependent upon suits brought by parents against state and local school systems that otherwise refuse to provide their children with an appropriate education.

Ordinary Americans do not have the means to bring frivolous lawsuits, but they must retain the opportunity to go to court to protect their communities when the government does not.

(5) Inability of very small governments to meet mandate standards and timetables: The Commission's report argues that "deadlines should be extended and requirements modified for very small governments." Improved flexibility, however, should not be an excuse for a lack of enforcement. A substantial portion of the nation's citizenry lives in small towns, and they are equally deserving of public protections.

Moreover, the report itself spends little time distinguishing between large and small governments when reaching its conclusions for most of the programs it reviewed. In one of the few instances where it did — the Family and Medical Leave Act — it was wrong. The ACIR is flatly incorrect that small state and local government employers are overwhelmed by the FMLA's administrative costs. Employees of small state and local governments (those with fewer than 50 employees within a 75-mile radius) are expressly *exempt* from the statute.

(6) Lack of coordinated federal policy with no federal agency empowered to make binding decisions about a mandate's requirements: The report recommends that a single federal agency be designated "to coordinate each mandate's implementation and to make binding decisions about that mandate." Improved coordination is always a worthy goal, but the continued applicability of specific public protections should not be contingent upon the designation of a particular agency to oversee its enforcement. Sometimes coordination between agencies is an unavoidable and, in fact, desirable outcome.

CONCLUSION

Federal "mandates" are widely misunderstood in today's political climate. In the abstract they are often condemned as burdensome, inflexible, and generally unneeded. But when the debate shifts from generalities to the specifics of particular programs, public support for wholesale deregulation usually shifts dramatically. Everyone favors eliminating burdensome and unneeded regulations. No one is for eliminating needed public protections that safeguard our livelihoods, environment, health, and safety.

The ACIR report has, to a certain extent, done the American public a great favor by crystallizing exactly what eliminating "unfunded mandates" really means.

The laws and public safeguards reviewed by the Commission should be preserved, not weakened. They protect millions of Americans from unfair or hazardous workplace conditions, discrimination, and an unhealthy environment. They remain as important today as when they were passed. This preliminary report is deeply flawed, both in its basic assumptions and in its specific prescriptions, and its recommendations should be discarded.

Section II — Process Abuses by ACIR: Faulty Methodology and Basic Procedural Failures

ACIR's preliminary report not only raises serious concerns regarding content; it also raises significant methodological and procedural concerns. ACIR's methodology for selecting mandates and formulating recommendations seems random and haphazard at best. At worst, it is purposefully misleading.

The Commission's procedural shortcomings have been, if anything, even worse. Since 1972, ACIR has been, strangely, one of the few government entities that is not required to comply with the public disclosure requirements of the Federal Advisory Committee Act. The public, as a result, has had little or no opportunity to monitor the ACIR's activities or to provide input.

It also appears that the report was issued despite a lack of discussion and input by Commission members themselves. An independent check showed that most thought they were voting simply on whether to release the preliminary report for comment, not to endorse its contents.

Methodological Shortcomings of the Preliminary Report

As ACIR staffer Philip Dearborn noted during a December 19, 1995 meeting, "because we only had three of us [on staff], we lacked the technical ability to really get in and design specific amendments and address specific issues." How can a staff of three explore 200 proposed mandates, select 14, and publish a set of well researched and coherent suggestions in less than one year? A glance at the report itself shows that key corners were cut.

ACIR performed no independent studies itself. In fact, there is no evidence that the Commission even referred to any *existing* studies when making determinations about the laws under its review. For example, the Commission lists five concerns with the Occupational Safety and Health Act:

1. "Pervasive misunderstanding" as to the difference between a mandate and a state option;
2. "Lack of understanding or doubt" over the rational or science behind a regulation;
3. "Perceived rigidity, complexity, and burdensome nature of the rules;"
4. A "perception" that the program is punitive;
5. "Situations" where state and local needs are ignored in favor of compliance.

The Commission has no basis for making these assertions. Each is couched in the language of perceptions and concerns. There are no hard facts, no studies, no empirical support at all. ACIR's conclusions appear to rest solely on the subjective judgment of its members and/or its staff.

Procedural Shortcomings of the Preliminary Report

The Advisory Commission on Intergovernmental Relations is not governed by the Federal Advisory Committee Act (FACA). Groups like the CIA and the Federal Reserve are exempted from the Act, but ACIR? There is no good reason for the Commission to be exempt from FACA's public disclosure requirements, nor for the Commission to hide behind its exemption and refuse to make certain information about its decision making process available to the public.

Under FACA, it is a violation for publicly funded entities like ACIR to conduct business for the purpose of formulating its ideas and policies, and then charge the public for the right to participate and be heard. On January 17, 1996, the ACIR announced in the *Federal Register* (page 1194) that a preliminary report with recommendations dealing with federal mandates was approved by the Commission on January 5, 1996.

The notice stated that ACIR would host a conference on March 6-7, 1996 to satisfy its statutory requirement to hold public hearings on the preliminary report. ACIR further decided to charge over $400 per participant, well beyond the reach of most members of the general public.

Since then, at the insistence of the public interest community, ACIR announced that it will hold a public meeting after the conference, giving members of the public just five minutes each to air their concerns. The Public Hearing was announced in the Federal Register on February 27, 1996, just 12 days before the event. This relatively short period of time will effectively reduce public participation. On March 1, the ACIR notified requested speakers that the hearing has been postponed.

The Unfunded Mandates Act, which required ACIR to develop the preliminary report, also expressly calls for the Commission to convene public *hearings*, not just one hearing. At present, ACIR plans to hold more than one day of hearings only is there are too many speakers for the postponed event..

The Commission also failed to follow generally accepted rules for voting on the report. There was no quorum present. According to the transcript of the December 19 meeting, attendees included Governor William F. Winter, Chairman; Richard P. Nathan; Sen. Dirk Kempthorne (R-ID); Sen. Craig Thomas (R-WY); Rep. Robert Portman (R-OH); Mayor Victor H. Ashe (Knoxville, TN); John H. Stroger, Jr., Commission President (Cook County, IL). Only 7 of 23 members were present. As Gov. Winter commented, "I regret to note that we have limited attendance...because of the importance of this agenda we will proceed at this time." Later: "I note the obvious absence of a quorum...Absent a quorum, we will disseminate in some manner the results of this meeting, and hopefully get consensus from the entire Commission." That most of the members were eventually balloted does not make it less of a concern. The purpose of having a quorum present is not just for the vote itself, but for the discussion and free exchange of ideas that takes place prior to the vote. There was no such exchange. As a result, this report can and should not be construed as the will of the Commission.

Worse still was the decision's lack of clarity. According to ACIR Executive Director William Davis, "...the decisions you [the Commission] make today are really on what it is that you want to expose for public comment over the next three months." Commissioners never voted on the substance of the report. Rather, they merely assented to have it published in the *Federal Register* for comment.

Lastly, ACIR still refuses to release the results of the vote. In an independent check, CSS determined that several Commissioners never even saw the ballot. According to sources, fifteen Commissioners voted to publish the preliminary report, three (Graham, Payne, and Moran) voted no, and the three administration officials (Browner, Hale, and Riley) did not participate as the government was shut down. Two votes are as yet unaccounted for.

It seems illogical, and even wrong for public officials to hide behind an anonymous vote. The days of smoke filled rooms should have ended long ago. While ACIR's recommendations are bad enough, its refusal to be forthcoming about how and from whom those recommendations came is even worse.

Section III — CSS Positions on ACIR's Specific Recommendations

FAIR LABOR STANDARDS ACT

ACIR RECOMMENDATION

ACIR recommends repealing provisions of the Fair Labor Standards Act (FLSA) covering state and local government employees. Other options considered by ACIR include:

- delete FLSA provisions extending coverage of the law to state and local government employees.
- amend the FLSA to provide state governments with regulatory and enforcement authority similar to that granted to the federal government;
- replace the FLSA provision allowing individuals to sue state and local governments over FLSA issues with language restricting FLSA suits to those brought by the federal government as a part of its enforcement responsibilities; and
- amend the FLSA to resolve the issues most often subject to intergovernmental controversies.

COALITION RESPONSE

The Coalition opposes the ACIR recommendation to repeal the provisions of the Fair Labor Standards Act covering state and local government employees. The Coalition also rejects all four options to amend or replace provisions of the FLSA.

The Coalition rejects ACIR's contention that the FLSA is "an unfunded federal mandate because it requires state and local governments to implement some employment policies that would not have been implemented without the federal law." The right to earn a minimum wage and be protected from being forced to work excessive hours and be compensated for working beyond the forty hour work week should be regarded as basic labor rights. In this regard, the FLSA is a fundamental labor right, not an unfunded mandate.

All workers regardless of where they work or whom they work for are entitled to be protected by the nation's fundamental labor laws including minimum wage and overtime. There is absolutely no justification for singling out state and local government workers for exclusion from the minimum wage and overtime protections of the FLSA. Discriminating against such employees such as secretaries, clerks, laborers, and nurses aides by excluding them from coverage, while their counterparts in the private sector continue to enjoy the Act's protections, would be fundamentally unfair, and without merit.

History of FLSA Coverage

The FLSA was enacted in 1938. It proclaimed Congress' intent to ensure "the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers ..." The overtime provisions of the Act were conceived to prevent employers from requiring employees to work excessive hours and to stimulate job growth.

In 1966, Congress extended coverage to a limited number of state and local government employees, mostly in schools and hospitals. In 1974, Congress expanded FLSA coverage to all state and local governments, thereby declaring that public employees should be entitled to the same standards of decency as other workers. Some state and local government employers disagreed and went to court, seeking to have FLSA coverage declared unconstitutional. The Supreme Court sided with the employers in its June 1976 *National League of Cities v. Usery* decision. However, in 1985, this ruling was overturned. In its *Garcia v. San Antonio Transit Authority* decision, the Supreme Court finally guaranteed FLSA protections to all state and local government employees. The Court rejected as "unsound in principle and unworkable in practice" efforts to distinguish between governmental and proprietary functions.

In 1995, Congress passed the Congressional Accountability Act, in recognition that its employees should be entitled to the same wage and hour protections as the rest of the U.S. labor force. In extending coverage to its employees, Congress also acknowledged the importance of a universal and uniform wage and hour public policy.

Current Employment Policies

Current state government wage and hour legislation suggests that while some state and local government workers may not be harmed under the ACIR recommendation, many will suffer. For example, 13 states, or roughly one-third, currently do not have a minimum wage law applicable to state and local government workers or have one in which the rate is less than the federal minimum wage. With regard to overtime protections, 32 states, or about two-thirds, do not have overtime provisions in their laws that apply to state and local government workers.

While the status of state government wage and hour laws is not included in its report, ACIR maintains that public employee unions will provide wage and hour protections for workers if FLSA coverage is repealed. Unfortunately, this contention is belied by reality. Currently, only slightly more than one-third of all state and local government employees are organized. Furthermore, almost 5.5 million state and local government workers are without protections because they are currently denied collective bargaining rights.

The Issue of Costs and Control

ACIR contends that under FLSA, "a state or local government cannot amend its personnel policies to accommodate situations unique to government employment or to reduce its budgets." This is false. There is nothing in the Act that denies any employer the flexibility to change work schedules, work shifts, operation schedules and hiring practices for the purpose of controlling overtime hours worked by employees.

State and local governments typically budget in advance for overtime costs. The control of overtime costs, like most budget expenditures, is dependent on proficient management. When the Congress was debating public employees' coverage in the 1970s, the U.S. Department of Labor (DOL) was responsible for studying the "economic effects" of such coverage. According to DOL, neither the costs of minimum wage coverage or overtime would exceed one percent of wages. Admittedly, the data in those studies is not current, but there is no reason to believe that the impact today would be any greater. Indeed, ACIR has offered no cost estimates that the minimum wage and overtime provisions impose excessive costs on state or local governments. Therefore, the Coalition rejects the concern raised by ACIR that FLSA "thwarts a state or local governments' efforts to control its own fiscal condition."

Review the Regulations

ACIR maintains correctly that there have been conflicting court decisions regarding various aspects of the Act's regulations. However, this is no justification for repealing coverage of state and local government employees. DOL is currently studying the FLSA regulations. DOL has been responsible for administering and enforcing the FLSA for almost 60 years. This responsibility has generated a wealth of knowledge and expertise crucial to ensuring that the objectives of the FLSA are met.

To the extent that the DOL identifies problems during its study of the regulations, including those related to overtime pay, they can be addressed through the regulatory process. As part of that process, public employer representatives and public employee unions can engage in joint problem-solving discussions similar to those undertaken when the Act was amended to cover state and local government employees.

COALITION POSITION

The Coalition strongly opposes the ACIR's recommendation and all options regarding changes to the FLSA. There is no justification for repealing coverage for state and local government employees.

For more information contact Marge Allen, Legislative Affairs Specialist, American Federation of State, County, and Municipal Employees (AFSCME), at 202-429-1184; or Michael Messina, Labor Economist, AFSCME, at 202-429-1076.

OCCUPATIONAL, SAFETY AND HEALTH ACT

The ACIR improperly views OSHA as a mandate. Its provisions, with respect to state and local government employees, are in essence voluntary.

States and their political subdivisions are only subject to OSHA requirements if they opt to administer the federal program. In those states where the program is federally administered, state and local governments are exempt from coverage, unless they proactively choos to cover their own employees, as the states of New York and Connecticut have done.

ACIR RECOMMENDATION

The ACIR recommends repealing the provisions which extend OSHA to public employees in participating states.

ACIR OPTIONS

The ACIR considered three options with regard to OSHA:

1. *Make no significant change in the law.*

The Commission concedes that OSHA's protective standards and enforcement are "largely responsible for the 57 percent decline in workplace fatalities over the last 25 years." One option considered by the ACIR staff would be to recommend no fundamental changes to the program for public sector employers. The staff options do not consider extending coverage to state and local government employees in federally administered states nor to federal government employees.

2. *Amend OSHA to give participating state governments as much flexibility with regard to public employees as is authorized for federal agencies.*

According to the Commission's report, "[t]he current law allows the heads of federal agencies to develop an occupational safety and health program that is 'consistent with' the federal OSHA program for businesses." The ACIR staff argues that this requirement allows the federal government great flexibility in developing safety and health programs. By contrast, the ACIR staff repudiates language in the Act requiring states to establish standards for their employees that are "as effective as the standards" administered by the state for private businesses. The ACIR staff argues that this does not provide states with the compliance flexibility they need and suggests that the language which applies to the federal government could apply to the states as well.

3. *Delete language in the law regarding coverage of public employees.*

According to the ACIR report, this option, ultimately recommended by the Commission, "would allow states to establish their own occupational safety and health standards for public employees independent of the federal program," and allow the states who opt to administer their own programs the same flexibility granted to the federal government with its own employees.

COALITION RESPONSE

In its assessment of OSHA, the ACIR begins with the premise that the reductions in occupational fatalities, injuries and illnesses are largely attributable to the enforcement of the standards promulgated under the Act. State and local government employees encounter hazards on the job and state governments should have the same responsibilities as private sector employers to provide protections. Coverage of employees under the Occupational Safety and Health Act, including its standards and the rights that workers have to a workplace free from recognized hazards, is an important public policy goal. To exempt local governmental entities from these requirements is, on its face, hypocritical.

The following are reasons to reject the Commission's recommendation.

<u>OSHA Coverage Is Not a Mandate</u>

The classification of OSHA coverage for public employees as a mandate is incorrect. In fact, there is *no* federal mandate extending coverage to state and local governments. Instead, coverage is a requirement only when a state voluntarily exercises the option to administer its own OSHA program for private sector employees or if the state chooses to voluntarily cover its public employees (as Connecticut and New York have done). Twenty-seven states have chosen not to cover public employees, and are currently under no mandate to do so.

Since OSHA coverage for public employees is not a mandate, recommendations by the Commission for changes in the law would appear to be beyond its purview.

Assuming however that the Commission has properly characterized public employee coverage under OSHA as a mandate, their recommendation for repeal fails on a number of counts.

Purported "Mandate" Fails to Meet Criteria Established by ACIR

The Commission has established four criteria to define "mandates" of significant concern, but has failed to establish that OSHA meets any of these criteria.

(1) Substantial Expenditure: The first criterion concerns whether the law requires state and local governments to expend substantial amounts of their own resources without regard for state and local priorities. The Commission has failed to present any empirical evidence that a substantial financial burden is levied on any state in covering public employees under the Act.

The Commission has failed to note that although coverage may impose certain compliance costs for the states, that financial burden is partially alleviated by federal financial assistance. For those states that have opted to cover their employees, financial assistance is provided by the federal government for the administration of regulatory and enforcement programs which affect both the private and the public sector. Grants which can fund up to 50% of the administration and enforcement expenses are available to states that accept the responsibility of covering public sector workers. Moreover, extending coverage may actually save money (see below).

(2) Historic Powers: The second criterion concerns whether a law "abridge[s] the historic powers of state and local government without a clear showing of national need." Again, OSHA fails to present this problem. A national need for an occupational safety and health act was established by Congress when it passed the law in 1971. Although safety and health conditions in American workplaces have improved since that time, largely because of OSHA's standards and enforcement, significant problems still exist and must be addressed. The fact that more than 150 American workers die each day is continued evidence of a national need. Moreover, there is no abridgement of the historic powers of state and local governments since the decision to administer a state OSHA plan is a voluntary one.

(3) Feasible Implementation: The third criterion is whether a law "impose[s] requirements that are difficult or impossible to implement." While the ACIR recounts anecdotal accounts of state and local government confusion over OSHA standards, the ACIR fails to provide any empirical evidence that this is the case. In describing this criterion, the Commission suggests that implementation delays, the issuance of court orders, or the assessment of fines would represent evidence of compliance difficulty, yet no such evidence is presented in the report. It can only be assumed that such an assessment was not undertaken. Moreover, even if such evidence were to exist, we do not believe that it would necessarily override the compelling public policy goal of reducing occupational death and injury.

(4) *Widespread Complaints:* The final criterion is whether a law is "the subject of widespread objections and complaints" by state and local governments. The Commission has again not demonstrated this to be the case. As a matter of fact, the methodology used by the ACIR to determine which mandates to consider does not represent a statistically significant sampling of state and local officials and should not be used to determine if a particular mandate meets this requirement.

Public Employees Face Significant Hazards on the Job

The arguments parroted by the ACIR concerning OSHA are similar to those used by private employers in their attacks on the agency and the underlying law. The ACIR's recommendation that public employees not be covered by the law is a classic case of "having your cake and wanting to eat it too." The Commission argues that the Act has been successful, but when it comes to states having to comply, it desires a blanket exemption.

Moreover, public sector employment can hardly be considered to be safer then employment in the private sector. Public employees suffer 3.5 times as many work-related deaths as private sector workers and 25% more injuries. Public sector employees perform work that is as dangerous as their private sector counterparts. Public sector employees are not simply employed in relatively benign settings, but hold a number of dangerous occupations including:

police officers, corrections employees, sewer personnel, health care workers and sanitation employees. Further, clerical and office employment is increasingly hazardous, demonstrated by the increase in repetitive motion injuries such as carpal tunnel syndrome. To suggest that these workers should somehow be exempt from largely successful safeguards is a faulty proposition.

Statistics maintained by the National Safety Council demonstrate that work in the governmental sector is as dangerous as work in other sectors. For example, in 1993 the national average fatality rate for all industries was 8/100,000 workers while the rate for government workers was 11/100,000 workers. The rate in manufacturing, widely considered to be a hazardous industry, was 4/100,000 workers. Moreover, in those sectors where OSHA has concentrated its enforcement resources, such as construction and manufacturing, the fatality rate has declined by more than 50% in the last 25 years; conversely, in the government sector, where OSHA has not concentrated resources, the declines have been far less impressive (see National Safety Council, *Accident Facts*, 1995).

It is preposterous to suggest that public employees should not have the same rights as private sector employees, or that state and local governments, in their roles as employers, should not have the same responsibilities as employers in the private sector. We must not exacerbate a dual standard which already exists in states where public employees are not covered. For instance, a nurse employed in a public hospital should have the same protections as a nurse employed by a private facility.

<u>Safeguards Prevent Public Employee Deaths and Injuries</u>

Compliance with OSHA standards saves the lives of hundreds of public employees and spares thousands of workers and their families the pain and suffering of disability and death every year.

Moreover, several states have found that extending coverage makes a positive difference in reducing workplace injuries and illnesses. For instance, North Carolina experienced a 24% decline in public sector injuries after extending OSHA coverage to that group, and a study done by the New York Department of Labor found an 18% average annual reduction in states adopting state-run OSHA programs.

<u>Coverage May In Fact Save Money</u>

In addition to the failure to state an empirical basis for their recommendation, the Commission has not documented any evidence that coverage of public employees represents a significant financial burden on state or local governments. A study by Ruttenberg and Associates found that expanding OSHA coverage to all public employees would in fact save state and local governments at least $600 million annually. (See Ruttenberg and Associates, "Saving Money, Saving Lives: OSHA Coverage for Public Employees", March 1994).

The Ruttenberg study found that for every dollar spent on administrative costs, including federally funded research and evaluation, as well as costs of compliance officers and inspections, jurisdictions save more than $10. Many of the savings can be reaped through improved prevention, reduction of workplace injuries and illnesses and the concomitant reduction in medical and workers' compensation costs.

COALITION POSITION

Requirements of OSHA concerning state and local governments do not represent a mandate. Rather, they represent a state's responsibility which accompanies the choice to administer the OSHA program. The provisions requiring coverage of state employees should not be repealed. In fact, it would be prudent for the Commission to equalize the requirements placed on all sectors of government by extending coverage of OSHA to all public sector employees.

This recommendation was contained in legislation to amend the Occupational Safety and Health Act during the 103rd Congress (H.R. 3160; S. 575) and had broad bi-partisan support. Republicans in both houses who did not favor the legislation introduced substitute bills which contained provisions to extend coverage and the Bush Administration supported such extensions. Additionally, the 104th Congress has recognized the importance of safety and health protections for its own employees and extended coverage to them under the Congressional Accountability Act. The states should do the same.

For more information contact Keith Mestrich, Occupational Safety and Health Specialist, AFL-CIO at 202-637-5210.

FAMILY AND MEDICAL LEAVE ACT

ACIR RECOMMENDATION

Repeal the Family and Medical Leave Act for state and local governments.

ACIR OPTIONS

- Make no significant changes in the law.
- Exempt state and local governments from FMLA provisions.
- Give state governments independent regulatory enforcement responsibility for compliance with the law.

COALITION RESPONSE

In 1993, Congress passed the Family and Medical Leave Act (FMLA) in response to major demographic changes that prevented families from adequately taking care of young children and sick parents. The FMLA provides a safety net for families in times of crisis ensuring that when family or health needs require that employees be out of work temporarily, they do not lose their jobs and financial security.

The FMLA extends to all employers having at least 50 employees. Eligible employees can take up to twelve weeks of job-guaranteed unpaid leave each year to care for a newborn, newly adopted or newly placed foster child or a seriously ill child, spouse or parent or to recover from their own serious illness.

The FMLA requires that when an employee returns to work, the employer must reinstate the employee to her or his former position or the equivalent, and restore full employment rights and benefits. Knowing that they will be able to return to their jobs and their incomes — and the continuation of their health insurance coverage during their leaves from work — helps these employees and their families meet their family needs and weather their medical crises.

Yet ACIR proposes to repeal this critical safety net for America's working families in state or local government. In this section, we will first discuss the flawed methodology that ACIR used to arrive at this recommendation, and then turn to each of the arguments on which ACIR apparently relied.

<u>ACIR's Methodology in Evaluating the FMLA is Flawed</u>

The first and most serious flaw in ACIR's methodology is its failure to offer any facts or statistics in support of its claims about the FMLA. Neither its Preliminary Report nor the discussion at its December 19, 1996, meeting offers any factual basis for the ACIR's conclusion that state and local governments should be exempt from the FMLA. Nor, apparently, did the ACIR consult with employee advocates of the FMLA prior to adopting its preliminary recommendations. To the contrary — the ACIR's report appears to be based solely on unsupported conclusions.

Indeed, the ACIR offers no proof that the FMLA requires states and localities to incur costs at all, much less costs that are "unfunded;" it offers no evidence of "costs" at all, other than an unsupported assertion. Nor did the ACIR conduct any studies to ascertain the costs that the FMLA created for state and local governments. As discussed below, private employers' costs in implementing the FMLA have been minimal at most; there is no reason to think that state and local governments have incurred any greater costs.

<u>A Compelling National Purpose Justifies Universal FMLA Coverage</u>

Contrary to the ACIR's conclusion, a compelling national purpose justifies the FMLA's application to state and local governments. The dramatic increase in the number of women working outside the home in recent decades is an uncontested reality. This increase means that most American parents — in single-parent and two parent households alike — have both job responsibilities to meet and families to support and nurture. At the same time, our society has seen an increase in elderly parents who depend on their adult children for primary care.

Prior to FMLA's enactment in 1993, a large number of employers, including state and local government employers, did not provide employees with any job security during periods of family and medical leave. Until the FMLA, people risked losing their jobs when they had compelling family or medical needs that kept them out of work for a short while; when they had newborn or adopted children; when they were temporarily unable to work because of serious medical conditions; and when they had to care for seriously ill children, spouses, and parents.

For example, a 1992-1993 Bureau of Labor Statistics survey found that only 37 percent of public and private employees had access to unpaid "maternity" leave, only 28 percent were eligible for unpaid "paternity" leave. Prior to the FMLA, many, but not all, states provided some kind of leave option for employees, but job-guaranteed family and medical leave was not established as a universal labor standard.

Today, the FMLA provides much needed safeguards for state and local employees. For example, in a September 1995 survey of state affiliates, the National Education Association determined that the FMLA improved coverage for family leave for 48 percent of its state affiliates, and improved medical leave coverage for 32 percent.

FMLA has made a tremendous difference in the lives of millions of American families — providing them with crucial economic security at a time when job loss can lead to severe economic consequences. According to new scientific research by the Family Leave Commission on the effects of the FMLA, two-thirds of employers have changed their policies to comply with FMLA. Each year, at least one to three percent of American employees take specific advantage of FMLA — and state and local employees are no exception.

For Velma Parness, a state employee at the University of California Berkeley Extension, the FMLA made it possible for her to work part-time at home when her husband was dying from chronic myelogenous leukemia. In her heartfelt testimony before the Family Leave Commission, Ms. Parness explained:

> "What I do know, is what a difference [the FMLA] made in the quality of remaining time we had together . . . I had become the sole wage earner of our family, and carried the family health insurance through my employer. The loss of job and benefits would have been terrible for us . . . Quite frankly, I don't know what I would have done if I didn't have that job to go back to . . . "

The experience of Kevin and Kimberly Knussman is another illustration of how important the FMLA is for state and local employees and their families. *Both* the Knussmans work for the state of Maryland, she as a fiscal specialist and he as a flight paramedic with the Maryland State Police. When she was pregnant with her first child, Ms. Knussman had a complicated pregnancy and had to be hospitalized for two-and-a-half weeks prior to the delivery. Afterwards, she had to recover and could not care for the baby; she needed her husband's help for six weeks. While *her* state agency employer granted her leave, *his* would give him only 10 days of leave. He even remembers being told that a father cannot get leave unless his wife is in a coma or dead. Mr. Knussman has sued his employer over this. In his Family Leave Commission testimony, Mr. Knussman said that he learned from his experience that:

> "The role of family and medical leave in today's society is an important one. The stability of the American family is an issue that can be supported whether conservative of liberal; Democratic or Republican; male or female."

Thus, the ACIR's self-serving conclusion that no sufficient "national interest" justifies the FMLA's application to state and local governments is completely unsupported. It flies in the face of the findings that in 1993 led Congress to pass the FMLA with strong bipartisan majorities, and prompted President Clinton to sign it as the first legislation of his Administration.

<u>The FMLA Does Not Impose Substantial Administrative Costs on State and Local Governments</u>

The ACIR's claim that the FMLA imposes too many administrative costs on employers is equally flawed. The ACIR asserts, without citation, that the FMLA created new costs in connection with revising leave policies and continuing health insurance benefits. Yet, new scientific research by the Family Leave Commission on costs associated with business compliance with the FMLA establishes a very different picture. The Commission conducted a random-sample, statistically significant survey of private businesses' experience with the FMLA in 1994 and found that:

- eighty-nine percent of employers experienced only a small increase or no increase at all in administrative costs to comply with the FMLA;
- ninety-two percent of employers found it easy to determine employee eligibility under the FMLA;
- seventy-six percent found it easy to comply with the additional record-keeping;

- eighty-one percent found it easy to coordinate state and federal leave policies;

- seventy-eight percent found it easy to coordinate the FMLA with preexisting leave policies; and

- ninety-three percent experienced only a small increase or no increase at all in the cost of continuing benefits during employees' FMLA leaves.

State and local governments had even more extensive family and medical leave policies in place prior to the FMLA's enactment than the private sector: while only 34% of private sector employees had access to job-guaranteed "maternity leave" in 1993, 56% of public-sector employees had such access. Similarly, in a recent survey of state affiliates, the American Federation of Teachers found that "only a small fraction of surveyed locals have actually incorporated the provisions of FMLA into their contracts" because locals were eligible for leave before the FMLA's enactment. Thus, the public sector had *smaller* adjustments to make to come into compliance with the FMLA than the private sector — and therefore incurred *fewer* costs. There is no evidence whatsoever to suggest that public-sector employees incurred any *greater* costs as a result of the FMLA.

Moreover, the ACIR is incorrect to suggest that the burdens of implementing the FMLA (if any) are not shared among governments. In fact, under the FMLA, all government employees are essentially treated the same. Indeed, the law does "contain special provisions for federal government employees," but those provisions are *more* generous for employees than those governing the private sector and state and local governments (as well as the Congress).

Nor has the ACIR offered any evidence to support its claim that the FMLA has created an avalanche of lawsuits against state or local governments. In fact, available evidence shows the contrary. Since the FMLA became law, we have found only *two* lawsuits filed against state or local employers. And according to the September 1995 survey by the National Education Association, for education employees in some states, the number of grievances and lawsuits filed over family and medical leave were actually *reduced* after FMLA became law.

Finally, the ACIR is flatly incorrect that small state and local government employers are overwhelmed by the FMLA's administrative costs. Employees of small state and local governments (those with fewer than 50 employees within a 75-mile radius) are expressly *exempt* from the statute.

<u>State and Local Governments Actually Have Great Flexibility In Implementing the FMLA</u>

Like other workplace standards that are part of the fabric of the American employment experience, the FMLA sets a *floor* below which employers' family and medical leave policies may not fall. But that floor is fairly minimal; and once it is met, state and local employers, like private employers and the federal government, have enormous flexibility in establishing family and medical leave policies, and indeed in implementing the FMLA itself. The only limitations on that flexibility are those imposed by their own laws or ordinances or by their agreements with unions representing their employees.

Among the myriad decisions that state and local employers have the discretion to make about provision of family and medical leave are the following:

- whether to cover employees who have not worked for a year or for at least 1250 hours in the preceding year;

- whether and in what circumstances to provide *more* than 12 weeks of job-guaranteed leave;

- whether and in what circumstances to require medical certifications for leaves based on medical conditions;

- whether to require employees to exhaust accrued paid sick and annual leaves as part of their (otherwise unpaid) family or medical leave;

- whether to allow employees to use accrued paid sick leave while they are on (otherwise unpaid) family leave;

- how to treat benefits (other than health insurance) during leave;

- how to cover employees' work while they are on leave;

- whether to provide wage replacement during leave, and if so, how much and by what means.

Indeed, a number of states have, by state law, taken the opportunity to make such decisions. For example, California decided to conform its family and medical leave law (applicable to private employers as well as to state and local governments) to the federal FMLA in general, although it provided maternity disability leave for *longer* than the FMLA's 12 weeks, and to smaller firms; Ohio provided state employees with up to four weeks of leave for birth or adoption *at 70% pay*. These variations show how much flexibility states and localities continue to have in designing and implementing their family and medical leave policies.

Conclusion

In sum, the ACIR's recommendation to repeal the FMLA for state and local employees is based on flawed methodology and incorrect factual assumptions. The FMLA is not a costly burden for states and localities. To the contrary, it provides critical protections for state and local employees. It should not be repealed.

COALITION POSITION

The ACIR should withdraw its preliminary recommendation to exempt state and local governments from the Family and Medical Leave Act. None of its other recommended changes to the FMLA for state and local governments should be made.

For more information contact Donna R. Lenhoff, General Counsel, Women's Legal Defense Fund, at 202-986-2600.

BOREN AMENDMENT

The Boren Amendment requires states to establish reimbursement rates for hospitals, nursing facilities, and intermediate care facilities that provide Medicaid-related services. State-determined reimbursement rates must be "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities."

ACIR RECOMMENDATION

Repeal the language of the Boren Amendment and insert language making states solely responsible for determining Medicaid reimbursement rates.

ACIR OPTIONS

- Retain current provisions with no significant changes.
- Delete the federal criteria and make states solely responsible for Medicaid reimbursement rate determinations.
- Limit litigation to enforce the Boren Amendment.

COALITION RESPONSE

Medicaid does not create federal mandates. Participation by states is voluntary. In fact, Arizona did not participate in the program until many years after its enactment.

The federal law sets up a contractual agreement. If a state wants to receive some of the billions of dollars in available federal funds, it must meet certain conditions, including minimum coverage for certain groups and services. The federal program, however, offers states numerous options with respect to their state plans, and no state is required to participate. States that choose not to participate are not mandated to reimburse providers by a specific methodology.

The Boren Amendment was originally intended to control costs. The Governors supported it because they needed help keeping down reimbursement rates for hospitals and nursing homes. Over time, as medical care inflation increased dramatically, the "Boren Amendment" was used by facilities to demand higher reimbursement rates than the states wanted to pay. The Governors changed their position on this provision and now uniformly cite its repeal as a top priority.

Recently, the Governors have set their sights on reforms grander than simply repealing the Boren Amendment. The Governors would like to see the entire Medicaid "contract" dramatically changed. On February 6, 1996, the National Governor's Association issued an outline which changes the very nature of the federal-state partnership. In the Governors' plan, the states contribute less money and the federal government is limited in its ability to hold states accountable for the billions of federal dollars they receive. The Governors include the repeal of the Boren Amendment in their revision of Medicaid.

ACIR should not muddle the complex Medicaid issue by attempting to repeal one provision it labels "a burdensome mandate."

COALITION POSITION

Retain the current provisions.

For more information contact Judy Waxman, Director of Government Relations, Families USA, at 202-628-3030.

CLEAN AIR ACT

ACIR RECOMMENDATION

The Commission recommends relaxing some of the Act's deadlines and providing more federal financial aid and technical assistance. It further recommends amending the Clean Air Act to provide only performance goals without providing any guarantee that these goals will be met. The Commission advocates eliminating the Act's specific requirements for emission reductions and the sanctions states currently face for failing to deliver clean air.

COALITION RESPONSE

The ACIR report acknowledges that in the past states have repeatedly failed to develop control measures to clean their air to healthy levels. States were first required to develop and implement plans to achieve national air quality standards in 1967. As a result of the states failure to do so, plan deadlines were extended in 1970, 1977 and then again in 1990. In 1990, 150 million Americans still lived in areas that violated the federal air quality standards.

Nevertheless, the Commission recommends eliminating improvements made to the Clean Air Act in 1990 which guarantee that harmful air emissions in polluted urban areas will be reduced. While states retain the authority to develop the specific plans for cleaning their air, the 1990 amendments to the Act require some specific emission reduction controls. Generally, states are required to demonstrate that harmful, smog-forming pollutants are reduced by specified amounts by certain deadlines. If these deadlines are missed, EPA is authorized to impose sanctions on the state. These sanctions are not punitive, but are simply designed to achieve the required emission reductions. For example, one sanction requires that before a new manufacturing facility can be built, the emissions it will generate must be offset by at least 2 to 1 emission reductions elsewhere.

The ACIR report implies that the Act's sanctions should be eliminated. While supporting the goal of clean air, the Commission would do away with the means to achieve it. Eliminating the sanctions would penalize those states which have complied with the law and put the pollution control measures in place. In order to make the difficult political choices necessary to reduce harmful air pollution, state and local governments must know that everyone will be playing by the same rules.

Furthermore, air pollution knows no political boundaries. A Midwest state's failure to control harmful emissions from coal-burning power plants within its borders affects citizens in the Northeast and other parts of the country, as well as within the state. The federal government has the duty not only to set national standards, but also to ensure that they are met.

The ACIR report recommends greater flexibility and increased consultation with states in enforcing the Clean Air Act. The Environmental Protection Agency, however, has already done a great deal to provide such flexibility. In early 1994, the Agency backed off of its requirement that states with the most polluted cities install new methods of testing automobile exhaust systems, scientifically proven to be most effective. The Agency also made the Clean Air Act's program to encourage carpooling to work voluntary. In fact, EPA has had to spend so much time responding to pressure to relax the rules that few resources have been left for technical assistance. Flexibility must be coupled with some guarantee that the necessary emission reductions are occurring.

The changes made to the Clean Air Act in 1990 have produced dramatic results. Over 50% of the cities that did not meet the air quality standard for urban smog in 1990 (55 out of 98 areas) now meet that standard. Toxic emissions have been reduced by 1.6 billion lbs/yr since 1990 — more than six times the reductions achieved from 1970 to 1990. This progress would be quickly reversed if the report's recommendations were followed.

Instead of turning back the clock, the ACIR should focus on the many problems that still remain. Almost all states failed to submit air quality plans for delivering clean air by the Act's 1994 deadlines. The

Commission could make a contribution by promoting pollution prevention initiatives and assisting in efforts to streamline the permitting process. Duplicative and conflicting permit requirements should be eliminated, but the requirements must not be relaxed and must remain enforceable by the public as well as state and federal authorities. Such efforts could ease the burdens faced by both state and local governments, as well as the regulated community, while guaranteeing cleaner air to the public.

COALITION POSITION

The Clean Air Act has worked to save lives and make our cities more livable. The Commission should work to improve the implementation of the Act rather than trying to relax it.

For more information contact Sharon Buccino, Senior Project Attorney, Natural Resources Defense Council, at 202-783-7800.

CLEAN WATER ACT

ACIR RECOMMENDATION

The Commission recommends restoring funding or allowing state and local governments more authority to set schedules.

COALITION RESPONSE

The ACIR report suggests that the history of the Clean Water Act demonstrates that "states and local governments ceded control over water pollution controls to the federal government in return for substantial federal aid." More important is the fact that after over 20 years of state programs, the nation's waters were not improving. In short, the federal government took over precisely because the state governments were not adequately addressing the problem. While the 1972 amendments did provide substantial aid for municipal sewage treatment, the amendments did not provide much aid for individual residential sewage treatment or industrial discharges. Pollution control was intended to be largely under the "polluter pays" scheme.

Nothing since 1972 suggests that Congress was wrong in its assessment that states and localities will not, on their own, adequately address water pollution. While pollution from discrete municipal and industrial sources is controlled under a federal/state permit program, runoff pollution from diffuse sources was left up to the states in section 319. This section is widely acknowledged to be a failure, with state plans — themselves largely inadequate — left unimplemented. Municipal stormwater, which according to the most recent EPA and state data is the largest source of estuarine impairment and either the second or third largest source of lake, ocean and wetland impairment, was largely ignored by states and municipalities until the federal government initiated a permit program in 1990. Thus, it is crucial that strong enforceable federal mandates be maintained with respect to water pollution.

The Clean Water Act fails to meet ACIR's own criteria for identifying mandates requiring change. For example, the ACIR set out to identify as mandates those federal statutes providing little discretion. Yet, under the Clean Water Act, states can choose to assume control over the program. Forty states have done so for the permit program. Only 2 states have done so for the wetlands program. Polluters are not allowed to discharge over certain amounts, but *how* they reduce their pollution is up to them. In reality there is much flexibility. Local governments, to the extent they are polluters, are themselves covered by the Act, but in their role as government entities they can choose whether or not to assume control over certain programs, such as industrial pretreatment.

The ACIR was also looking for federal requirements that are the "subject of widespread concern." All environmental programs, including the Clean Water Act, have been under attack in this Congress, but polls consistently show that the burden of environmental controls is NOT a matter of concern to most people. On the contrary, environmental protections are one of the few areas where most people want more protections. A poll done by the Wirthlin group in August 1995 found that 72% of the respondents felt that the environment was so important that it should be protected regardless of the cost.

The ACIR report criticizes the ability of citizens to sue to enforce various federal laws. This country would not have seen the dramatic improvement in the quality of its air, water and land over the past 20 years without the citizen suit provisions in the various environmental statutes. All too often, the federal government lacks the resources and the political will to sue state and local governments violating the law.

Citizen groups do not have the means to bring frivolous lawsuits, but they must retain the opportunity to go to court to protect their communities when the government does not.

Case Example: The Stormwater Discharge Program

In 1987 after years of state and local governments shirking responsibility, Congress required municipalities and industrial facilities to obtain a permit for their stormwater discharges — the runoff from city streets, and other areas that contains oil and grease, excess nutrients that rob receiving waters of oxygen, toxic heavy metals, dirt and excrement. Municipalities have complained that: (1) the cost of the application is too high, (2) it is impossible to meet numerical water quality standards, and (3) that receiving waters are polluted by other sources besides municipal discharges. The ACIR accepted these criticisms without any analysis as to their validity.

These charges are flawed for several reasons. First, many estimates of the cost are inflated by including other municipal planning costs in the stormwater control costs. Since very effective stormwater control can be achieved through the preservation of wetlands, stream buffers, and local vegetated areas, basic city planning and design can be charged to stormwater control, even when done for many reasons. Yet even these inflated costs come to only approximately $3 per person, far less than municipal residents pay for many other services or than rural residents may pay for runoff control.

Second, the ACIR's recommendation is based on an inaccurate picture of current law. Contrary to the ACIR report, state and local governments today are generally *not* saddled with stormwater permit requirements that "require compliance with standards that have detailed numerical limits that . . . it may not be feasible to attain." (A-19) *In fact*, there are very few such limits in stormwater permits; most permits allow the municipality to design its own stormwater management plan.

Third, while it is true that receiving waters are polluted by many sources, that is no reason to avoid controlling a significant — and in many cases the most significant — cause of water pollution. The better response is to improve control of those other sources, such as agricultural runoff.

ACIR is correct that the law need not be changed to allow state and local governments greater flexibility; it definitely should not be. We also do not disagree that additional federal funding would be appropriate. However, given the importance of pollution control and the poor track record of state and local governments, requirements must not be relaxed.

COALITION POSITION

The Commission should work to maintain or increase funding and allow flexibility in how, but not whether, to meet goals.

For more information contact Peter Lehner, Senior Attorney, Natural Resources Defense Council, at 212-727-2700.

THE SAFE DRINKING WATER ACT

ACIR RECOMMENDATION

The ACIR report recommends repealing some of the "most onerous" provisions of the Safe Drinking Water Act and establishing a long term goal of returning to the states full responsibility for safe drinking water standards.

COALITION RESPONSE

The report attacks the Safe Drinking Water Act by relying upon old bromides and unverified assertions, and upon statements like "it is perceived" or "it is felt" by state or local officials that there are unreasonable burdens on state and local governments of the Safe Drinking Water Act (SDWA). Generally, the ACIR report offers no concrete facts or citations to document its assertions or state and local governments' "perceptions" and "feelings."

The one supposedly supporting document ACIR notes is the Congressional Budget Office's (CBO) review of the drinking water act, which is cited as bolstering ACIR's assertion that the SDWA is an egregious example of an unnecessary and unfunded mandate. Inexplicably, however, ACIR fails to quote the central finding of the CBO study that appears in large print in bold on page one: "To date, the SDWA has resulted in fairly modest costs for most households. Although the SDWA has been cited as a particularly burdensome mandate, available data do not indicate that it has imposed high costs on most households" (CBO, THE SAFE DRINKING WATER ACT: A CASE STUDY OF AN UNFUNDED FEDERAL MANDATE, September, 1995).

The rest of the ACIR essay on drinking water is premised upon incorrect and undocumented anecdotal information. Each major "concern" cited by ACIR is undocumented and generally either demonstrably false or seriously overblown:

1. No Need for Federal Standards?

In developing its theme criticizing the requirement in the SDWA that states adopt federal drinking water standards, ACIR states that "prior to 1974, states generally required local water systems to adhere to the U.S. Public Health Service [USPHS] drinking water standards for regulation of water used by interstate carriers." (ACIR at A-28) Later it says that "[p]rior to the imposition of federally mandated requirements, most states were already imposing Public Health Service Standards on local water systems." (ACIR at A-29)

These assertions are flatly incorrect. In fact, the main reason the SDWA was passed was that states were not adopting federal standards and widespread disease outbreaks and contamination problems were being found. A 1974 House of Representatives report, for example, noted that federal standards were needed because:

> "A review of state drinking water standards, performed in 1971, indicated that *only 14* had officially adopted the USPHS Drinking Water Standards. Enforcement of these regulations is frequently poor. Sufficient surveillance of community water systems by public agencies at all levels of government has likewise been lacking" (H. Rep. No. 1185, 93rd Cong. 2d Sess. at 6-7, 1974, emphasis added).

2. Rules are Issued Without Consideration of Costs?

The ACIR states that under the SDWA, "[b]ecause there is no federal participation in the costs, it is felt that the requirements are being imposed for a wide variety of risks *regardless of cost*" (ACIR at A-29, emphasis added).

This assertion also is patently false. The SDWA expressly requires that all EPA drinking water standards shall be based upon the "feasible" technologies, explicitly "considering costs" (SDWA § 1412(b)). In addition, the statute specifically authorizes variances and exemptions from these cost-based standards for systems with economic or other difficulties complying with these standards (SDWA §§ 1415-1416).

We challenge ACIR to point to a single major drinking water rule issued "regardless of cost" — this would be a direct violation of the law, and has never happened. To the contrary, the public interest community long has complained that EPA is overly obsessed with the costs of its drinking water rules. EPA has been far too lax in its efforts to protect the public from certain drinking water contaminants due to concern about economic impacts (such as arsenic, which has a 54 year-old, very weak drinking water standard set by the USPHS before arsenic was known to cause cancer, a standard EPA has failed to update due primarily to concerns about the economic impact of a strict rule).

The ACIR's assertions that the Act imposes undue burdens without consideration of costs directly contradict other more scholarly efforts to assess whether the SDWA creates extreme costs. For example, as noted above, CBO found that "although the SDWA has been cited as a particularly burdensome mandate, available data do not indicate that it has imposed high costs on most households" (CBO, THE SAFE DRINKING WATER ACT: A CASE STUDY OF AN UNFUNDED FEDERAL MANDATE at 1, September, 1995). In addition, EPA's massive 1993 REPORT TO CONGRESS: TECHNICAL AND ECONOMIC CAPACITY OF STATES AND PUBLIC WATER SYSTEMS TO IMPLEMENT DRINKING WATER REGULATIONS, demonstrated that for most households, the costs of drinking water protection have been very modest indeed (on average less than $20 per household per year). While some small water system customers had to pay more due to the lack of economies of scale, this hardly represents proof that the SDWA is a statute that fails to consider costs. To the contrary, many observers in the public health and environmental community believe that in implementing the SDWA, EPA has been overly cost-conscious.

3. Unnecessarily Testing of Tap Water?

ACIR says — without supporting documentation — that "problems arise because of what are perceived as requirements to test for contaminants ... in instances where the risks are relatively low and the costs are significant" (ACIR at A-29).

The factual basis of the "perceived" unreasonable testing and treatment requirements is not specified or documented. However, it should be noted that with respect to drinking water testing, there is much flexibility available, including the availability of state waivers, grandfathering, and composite sampling to reduce monitoring burdens. For example, if a system is found to be unlikely to find the contaminant it can get a state waiver. Use waivers can be issued if the contaminant wasn't used in the area, and susceptibility waivers can be issued if the system is protected geologically or otherwise from contamination. ACIR fails even to mention that waivers are available, and to the extent they are not available in some states, that is the fault of the states for not developing or implementing a waiver program.

4. Unnecessary Treatment of Drinking Water?

In addition, ACIR says — again without supporting documentation — that "problems arise because of what are perceived as requirements to... treat surface water in instances where the risks are relatively low and the costs are significant." (ACIR at A-29). This accusation is untrue and insupportable. First, it is not mentioned that state officials and the drinking water industry strongly supported the surface water treatment requirements in the SDWA Amendments of 1986.

Second, ACIR does not mention that independent of the SDWA's 1986 amendments, many states already required all surface water systems to filter their water, and that over 90 percent of the surface water systems in the nation already filter their water. Thus, the supposedly unnecessary surface water treatment generally is necessary, according to a consensus of state and industry experts. Indeed, a coalition of state and water industry experts recently banded together to recommend that surface water systems go beyond current EPA rules to protect citizens against *Cryptosporidium* and other microbes because EPA's rules don't go far enough.

Third, ACIR does not mention that the SDWA and its rules specifically allow surface water systems with high quality, protected source water to avoid filtration if the state finds that it is not necessary (SDWA § 1412(b)(7)(C)).

5. EPA Prohibits the Use of Cheaper Alternative Technology?

In a similar vein, ACIR asserts without support that "alternative, less expensive technology to address specific risks is not permitted in some instances. Sometimes, the treatment requirements do not relate directly to specific existing and measurable contamination" (ACIR at A-29).

Precisely what this assertion could be referring to is unclear, but it appears to belie a lack of understanding of the SDWA. Virtually none of EPA's rules require a water system to use a specific technology to address a contaminant. Instead, under the Act EPA sets "Maximum Contaminant Levels" (MCL) which water systems can meet using any technology or water source protection measures they choose, so long as the drinking water meets the MCL. The one significant exception to this rule is the surface water treatment rule, which does state that certain surface water must be filtered, but does not require the use of any particular technology, so long as certain contact time and other water treatment technique parameters are achieved (such as a certain level of turbidity). Thus, it is not clear exactly what the complaint is targeted at, but it appears to miss its target.

6. Lack of State Discretion Regarding Enforcement?

The ACIR states that "concerns are expressed about being held equally accountable for violations that are genuinely health related and for failure to follow exactly prescribed schedules for testing procedures. States lack flexibility and discretion in implementing the law."

This accusation also completely misses the mark. A recent survey indicates that only about 3% of all drinking water violations are ever subject to any formal state *or* federal enforcement action (NRDC, YOU ARE WHAT YOU DRINK, 1995; NRDC, THINK BEFORE YOU DRINK: 1992-1993 UPDATE, 1994).

Penalties for even the most egregious health standard violations are extremely rare. EPA takes approximately 5 cases to court a year of the more than 100,000 recorded violations, and virtually all administrative actions are taken without collecting any penalties. According to GAO and EPA Inspector General studies, some states have essentially suspended enforcement of certain EPA rules they felt were low priority (*NRDC*, THINK BEFORE YOU DRINK , 1993).

Thus, you are at much greater risk of paying a fine for parking illegally than a water system is of getting a fine for supplying dangerous tap water. Thus, it can hardly be argued with any credibility that states lack enforcement discretion under the SDWA.

COALITION POSITION

The report proposes a goal of returning to the states "full responsibility" for drinking water standards. The public is clear, however, in its belief that federal standards should not be weakened. According to a recent industry poll, just 3 percent of the American public would favor relaxing federal drinking water standards. We believe that past and present history make it clear that there is a continuing need for a federal leadership role in establishing strong drinking water standards, with the states and localities primarily responsible for implementing those standards, subject to meaningful federal oversight.

There is a need for a basic minimum national level of health protection for drinking water. People should be able to live and travel anywhere in the country without worrying about their drinking water quality. Citizens of poorer states should not be forced to substandard drinking water compared to neighboring, richer states. States should not have to compete for industry (or fear driving industry away). Allowing states to set any standards they choose could encourage economically-strapped states to look the other way, or set weak drinking water standards, when local industries contaminate their tap water sources. In addition, 50 states should not have to research and reinvent 50 sets of drinking water regulations and regulatory schemes. There is a need for a basic federal role in protecting all Americans from drinking water contamination.

For more information contact Erik Olsen, Senior Attorney, Natural Resources Defense Council, at 202-783-7800.

ENDANGERED SPECIES ACT (ESA)

ACIR RECOMMENDATIONS

The ACIR recommends that Congress and the Administration:

- Retain the provisions of the Endangered Species Act but improve federal funding allocations and the implementation process, particularly to state, local and tribal governments.

- Amend the ESA to make state, local and tribal governments full partners with the federal government in the preservation of endangered species.

- Modify the recovery planning and listing policies of the ESA to minimize the social and economic impacts on state, local and tribal governments.

COALITION RESPONSE

The ACIR report recommends measures that would drastically weaken the Endangered Species Act, despite solid public support for strengthening this crucial law. Although ACIR rightly calls for expanded roles for state, local and tribal governments in implementing the ESA, this role should be accompanied by strong federal standards and oversight.

At present, the ESA provides mechanisms for the transfer of authority from the federal government to state wildlife agencies through Section 6 cooperative agreements. Although ESA authority transfers through cooperative agreements tend to be limited to scientific research, recent efforts to increase state cooperation and participation in species management have been relatively successful. This effort has been predicated upon the belief that state resource managers often have the best scientific and political resources to manage local habitat, particularly when they possess adequate financial resources

However, when considering which actions are appropriate for state agencies, it is important to remember that all states administering provisions of the ESA must be held to the same federal standards. Because not all states have solid wildlife programs there would be no assurance that one state's successful efforts to protect a species would not be drastically undermined by deleterious actions in other less responsible states. In the case of wide ranging or migratory species, an irresponsible conservation program in one state could have negative repercussions for an adjoining state's programs.

The Coalition disagrees with the ACIR recommendation that "state, local and tribal governments . . . have a consent role before a species is listed." The listing process must remain in the hands of the federal government, without state veto powers, because such decisions are made solely on the basis of the best scientific and commercial data available. State recommendations should be considered during the listing process, but the criteria under Section 4(a)(1) of the ESA must remain as is. Requiring such widespread consensus before any listing decision would deny many imperiled species essential ESA protections. Likewise, requiring listing decisions to be based only on information that has been "peer reviewed" would prevent the vast majority of listings — most listings are scientifically uncontroversial yet are based in part on non-peer-reviewed data.

The ACIR report states that "the goal should be to reduce the likelihood of economic disruption while ensuring species recovery." This wrongly assumes that species conservation and recovery have an adverse economic impact. The opposite is true — without biodiversity protection we ensure longterm adverse economic impacts, such as the loss of agricultural crops and cures for human diseases.

Under the ESA, state agencies are already heavily involved in the preparation and implementation of recovery plans. Because recovery plans recommend a range of actions to benefit a species, such as research, protection of critical habitat, captive breeding programs, and reintroduction efforts, qualified state agencies should also have the power to advise on future recovery activities. However, it is crucial that the federal government retain ultimate oversight over recovery plans.

Finally, while the Coalition agrees with ACIR that insufficient funding has contributed to ineffective implementation of the Act, increased funding should not be limited to state, local and tribal governments. Because program funding is often "zero sum," it is likely that funding would merely be transferred to states at the expense of other programs, such as recovery planning and listing.

COALITION POSITION

Proper implementation of the ESA by state, local, and tribal governments must be accompanied by strong federal oversight. Public citizens must retain their abilities to challenge both the substance and enforcement of state implementation activities. In order to insure effective transfer and implementation of ESA authorities to state agencies, we must increase the amount of funding authorized and appropriated to the states and the federal government under the ESA.

These steps would not only go a long way toward allowing states to experiment with conservation approaches that work best, but also result in more direct and effective species protection efforts.

For more information contact Heather Weiner, Legislative Counsel, Defenders of Wildlife, 202-682-9400.

AMERICANS WITH DISABILITIES ACT

ACIR RECOMMENDATIONS

Either increase federal funding to state or local governments or modify some of ADA's deadlines and requirements.

COALITION RESPONSE

ACIR recommends improving ADA's flexibility by moving from rigid requirements toward more general goals and goal attainment schedules. As it exists, however, the ADA is already quite flexible. The law simply compels employers to make reasonable accommodations for disabled workers, but not changes that would involve undue hardship. It requires state and local governments to review all policies, programs, services, and practices to ensure that they do not discriminate against disabilities, and any policies found to be inconsistent with ADA provisions are to be modified as soon as feasible.

In suggesting that deadlines be suspended or made voluntary for financially strapped areas, ACIR fails to realize that current law already states that a public entity is not required to take any action that would fundamentally alter a service, program, or activity or impose an undue financial or administrative burden.

Although the ADA Handbook states that the defense of undue burden should apply only in the most unusual cases, the courts have been receptive to state and local governments' concerns about cost. When state and local governments are able to show that they have taken constructive steps to accommodate disabled parties, and that providing certain services would indeed serve as an undue financial or administrative burden, courts thus far have sided for the most part with those governments. State and local governments that are making good faith compliance efforts should feel comfortable with the use of this defense, which allows suspension of the requirements for as long as the hardship continues.

The ADA Handbook also explicitly states that structural modifications are required only when there is no other feasible way to make the public entity's program accessible, and that this accessibility may be achieved by delivering services at alternative sites or making home visits as appropriated. Moreover, the regulation governing existing facilities requires only that the service, program, or activity be accessible when viewed in its entirety. In renovating a building, the law does not stipulate that each and every entrance, room, and floor of the building be modified and rendered accessible. Similarly, in construction of a new building the law only requires that part of the facility be accessible. This regulation provides additional flexibility by permitting governments to choose between two accessibility standards: the Uniform Accessibility Standards, or the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities.

In the realm of transportation, the ADA requires special paratransit service only when it is necessary to provide service comparable to the level of service provided to individuals without disabilities who use the fixed route system. As the appendix to the regulation explains, paratransit is meant to act as a safety net for individuals with disabilities.

By recommending that state and local governments be allowed to negotiate deadlines, the ACIR is penalizing those areas which have been cooperative, and encourages others to blatantly disregard the law's requirements.

COALITION POSITION

As it exists, the ADA is a comprehensive set of guidelines which successfully melds the rights of individuals and the concerns of state and local governments. ACIR's recommendations should not be adopted.

For more information contact Curt Decker, Executive Director, National Association of Protection and Advocacy Systems, at 202-408-9514.

INDIVIDUALS WITH DISABILITIES EDUCATION ACT

ACIR RECOMMENDATION

The ACIR report recommends that either federal funding be increased to cover 40 percent of IDEA costs (a long term federal goal) or that states be exempted from prescriptive and costly administrative "mandates." The report recommends that alternative dispute resolution practices be required, and that any court challenge based on the federal law be brought by state or federal agencies, not by individuals.

The report also lists the following concerns raised by state and local governments:

- IDEA creates administrative and financial burdens on state and local governments.
- There is a lack of adequate federal resources to assist states in meeting their obligations to provide "equal protection under the law to students with disabilities."
- Local funding agencies are unable to combine IDEA funds with other federal funding streams to provide non-categorical support for students with disabilities.
- IDEA has become overly "litigious and adversarial" in dispute resolution.
- IDEA usurps the states' authority in education, a "traditional domain of the state and local government. ... IDEA forces states to submit their special education service plans to the federal government for approval..."

COALITION POSITION

The report recognizes that the federal statute was preceded by landmark court decisions mandating educational rights for students with disabilities and their families. The statute is intended to assist states in meeting their basic constitutional duty to provide education to children with disabilities by funding a percentage of the extra costs of providing that education.

With or without IDEA and funding from the federal government, the requirement to provide a free, appropriate public education continues to be a state responsibility. Many families have been dragged into the "litigious" aspects of IDEA only because the state failed to provide a free, appropriate public education for their child. If implemented, the ACIR recommendation would deny access to courts for these families who have exhausted every other means of eliminating discriminatory practices against their son or daughter to resolve disagreements with the schools.

People with disabilities, parents of children with disabilities, advocates and others vehemently oppose changes that would gut the essential due process protections in the law.

For more information contact Celane McWhorter, Senior Policy Associate, United Cerebral Palsy Association, at 202-776-0406.

APPENDIX A - History of the Advisory Council on Intergovernmental Relations

Commission History

The U.S. Advisory Commission on Intergovernmental Relations (ACIR) is an independent federal commission that was established in 1959 to study how the federal government interacts with other levels of government, to identify policy and administrative problems that may exist in these relationships, and to convene and work cooperatively with representatives from the other levels of government to find creative solutions to intergovernmental problems.

ACIR's Mission is to: *Protect the Constitutional balance of the American federal system; to improve the ability of federal, state, and local governments to work together cooperatively; and enable the American federal system to adjust to changes in the needs of [sic] the expectations of the citizenry.*

In 1995, the *Unfunded Mandates Reform Act* (P.L. 104-4) directed the ACIR to investigate and review the role of federal mandates in intergovernmental relations.

Commission Membership

The ACIR has 26 seats. The leadership of the U.S. Congress selects three members from each chamber. The remainder are appointed by the President: three private citizens, three Executive Officers, four Governors, four Mayors, three State Legislators, and three County Officials. Where four members are appointed, party membership is evenly represented. Where three are appointed, the majority party has an extra seat within that category. Members serve two terms, and may be reappointed. If a term expires, and a new member is not appointed, the incumbent continues to serve until a replacement is named (e.g. Jim Moran (D-VA)). Because the ACIR may be terminated to save money, House Speaker Newt Gingrich (R-GA) has not appointed new Commissioners.

Commission Members

Governor Arne H. Carlson (MN)
Governor Howard Dean (VT)
Governor Bob Miller (NV)

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

Senator Bob Graham (FL)
Senator Dirk Kempthorne (ID)
Senator Craig Thomas (WY)

Rep. James Moran (VA)
Rep. Donald Payne (NJ)

State Senator Paul Burke (KS)
State Rep. Art Hamilton (AZ)

Mayor Victor Ashe (Knoxville, TN)
Mayor Gregory Lashutka (Columbus, OH)
Mayor Edward Rendell (Philadephia, PA)
Mayor Bruce Todd (Austin, TX)

County Commissioner Randall Franke (Marion, OR)
County President John Stroger (Cook, IL)

Peter Lucas (MA Bay Transport Authority)
Richard Nathan (Rockefeller Institute)
William Winter (Watkins, Ludlam & Stennis)

There are presently four vacancies on the Commission.

APPENDIX B - CSS Statement of Opposition to ACIR's Preliminary Report

CITIZENS FOR SENSIBLE SAFEGUARDS

February 26, 1996

Honorable William F. Winter
U.S. Advisory Commission on Intergovernmental Relations
800 K Street, NW
Washington, DC 20575

Dear Governor Winter:

We write in strong opposition to the recommendations contained in the preliminary report of the Advisory Commission on Intergovernmental Relations, released January 24. The laws and public safeguards reviewed by the Commission should be preserved, not weakened. They protect millions of Americans from hazardous workplace conditions, discrimination, and an unhealthy environment. They remain as important today as when they were passed.

In particular, we oppose your preliminary recommendation to exempt state and local governments from complying with seven critically important occupational, health and safety protections. Regrettably this recommendation would create a society where some are worthy of protection, and some are not.

Moreover, your report conveys a false sense of balance by recommending exemptions for seven of the reviewed laws, while recommending that seven others be retained "with modifications." Many of these "modifications" amount to "no money, no mandate," which in times of reduced federal spending are actually further exemptions. This report is not balanced in any sense of the word, and should be recognized as such.

It is ironic that, in the same month that Congress began abiding by the laws faced by other employers, ACIR would recommend exempting state and local governments from many of the same laws. Fairness dictates that all Americans benefit from these protections, regardless of where they work.

It is clear that much greater research, debate, and consideration is needed before any further recommendations are made in this area.

Again, as organizations representing millions of Americans, we strongly oppose the recommendations of your preliminary report, and urge their reconsideration before a final report is issued in the weeks to come.

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Action on Smoking and Health
AFL-CIO
AFL-CIO Public Employee Department
AFSCME
AIDS Action Council
Alliance to End Childhood Lead Poisoning
American Association of University Women
American Association on University Professors
American Council of the Blind
American Counseling Association
American Federation of School Administrators
American Federation of Teachers
American Foundation for the Blind
American Jewish Committee
American Lung Association
American Oceans Campaign
American Postal Workers Union
American Public Health Association
American Speech Language Hearing Association
Americans for Democratic Action
Association of Farmworker Opportunity Programs
Atlantic States Legal Foundation
Bazelon Center for Mental Health Law
Brain Injury Association
Center for Advancement of Public Policy
Center for Community Change
Center for Law and Education
Center for Law and Social Policy
Center for Marine Conservation
Center for Neighborhood Technology (IL)
Children's Defense Fund
Church Center for Sustainable Community
Citizens for Reliable and Safe Highways
Clean Water Action
Coalition for New Priorities
Commission on Social Action of Reform Judaism
Cornucopia Network of New Jersey
Council for Exceptional Children
Environmental Defense Center (CA)
Environmental Defense Fund
Environmental Health Coalition
Environmental Justice Working Group
Environmental Ministries
Epilepsy Foundation of America
Families as Leaders of Oregon
Families USA
Friends Committee on National Legislation
Fund for New Priorities in America
Galveston-Houston Association for Smog Prevention
Goddard College Institute for Social Ecology
Government Accountability Project
Greenpeace
Hadassah
Health and Development Policy Project
Higher Education Consortium for Special Education
Industrial Union Department of the AFL-CIO
International Association of Firefighters
International Federation of Professional and Technical Engineers
International Union of Electronic, Electrical, Salaries, Machine and Furniture Workers
Kansas Audobon Council
Laborer's International Union of North America
Metropolitan Ecumenical Ministry
National Association for Fair Contracting
National Association for the Advancement of Colored People
National Association for Visually Handicapped
National Association of Government Employees
National Association of Homes and Services for Children
National Association of Protection and Advocacy Systems
National Association of School Psychologists
National Associations of Developmental Disabilities Councils
National Audubon Society
National Campaign for Freedom of Expression
National Campaign for Pesticide Policy
National Catholic Social Justice Lobby
National Citizens' Coalition for Nursing Home Reform
National Coalition on Black Voter Participation
National Consumers League
National Council of Jewish Women
National Council of La Raza
National Council of Senior Citizens
National Education Association
National Mental Health Association
National Parent Network on Disabilities
National Urban League
National Wildlife Federation
Natural Resources Defense Council
Network for Environmental and Economic Responsibility
Oklahoma DD Planning Council
OMB Watch

Paralyzed Veterans of America
PhilPOSH
Physicians for Social Responsibility
Planned Parenthood Federation of America
Public Voice for Food and Health Policy
RI Association of People with Disabilities
Service Employees International Union
Service Employees International Union
Sierra Club
Sierra Club Legal Defense Fund
20/20 Vision
The Arc
The Arc of Multonomah County
The Arc of Texas
The International Brotherhood of Teamsters
The Learning Disabilities Association of America
Transportation Communications Union
Trout Unlimited
Union of Needle Trades, Industrial and Textile Employees
United Auto Workers Union
United Cerebral Palsy Associations
United Church of Christ Office for Church in Society
United Food and Commercial Workers International Union
United Methodist Church General Board of Church and Society
United Mine Workers of America
United Steelworkers of America
US Public Interest Research Group
Whole Foods Project (NY)
WI Assembly of Local Arts Agencies
Women Strike for Peace
Women Work
Women's Legal Defense Fund
World Institute on Disability

APPENDIX C - What Is Citizens for Sensible Safeguards?

Citizens for Sensible Safeguards is a coalition of more than 150 national organizations that opposes the attack on federal regulatory protections. The coalition has three main objectives:

- **To educate the public about proposals that have an effect on the federal government's ability to safeguard Americans.** The Contract With America proposed a number of changes dealing with unfunded mandates, risk assessment, cost-benefit analyses, private property rights, and government paperwork that would seriously undermine federal protections. More recently, Congress has proposed a number of other ideas, including sunsetting of all major regulations, that would hamstring federal agencies. Although these proposals have enormous policy and program impact, the public knows very little about them.

- **To encourage the public to get involved in the public policy debate over regulatory reform.** At stake are public protections affecting such areas as food safety, worker health and safety, toxic pollution, conservation, equal educational opportunity, civil rights, health care, and much more. National organizations that are part of CSS have launched a concerted effort to educate the grassroots about the pending proposals in Congress. CSS hopes to give the grassroots a means for voicing their concerns.

- **To influence the debate over regulatory reform by developing alternatives that are widely supported by the public interest community.** For too long now, the public interest community has had to defend programs and launch campaigns to oppose various state and federal legislative proposals. This has led many to believe the public interest community opposes regulatory reform and is largely obstructionist. Yet, in truth the public interest community has long championed reform. But we have not adequately described the criteria for successful reform. The coalition intends to present ideas for comprehensive, sensible regulatory reform.

Statement of Principles

Public protections, such as those dealing with food safety, safe drinking water, worker health and safety, equal educational opportunity, civil rights, motor vehicle safety, toxic pollution, the well-being of children, and health care, are under attack through Congressional initiatives to reduce or eliminate federal laws and regulations. The following organizations believe the federal government has an important role in protecting the public interest and in improving quality of life. We believe that undermining federal safeguards will cause serious harm to citizens. These Congressional initiatives also jeopardize services provided by public charities and religious and governmental entities valued by our society.

Buried in the *Contract with America's* rhetoric about shrinking government and rolling back red tape is a plan to undo laws and safeguards that citizens have struggled long and hard to champion. We strongly support improving laws and safeguards that protect citizens while recognizing the need to reduce unnecessary red tape. The zeal to minimize regulatory burdens, however, must be balanced with the need to ensure protections for all Americans. Accordingly, we oppose actions taken by Congress to undermine sensible safeguards.

We urge President Clinton and Congress not to let the popular cry of cutting red tape something we all believe in become a guise for dismantling federal safeguards that should be preserved.

Coalition Structure

Citizens for Sensible Safeguards has three standing committees: National Strategy Committee, chaired by American Federation of State, County, and Municipal Employees, National Education Association, and OMB Watch; Grassroots Strategy Committee, chaired by OMB Watch, Sierra Club Legal Defense Fund, and United Cerebral Palsy Associations; and Media/Message Committee, chaired by American Oceans Campaign and Service Employees International Union.

A Steering Committee overseas coalition activities. The Steering Committee is currently comprised of AFL-CIO, American Civil Liberties Union, American Federation of State, County, and Municipal Employees, American Oceans Campaign, The Arc, Families USA, Leadership Conference on Civil Rights, National Education Association, Natural Resources Defense Council, OMB Watch, Public Citizen, Service Employees International Union, Sierra Club Legal Defense Fund, United Auto Workers, United Cerebral Palsy Associations, United Methodist Church, and US PIRG. OMB Watch chairs the coalition.