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Environment and Public Works

Advisory Commission on Intergovernmental Relations

A View from the Commission

Early Californians called it liquid gold. Water—the lack of it and the competing needs for it—is definitely a prime topic of the 1990s. Today, the intensity of water battles in some parts of the nation lends credence to the "liquid gold" label.

The complex issues of water quantity and water quality, as well as conservation, reclamation, and coordination of surface water and groundwater, are being debated in many organizations and communities across the country. It is urgent that we reach greater consensus on water issues. The final report of ACIR's Senior Advisory Group on Federal-State-Local Cooperation in Water Governance outlines specific principles, findings, and recommendations to guide the improved governance of the nation's water resources. Last December, the group's resolution calling for a national water governance commission was approved by ACIR. Both of these actions represent positive steps toward consensus.

Water issues also are gaining greater focus elsewhere. Farm groups, environmental groups, and water agencies are communicating more and, in some instances, reaching a negotiated consensus on water guidelines.

In December, Richard Darman, director of the Office of Management and Budget (OMB), issued a memorandum pointing out that water-related responsibilities are dispersed through the executive branch, requiring collaboration and communication among dozens of federal organizations. The Department of the Interior, through the U.S. Geological Survey, will serve as the lead agency for a Water Information Coordination Program (WICP). Among five objectives, WICP is "to develop uniform standards, guidelines, and procedures for the collection, analysis, management, and dissemination of water information in order to improve quality, consistency, and accessibility nationwide."

The focus on water issues has been especially keen in California, due in part to the six-year drought. Governor Pete Wilson established a Drought Action Team early in 1991, which created a Drought Water Bank involving the voluntary transfer, lease, or sale of water or water rights to areas in dire need. Of course, most of the water is in the north and most of the people are in the south. In April 1992, Governor Wilson released his new California water policy, which proposes short- and long-term solutions and calling for a consensus among urban, environmental, and agricultural water users. "All major water user groups must recognize that no one sector can be allowed to get ahead of the others in meeting its needs. We must move step by step. And each step must be linked to progress for every sector."

In California, with 30 million thirsty people and 10 million more projected by 2005, there have been no significant additions to the water supply in 20 years. Between 1987 and 1991, about 75 percent of residents were under rationing and conservation mandates to reduce water use. The irony is that in 1986, one of the wettest years in history, there was widespread flooding. This has pointed up the need for drought emergency plans comparable to those for flood control and response contingencies. Water agencies that have put in place conjunctive use projects with groundwater and surface water supplies have felt the least impact from the drought (see also ACIR's 1991 report, *Coordinating Water Resources in the Federal System: The Groundwater–Surface Water Connection*).

In a report last June, the Association of California Water Agencies pointed out that "in California, a 'normal' water year is more of a statistical abstraction between uncomfortable extremes of drought and flood than something actually experienced." The report states that overall, since 1890, California has seen relative water abundance. Researchers have found that California experienced more than 50 years of drought from about 1760 to 1820. For most of the last 15 years, there has been below normal precipitation in the state.

Nationwide, according to some estimates, about half the population depends on underground supplies for drinking water. The underground fresh water supply is about 30 times the surface water in rivers, lakes, and streams. Yet, groundwater depletion and subsidence is a major problem in many parts of the country.

The complexity and diversity of issues point up the importance of balance and of state and local participation in decisionmaking for collaboration and cooperation among all the relevant agencies and governments. A temporary national water governance commission, made up of expert local, state, tribal, basin, regional, and federal participants should be established by the Congress to help develop further consensus on basic federal water policy. It is time to protect and enhance our "liquid gold" to benefit future generations.

Ann Klinger
Merced County Supervisor
Merced, California

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On the ACIR Agenda

The last meeting of the Advisory Commission on Intergovernmental Relations was held in Washington, DC, on June 11-12, 1992. On the evening of June 11, the Commission reconvened at a dialogue on "Federalism: Problems and Prospects of a Constitutional Value," cosponsored by ACIR and the Woodrow Wilson International Center for Scholars. Featured speakers were the Justice Sandra Day O'Connor of the United States Supreme Court and Senator Charles S. Robb, with commentary by Mayor Victor Ashe of Knoxville.

Following are highlights from the agenda and Commission actions.

Federal Regulation of State and Local Governments

The Commission approved a new report, *Federal Regulation of State and Local Governments: Regulatory Federalism—A Decade Later*. The report examines legislative and executive attempts to restrain the growth of federal regulation of state and local governments during the 1980s, and assesses the impact on federalism of the fiscal notes process in the Congress, Executive Order 12612 on federalism, and various court decisions.

Following discussion of this report at the March 20 meeting, Chairman Robert B. Hawkins, Jr., asked Commissioners Victor Ashe, Mary Ellen Joyce, Barbara Todd, Daniel Akaka, Donald Payne, and Craig Thomas to develop recommendations for promoting federal-state-local partnership and reducing unnecessary regulation. The Commission adopted the recommendations to: (1) encourage state and local governments to identify pending bills in the Congress that may have a significant impact on state and local governments; (2) press for early access to the administrative rulemaking process; (3) educate the public and press about the impact of federal regulation on state and local governments; (4) encourage local governments to publicize the cost of mandates to their residents by showing this cost on local tax bills and other reports; and (5) continue evaluation by federal, state, and local governments to improve regulatory relief mechanisms and give high priority to developing more effective and equitable intergovernmental partnerships to achieve shared objectives with minimal costly regulation.

The Commission also called on the Vice President and director of the Office of Management and budget to step up enforcement of Federalism Executive Order 12612 to ensure that all agencies appoint federalism officials and conduct the federalism assessments required by the order.

Criminal Justice Information Report

The Commission authorized publication of *The Role of General Government Elected Officials in Criminal Justice*. This study was recommended by the National Association of Counties and was funded by the Office of Justice Programs, U.S. Department of Justice. The research process included state and local legislators, executives, law enforcement officials, judges, and corrections officials. The report is intended to help elected officials develop a better understanding of criminal justice, make better policy decisions, and develop better mechanisms for coordinating and cooperating in administering the system. A reference guidebook also is being prepared.

Report of the Outreach Committee

At the June 1991 Commission meeting, Chairman Hawkins asked Commissioners Mary Ellen Joyce, David E. Nething, Ann Klinger, and Joseph A. Leafe to form a committee to solicit input and develop recommendations on ways to improve ACIR's effectiveness. Recommendations submitted by the committee at the June 12 session, and adopted by the Commission, call for:

- A more selective focus on basic, long-term issues, in part to free up more staff and budget resources for implementation and outreach.
- More varied opportunities for Commission member participation.
- Full-day Commission meetings.
- Appointment of an Agenda Committee and a Finance Committee.
- Development of an ACIR role in helping emerging democracies.

State Regulation of Insurance

The Commission convened a panel to discuss ACIR's draft report *State Regulation of the Insurance Industry*. The panel was asked to address the major issues affecting solvency in the insurance industry and the types of policies that states might consider to resolve problems in the industry, and whether there is a regulatory role for the federal government.

Participating on the panel were J. Robert Hunter, president, National Insurance Consumer Organization; James M. Jackson, vice president and deputy general counsel, Transamerica-Occidental Life Insurance Company; William H. McCartney, president, National Association of Insurance Commissioners; and Laura P. Sullivan, vice president, counsel and secretary, State Farm Mutual Automobile Insurance Company. The Commission approved the background report for publication. The Commission's findings and recommendations will be considered at the September 17-18 meeting.

Federal Infrastructure Strategy

ACIR has been working with the U.S. Army Corps of Engineers to develop a federal interagency infrastructure strategy. The draft report has been completed and the Commission convened a panel to discuss ways to identify

Next Commission Meeting

The next Commission meeting is scheduled for September 17, 1:00-5:00 p.m., and September 18, 8:30-11:30 a.m., in San Francisco, California.

opportunities for federal interagency cooperation that show promise of benefiting public works. Panel members were Edward Dickey, deputy assistant secretary for civil works, U.S. Army Corps of Engineers; Thomas Larson, administrator, Federal Highway Administration; and Tad McCall, acting deputy assistant administrator, federal facilities enforcement, EPA. The panelists supported the report findings that interagency cooperation is essential to infrastructure planning, particularly for environmental protection, finance, regulatory processes, and research and development. The Commission approved publication of *Toward a Federal Infrastructure Strategy: Issues and Opportunities for Federal Agencies*, and authorized continued participation with the Corps in a series of interagency and intergovernmental task forces.

National Guard Report

The Commission adopted the recommendations in *Federal-State Relations Affecting the National Guard: Maintaining Constitutional Balance.* The Guard faces new challenges primarily because of the recent proposal by the Department of Defense to reduce the nation's defense forces, including the National Guard, due to changing international conditions. State and local government officials are concerned about the impact of the proposed reductions and restructuring of the Guard to meet domestic needs. The report examines issues of constitutional balance, the future of the National Guard, and opportunities for improved intergovernmental cooperation.

Senior Advisory Group on Water Governance Reports

The Commission adopted the final recommendations of the Senior Advisory Group on Federal-State-Local Cooperation in Water Governance, submitted by committee co-chairs Governor George A. Sinner and Mayor Robert M. Isaac. This group was formed to help implement ACIR's policy report *Coordinating Water Resources in the Federal System: The Groundwater-Surface Water Connection* (A-118) and to develop specific principles, findings, and recommendations to guide improved governance of the nation's water resources. In December, the Commission approved a Senior Advisory Group resolution calling for a national water governance commission (see recommendations, page 6).

Proposed State and Local Technical Assistance to Russia

The Commission approved a possible initiative, pending external funding, to work with national associations of state and local officials to provide joint technical assistance on building regional and local democratic governments in Russia. This initiative grew out of a December 1991 visit to Moscow by delegation of federal, state, and local officials, which included four Commission members. This project would also focus on relations between local governments, between local and regional governments, and between those governments and the national government.

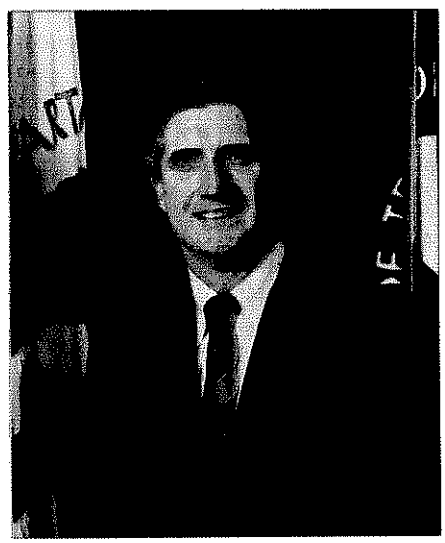
ACIR Staff Changes

Patricia Pride, Erica Price, and Andree Reeves have left the Commission to pursue new career opportunities. Andree Reeves has accepted a position as assistant professor of political science at the University of Alabama in Huntsville, and Erica Price has taken a position with the National League of Cities.

Commission Appointments

President George Bush has appointed Andrew H. Card, Jr., Secretary of Transportation, and Bobbie Kilberg, Deputy Assistant to the President and Director of Intergovernmental Affairs, to two-year terms.

Andrew H. Card, Jr., was sworn in as U.S. Secretary of Transportation on February 24, 1992. Secretary Card served in a number of capacities at the White House, most recently as assistant to the President and deputy chief of staff. During the Reagan administration, as deputy assistant to the President and director of intergovernmental affairs, he was the liaison to state and local elected officials, and was a member of ACIR. Secretary Card also has held a number of elected and appointed municipal offices in Holbrook, Massachusetts.



Andrew H. Card, Jr.

Bobbie Kilberg was appointed by President Bush to serve as Deputy Assistant to the President and Director of the White House Office of Intergovernmental Affairs in April 1992. She formerly served as White House deputy assistant to the President for Public Liaison. Mrs. Kilberg previously was vice president and general counsel for the Roosevelt Center for American Policy Studies, project director at the Aspen Institute, and vice president for Academic Affairs at Mount Vernon College.

Ashe to Commission on Urban Families

Commissioner Victor Ashe, Mayor of Knoxville, Tennessee, has been appointed by President George Bush to the eight-member National Commission on America's Urban Families.

McDowell Named to Infrastructure Panel

Bruce D. McDowell, ACIR's director of government policy research, has been appointed to serve on the "experts group" for the subcouncil on public infrastructure of the Competitiveness Policy Council. The subcouncil is chaired by former Virginia Governor Gerald L. Baliles, and is one of eight set up to work out detailed proposals for a comprehensive national competitiveness strategy.

State ACIRs

Rep. Nancy Brown of Kansas introduced a bill in the legislature, that was subsequently passed, to create a state ACIR based on the U.S. ACIR model. Governor Joan Finney vetoed the bill in April on the ground that the state did not need another "council or bureaucracy for the apparent purpose of enhancing communications between government officials who must work together on a continuing basis in the best interests of the people they are elected to serve." Kansas had an ACIR from 1969 until 1975, when the legislature abolished it in concurrence with the governor's FY 1976 budget recommendations.

Intergovernmental Cooperation in Water Governance: Commission Recommendations

In December 1990, the U.S. Advisory Commission on Intergovernmental Relations adopted a report entitled *Coordinating Water Resources in the Federal System: The Groundwater-Surface Water Connection.* In the Commission's view, coordination needs to encompass surface water and groundwater, as well as issues of water quality and quantity.

The report recommends:

- Better coordinated governance of water resources through state actions, interstate mechanisms, and federal restraint in mandating specific forms of coordination;
- Incentives for and removal of institutional barriers to the coordinated use of water resources, especially questions of water rights, disagreements among federal agencies, and proper pricing of water resources; and
- Improved water resource research, information, and management training.

The Commission also convened a Senior Advisory Group on Federal-State-Local Cooperation in Water Governance in cooperation with the Western Governors' Association to help implement the report and to develop more specific recommendations to improve governance of the nation's water resources. The group, co-chaired by Governor George Sinner and Mayor Robert Isaac, consisted of prominent policymakers and former officials associated with water and related environmental issues. In December 1991, ACIR approved a resolution developed by the group calling for a national water governance commission. The resolution was transmitted to appropriate congressional committees. Provision for a water policy commission was included in a bill that passed the Senate.

Members of the group who approved the following statement and recommendations on March 19, 1992, were:

Bruce Babbitt, Steptoe and Johnson; former Governor of Arizona

Robert K. Dawson, Cassidy and Associates; former Assistant Secretary of the Army for Civil Works and Associate Director of the Office of Management and Budget

Franklin D. Ducheneaux, Ducheneaux Forest and Company; former Counsel on Indian Affairs, House Committee on the Interior

Frank H. Dunkle, Colorado School of Mines; former Director, U.S. Fish and Wildlife Service and Montana State Senator

Frank Gregg, University of Arizona; former Director, New England River Basin Commission and U.S. Bureau of Land Management

Robert M. Isaac, Mayor of Colorado Springs

David N. Kennedy, Director, California Water Resources Department

Ann Klinger, Supervisor, Merced County, California

David E. Nething, North Dakota Senator

Christopher Paulson, Saunders, Snyder, Ross & Dicksen; former Majority Leader, Colorado House of Representatives

George A. Sinner, Governor of North Dakota

Stan Stephens, Governor of Montana

John R. Wodraska, Florida Atlantic University; former Executive Director, South Florida Water Management District

James W. Ziglar, Paine Webber; former Assistant Secretary of the Interior for Water and Science

Some members offered additional comments, which are included as notes to the statement. The Senior Advisory Group forwarded this statement and recommendations to the U.S. Advisory Commission on Intergovernmental Relations. The Commission endorsed them on June 12, 1992, and thanked the group for its excellent work.

Recommendations of the Advisory Commission on Intergovernmental Relations on Federal-State-Local Cooperation in Water Governance

Principles

1. The nation's environmental well-being, economic development, and international competitiveness require strategically wise uses of the nation's finite and unevenly distributed surface and groundwater resources.
2. Development and use of the nation's diverse water resources have direct effects on ecosystems, and must be managed in such a way as to protect the long-term health of those ecosystems for the benefit of future generations of people, while simultaneously meeting the present competing water needs.
3. The nation's governments, systems of water rights, and administrative structures and procedures must be able to recognize and reconcile changing water needs and environmental requirements, and to create appropriate incentives for effective, efficient, and environmentally sound public and private use and conservation of water in times of plenty as well as times of drought.
4. The federal government has the constitutional responsibility—and the responsibility as a landowner and water resources developer and manager—to allow for and promote sound governance of water resources by state, tribal, and local governments.[1]

Findings

1. Systems of water governance in many parts of the United States are insufficient to support the needs of the people in a timely and environmentally, economically, and socially balanced way.
2. In some cases, the development and management of water resources have resulted in environmental change that may be inconsistent with long-term ecosystem sustainability for future generations. In other cases, the development and use of water resources have created new or enhanced ecosystems while meeting the nation's needs.[2]
3. Changing values and demands for the uses of water are creating serious conflicts among competing water uses.[3]
4. Inadequate governmental responses to these issues may result from:
   a. Narrowly focused laws, organizations, programs, and regulations that invite polarization and inhibit collaborative problem solving; and
   b. A lack of coordination mechanisms to help link federal, state, tribal, and local efforts to find solutions to water resources problems—especially basinwide, interbasin, and interstate problems.
5. The present process sometimes leads to intergovernmental gridlock—an inability of the governments of the United States to meet the nation's needs.
6. There is an urgent need for a more positive and flexible problem-solving approach to meeting America's water needs. This approach should include proactive, environmentally sound water resources planning; greater collaboration among the federal, state, tribal, and local governments; and negotiation and dispute resolution encompassing the variety of needs within large and small water basins.[4]

Recommendations

1. Federal Responsibilities

The federal government should become a more effective partner in helping solve the nation's water problems. To do so, the federal government should:

a. In consultation with state, tribal, and local governments, water users, and other interests, establish policies that concentrate on flexible performance goals for ensuring healthy ecosystems throughout the nation—goals that recognize the diverse and competing beneficial uses of the nation's finite surface and underground water resources, and recognize differing situations in various parts of the nation;

b. Rely on state, tribal, and local governments and the private sector as the primary instruments for achieving national, basin, state, local, and private goals served by water resources—concentrating direct federal actions on those goals that clearly can be addressed best by the national government;

c. Recognize regional, state, tribal, and local determinations of water needs, and accept local procedures for meeting those needs, except in the case of a clear violation of federal law;

d. Allow for administrative and regulatory structures that can provide sound protection of the environment and hydrologic systems for present and future generations by relying on state, tribal, and local basin governments capable of working rationally with day-to-day problems;

e. Establish federal policies and institutions capable of consistent and coordinated exercise of federal responsibilities, and of meaningful and coherent communication with others in the federal system across the full range of water resource issues, needs, and actions;

f. Assist the state, tribal, and local governments to improve their water resources planning and

management capabilities, and provide incentives for them to do so;

g. Facilitate the establishment and effective operation of appropriate basinwide and interbasin cooperative bodies through negotiation of interstate compacts where needed;

h. Reorganize or coordinate federal water resources agencies and policymaking structures to focus more consistently and effectively on finding appropriate solutions to pressing water quantity and quality problems in times of drought as well as in times of normal and excessive flows, while recognizing competing demands on the nation's water resources and water systems; and

i. Encourage research on improved technology-based approaches and information sharing for protecting water and related environmental resources.

2. State Leadership

To the extent that each state demonstrates willingness, capacity, leadership, and commitment, the federal government should turn over to the state authority to administer water quality, stream flow, wetlands, and related standards[5] because:

a. The states are chiefly responsible for water rights laws, water quality enforcement, empowerment of local water authorities, and many other water-related matters essential to resolving water problems within their boundaries; and

b. The states have the proximity to water problems and first-hand knowledge and understanding necessary to exercise leadership in developing comprehensive water policies, systematizing water rights provisions, achieving water and water-related environmental protection goals, and bringing together all of the parties at interest to resolve water disputes and negotiate innovative means of meeting changing water needs.[6]

3. Interstate Water Basin Governance

Many river basins and large groundwater aquifers extend beyond state boundaries. Governing them effectively requires the establishment of special intergovernmental agreements and organizations with authority over water quality and quantity matters, including connections between surface and underground systems, hydropower generation, irrigation, navigation, fish and wildlife, and related issues.

To facilitate establishment of such agreements and organizations, where needed, the Congress should authorize and approve the creation of interstate regional mechanisms, including, in some cases, joint federal-interstate compacts. These interstate organizations, which will necessarily include interjurisdictional arrangements as well as new public jurisdictions, should be empowered to undertake the range of functions necessary to achieve coordinated use and conservation. Federal agencies involved in the operation of federal water projects should be directed to cooperate with the coordinated use programs of these interstate organizations.

Except in clear instances of violation of federal laws or the United States Constitution, no federal official or agency should be authorized to withhold participation in or to veto a coordinated water use program established by agreement.

Interstate water resource coordination organizations should be:

a. Established pursuant to negotiations among the parties affected;

b. Self-governing;

c. Governed by representatives of affected state, tribal, and local governments, the federal government, where appropriate, and water interests;

d. Self-financing to the extent possible; and

e. Empowered to take effective action within the scope of responsibility agreed to.

Given the reach of federal authority, it is essential that basin governance institutions be recognized by the federal government as controlling on federal agencies within the framework of federal law and appropriations. While precise forms of federal involvement may vary, the presumption of state leadership and of federal responsiveness to interstate consensus consistent with federal law is essential to the growth of responsible basin self-governance.

Notes

[1] Mr. Dawson would concede the federal role described here, but emphasizes that the geographic scope and distribution of water resources and needs necessitate a spectrum of authorities and responsibilities, ranging from the federal government to state, tribal, and local governments.

[2] Mr. Gregg comments: The report vastly understates environmental damage—to aquatic and riparian habitats and species, to scenic and recreation values—arising from construction and operation of developed water systems and from pollution, and fails to note the urgency of remedial and preventive actions.

[3] Mr. Isaac comments: In the development of appropriate solutions to water quantity and water quality problems, all vested water rights interests must be protected, and all interstate compact entitlements honored.

[4] Mr. Gregg comments: The report fails to recognize efficiency in water use and markets as tools for reallocating water to more highly valued uses, as economically and environmentally preferred alternatives to new supply development in most cases.

[5] Mr. Gregg comments: The report fails to place a burden on states to assume affirmative and evenhanded responsibility for all values served by water resources as a condition of federal deference to a state leadership role.

[6] Mr. Ducheneaux comments: Nothing in the recommendations should impair Indian water rights or the trust responsibility of the United States in protecting those rights. State involvement in Indian water matters should be on a consensual, negotiated basis.

The Environment and Public Works

Bruce D. McDowell

Many public works proponents believe their projects enhance the environment and the economy. Many environmental protection proponents believe that most development is damaging to the environment and they oppose compromises that allow development. The question of whether to issue development permits frequently is framed in either-or terms—either jobs *or* a clean environment, not both. Polarization between these groups is common because they lack definitive information about what it takes to ensure a healthy environment, and they cannot decide who will pay for protective actions.

In an attempt to respond to some of these issues, the Advisory Commission on Intergovernmental Relations' new report *Intergovernmental Decisionmaking for Environmental Protection and Public Works* (forthcoming) starts from the premise that protecting the environment and providing adequate public facilities are equally important objectives. The report looks toward procedural improvements in decisionmaking processes as well as better information about how natural ecologies work.

ACIR finds that "present federal rules and procedures governing decisionmaking for protecting the environment often are complex, conflicting, difficult to apply, adversarial, costly, inflexible, and uncertain" when they are applied to the permits required for developing state and local public works projects. These "procedures too often result in delay, wasted effort and money, [and] lost opportunities to accommodate both environmental protection and infrastructure objectives. . . ."

The report also identifies reasons for these difficulties and recommends remedies. The chief remedy is better integration of environmental protection laws under the umbrella of the *National Environmental Policy Act* (NEPA). This remedy promotes stronger consideration of environmental factors at the earliest stages of public works planning, before specific facilities are being considered. The Commission calls for amendments to NEPA as well as issuance of an Executive Order to further these objectives.

The Commission also calls for (1) enactment of an environmental law to integrate federal pollution controls over discharges to air, water, and land; (2) a stronger administrative role for the states; (3) greater use of environmental mediation and negotiation techniques; (4) federal reimbursement of certain mandated environmental protection costs; and (5) a greatly strengthened scientific basis for managing ecological systems.

The Permit Process

The reasons why it takes so long and costs so much to get permits for public works projects include:

- Inadequate environmental sensitivity and knowledge at the beginning of the planning cycle;
- Too many separate steps and veto points that usually are addressed sequentially;
- Too many separate agencies involved, each with differing responsibilities, philosophies, and procedures;
- State and local requirements on top of multiple federal requirements;
- Judicial processes on top of administrative processes;
- Unnecessary arbitrariness of some environmental standards, ruling out possibilities for compromise and accommodation;
- Underdeveloped mechanisms for balancing diverse needs and values, and for avoiding impasses and litigation; and
- Disagreement even about these findings.

Federal environmental laws affect the nature and timing of state and local public works by requiring (1) an environmental permit (or license), (2) approval for grant funding subject to environmental constraints, and/or (3) an environmental impact statement (EIS). Although NEPA requires federal and state agencies to coordinate review and decision

processes, many projects go through additional and distinct steps to satisfy other federal environmental requirements.

The EIS and permit processes are fundamentally different. An EIS may provide valuable information for project design, open the review process to public comment, delay a project, add to a project's costs, or stop a project on procedural grounds. The permit (or license or grant review) decision either allows a project to proceed or stops it. Frequently, there is more opportunity for affected parties to be involved in the EIS process. Generally, the permitting, licensing, and funding requirements generally take precedence over the findings of an EIS.

Under some federal laws, such as the *Clean Air Act*, *Clean Water Act*, *Endangered Species Act*, and *Department of Transportation Act*, a federal permit, license, or grant may not be approved if the project does not comply fully with specific uniform standards for protecting wetlands, endangered species, open spaces, and air or water purity. Assessments prepared to support permit decisions often include data and analysis similar to, but separate from, an EIS.

In addition to these procedural differences, there are two types of criteria for approving a public works project or for selecting the "best" alternative:

1) Balancing environmental, economic, and social objectives, as in NEPA and the *Federal Power Act* (and *Electric Consumers Protection Act*); and
2) Applying definitive environmental standards irrespective of other needs, as with the effluent standards under the *Clean Air* and *Clean Water* acts, wetlands "dredge-and-fill" regulations under Section 404 of the *Clean Water Act*, and the *Endangered Species Act*. These latter types of standards emphasize the potential to veto rather than to suitably accommodate public works projects. They may be highly prescriptive and inflexible, and may leave little room to account for site-specific differences or for the resource limitations of small communities.

The Decisionmaking Process

The Commission's recommendations for helping bring the development and environmental protection communities together rest on the principle that the intergovernmental decisionmaking process "should be clear, cooperative, consistent, efficient, flexible, definitive, responsive, and fair."

Integrating the Federal Decisionmaking Process. The first step in reaching quicker and better decisions on public works projects is to integrate federal environmental protection procedures. NEPA provides a sound starting point. The required EIS forms a comprehensive framework for the considerations in other environmental acts. The EIS process is administered by the Council on Environmental Quality (CEQ) in the Executive Office of the President.

ACIR recommends (1) legislation strengthening NEPA and the role of CEQ so that a single EIS for each project would provide a complete and adequate basis for deciding all permit questions; (2) an executive order to achieve these objectives to the extent possible without additional legislation; and (3) additional legislation to integrate all federal pollution control laws affecting discharges to air, water, and land.

Given that NEPA sets forth a comprehensive environmental policy, strengthening the law would streamline the review process. Uniform procedures would help state and local governments overcome many of the difficulties in getting public works permits and funding. Although NEPA regulations accommodate many state and local government concerns, more fully integrated application processing and appeals procedures, together with clearly defined enforcement authority, would give decisionmakers a better road map for dealing with federal agencies.

Procedures should require consideration of environmental protection goals and practices from the earliest stages of public works planning, yielding project designs that avoid permit and review problems. A requirement for federal agencies to provide a list of project-specific evaluation criteria at the beginning of the process, and to stick with a decisionmaking schedule based on it, would add certainty, efficiency, and fairness to the process for state and local governments.

Because this kind of legislation would be difficult politically and procedurally, and could take several years, an executive order should be developed quickly to establish federal responsibility for integration. The Council on Environmental Quality should be tapped to oversee this process. CEQ has developed workshops for federal, state, and local governments to help all parties get the greatest benefit out of the EIS process (see page 17). That program would be given additional guidance and authority by the proposed executive order.

Adoption of a single act for air, water, and land polluting emissions and effluents could replace numerous permits and decision points with a comprehensive process in the Environmental Protection Agency (EPA). This process would institutionalize an integrated approach to evaluating and choosing the least harmful and most helpful options for dealing with the polluting effects of human activities, including public works projects. It also would eliminate administrative overlap and inefficient use of resources. Federal funding assistance to state and local governments could be consolidated under such an approach. (New Jersey has a comprehensive permit process that may serve as a useful model.)

State Implementation. Federal environmental protection laws generally provide for state administration to avoid duplication, large federal bureaucracies, and displacement of state programs, some of which provide greater protection than federal programs. To encourage states to accept delegation of these federal programs more readily, they need additional federal funding and assurances that they will not be overruled arbitrarily.

State and local governments want and need flexibility to tailor programs and permits to site-specific conditions. Yet, the potential benefits of delegating federal environmental programs to the states have been limited by several factors. The primary federal program for which states have not requested delegated authority is the Section 404 wetlands permitting program. Most states believe that, in addition to cost, the disadvantage they face is the likelihood of their permit decisions being overturned by federal agencies (see page 27).

Mediation. Creation of federal, state, and local mediation services can help resolve environmental issues among the stakeholders more quickly and amicably than frequent resort to the courts. Federal agencies are beginning to use mediation to negotiate regulations as well as to resolve implementation disputes (see page 20).

Dispute mediation provides incentives and room for all parties to reach a workable and fair solution, and could bring more certainty and mutual satisfaction to environ-

mental decisionmaking. Amendments to the *Administrative Procedure Act* in 1990 authorized all federal agencies to use administrative dispute resolution as well as negotiated rulemaking. The use of these new tools could be enhanced by creation of a mediation service to provide resources to parties that might otherwise be left out. (The Administrative Conference of the United States is responsible for promoting administrative dispute resolution and negotiated rulemaking by federal agencies.)

Reimbursement for Federal Mandates. The Commission believes that the federal government should "reimburse state and local governments for the additional costs of complying with federal environmental standards, over and above the costs of providing strictly state, local, and private benefits."

If the federal government remains free to enact environmental protection standards without any responsibility for the financial consequences, there is no fiscal discipline to keep the decisions realistic. In addition, the costs of complying with federal environmental standards frequently fall unevenly on state and local governments across the country. This unevenness is not necessarily related to the present benefits and activities of state and local governments. To a significant extent, the benefits accrue to the nation as a whole, and to its citizens, rather than to individual places. When this happens, the federal government should help to meet the costs of providing such benefits.

In addition, uniform federal standards impose disproportionately greater costs on some small governments. These governments often have small revenue bases and inadequate technical capacities to meet federal standards and requirements. The *Regulatory Flexibility Act of 1980* recognized this difficulty and provided for special treatment of small governments, as well as small businesses, unable to carry out the mandated task. Implementation of this act has been slow, however, and is only partially realized. Small governments need additional attention, especially for federal reimbursement of certain environmental costs.

Ecological Knowledge. Federal-state-local cooperation is fundamental in strengthening "the scientific basis for understanding the operation, health, and stability of ecological systems through research, long-term data collection, and development of improved analytical techniques."

ACIR found that "management of specific ecosystems may offer better prospects of balancing environmental protection and public works needs than a series of individual and unrelated standards for protecting single-media environmental resources." At the same time, however, "the operation of natural and man-made ecosystems, and their interrelationships, are not fully understood."

Thus, America needs research and improved analysis of the effects of proposed projects on the environment. Federal money and technical assistance can help state and local governments improve their environmental decisions. It may be particularly timely to turn excess military science skills and certain segments of defense industries to the task of meeting this environmental objective.

A melding of better ecological understanding, improved procedures, and fuller intergovernmental cooperation is needed to transform the frequently polarized contest between environmentalists and infrastructure providers into a creative partnership.

Bruce D. McDowell is director, Government Policy Research, at ACIR.

Local Boundary Commissions: Status and Roles in Forming, Adjusting, and Dissolving Local Government Boundaries

To determine the status of the boundary review commissions (BRC) that operate in 12 states, ACIR interviewed staff members and conducted a survey of state associations of municipalities, townships, and counties. Eight states established BRCs between 1959 and 1969 (Alaska, California, Michigan, Minnesota, Nevada, New Mexico, Oregon, and Washington). The other BRCs are in Iowa (1972), Utah (1979), Virginia (1980), and St. Louis County, Missouri (1989). The commissions exercise decisionmaking or advisory authority over the establishment, consolidation, annexation, and dissolution of units of local government, within the framework of state constitutional and legislative provisions. For the most part, the commissions are small and have limited funding. Annexation and mediation of interjurisdictional boundary conflicts top the BRC agendas. Some commissions have developed new techniques for resolving disputes and negotiating agreements for service delivery and tax sharing. Despite 30 years of experience with BRCs, no comprehensive evaluation of their work or effectiveness could be found.

M-183 1992 **$8**

Metropolitan Organization: The Allegheny Case

This information report continues ACIR's effort to learn how complex metropolitan areas function.

Allegheny County, the central county of the Pittsburgh metropolitan area, is by conventional measures the premier fragmented county among those nationwide with populations of more than one million—and by traditional accounts should exhibit all the "pathologies" of jurisdictional fragmentation.

But it doesn't.

Allegheny County has a complex organization for delivering police and fire protection, street services, and education--the services that are the focus of this report. The study also describes patterns of growth, political economy and geography, intergovernmental cooperation, and the functional dimensions of metropolitan organization.

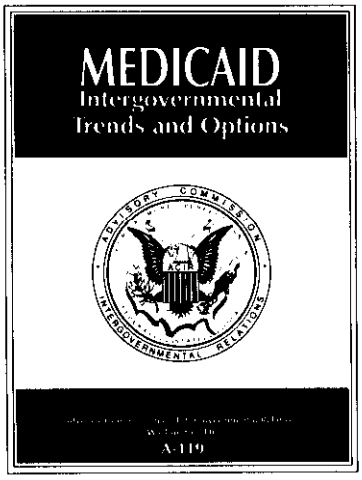
M-181 1992 **$10**

(see page 29 for order form)

Medicaid: Intergovernmental Trends and Options

Medicaid is increasing in cost and decreasing in effectiveness in many areas. Medicaid spending nearly tripled between 1980 and 1990 (from $24.8 billion to $71.3 billion), and the expenditures are projected to continue to rise sharply. The report identifies major trends in Medicaid and presents recommendations intended to restore the program's original goals and design by (1) increasing state and local roles in Medicaid policymaking; (2) increasing state and local program flexibility; (3) adopting interim modifications to Medicaid and implementing comprehensive health care reform by 1994; (4) transferring local Medicaid administration and financing to the states; (5) transferring the cost of long-term care to the federal government under Medicare; and (6) improving the targeting of federal Medicaid funds. The recommendations are intended to slow the growth of Medicaid expenditures for the states, allow the states to serve the health care needs of their populations better, and bring more accountability, balance, and certainty to Medicaid service delivery and financing.

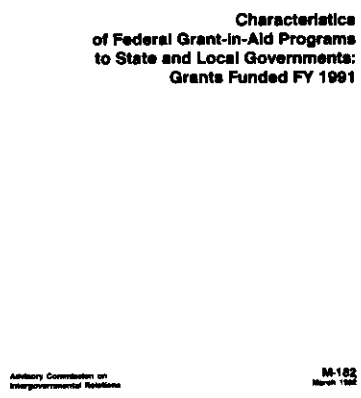
A-119 1992 **$10**



Characteristics of Federal Grant-in-Aid Programs to State and Local Governments: Grants Funded FY 1991

During the past 25 years, federal grants-in-aid to state and local governments have changed dramatically in type, number, dollar amount, and other characteristics. This is ACIR's sixth report on the system since 1975. The number of categorical grant programs grew from 422 in 1975 to 534 in 1981, dropped to 392 in 1984, and rose to an all-time high of 543 in 1991. The number of block grants grew to 14 by 1991. In general, about 75 percent of all grant aid is distributed by formulas, and over 25 years at least 70 percent of the money in the system has been distributed through categorical programs. Medicaid, the largest formula program, accounts for about 30 percent of all grant outlays.

M-182 1992 **$10**



(see page 29 for order form)

Intergovernmental Digest

Supreme Court Rules on Out-of-State Mail Order Taxes

On May 26, 1992, in *Quill Corporation* v. *North Dakota*, the U.S. Supreme Court ruled that a state cannot require out-of-state mail-order firms and direct marketers to collect state sales and use taxes on sales to residents within the state. The Court reaffirmed part of the decision reached 25 years ago in *National Bellas Hess* v. *Illinois Department of Revenue*. That case was decided on the constitutional grounds of due process and the interstate commerce clause. In *Quill*, the Court reversed one of its positions in *Bellas Hess* by holding that physical presence in a taxing jurisdiction is not required for a state tax to pass muster under the due process clause. However, the Court reaffirmed its ruling in *Bellas Hess* that a "substantial nexus" within a state is still a valid test of whether a state may impose use-tax collection requirements on mail order firms under the commerce clause. The Court concluded that the Congress is free to enact legislation outlining the conditions under which states would be allowed to burden interstate commerce by imposing use-tax collection requirements on out-of-state sellers who do not have a physical presence in the state. The Multistate Tax Commission and the Federation of Tax Administrators have met with representatives of the Direct Marketing Association to negotiate an agreement on voluntary compliance that may preclude the need for federal legislation. ACIR estimates that the revenue potential for state and local governments, if out-of-state sellers collected state and local use taxes, would be between $3.3 billion and $3.9 billion in 1992.

Supreme Court Nixes Out-of-State Waste Fee

On June 1, 1992, the U.S. Supreme Court struck down an Alabama fee levied on out-of-state hazardous waste deposited in the state's landfills. Ruling 8-1 in *Chemical Waste Management, Inc.* v. *Hunt*, the Court held that the "additional fee" levied on out-of-state waste, which exceeded the "base fee" levied on all waste regardless of origin, violated the commerce clause of the U.S. Constitution. The Alabama Supreme Court had upheld the fee on the grounds that it served four legitimate regulatory goals: (1) protecting the health and safety of state citizens; (2) protecting the local environment and the state's natural resources; (3) providing compensatory revenue for hosting out-of-state waste; and (4) reducing the amount of waste carried on state highways. The U.S. Supreme Court, however, found "absolutely no evidence . . . that waste generated outside Alabama is more dangerous than waste generated in Alabama." The Court held that there must be "some reason, apart from origin" for treating out-of-state waste differently. The Court suggested that state taxes can be designed to satisfy local environmental concerns and federal constitutional rules, such as tonnage fees levied on all hazardous waste and per-mile charges on vehicles carrying hazardous waste within a state.

Tap-Water Mandate Taps Dry State Budgets

Provisions of the *Safe Drinking Water Act* of 1986 required large water utilities to begin sampling household tap-water for lead and copper content as of January 1, 1992. Medium-sized systems must begin sampling in July. This is an expensive procedure that is hitting state budgets during hard times. The program is designed to be administered through the states, but Wyoming has withdrawn, and California has notified the U.S. Environmental Protection Agency (EPA) that it will need federal financial aid. The American Water Works Association estimates that about 40 percent of the states may have to give up their implementation role unless they get help. If states do not take on this responsibility, it reverts to EPA. It appears that EPA's contingency plan is to contract this activity to private firms.

Proposed Local Partnership Act Defeated in Committee

On June 3, 1992, the House Government Operations Committee defeated the "Local Partnership Act" (HR 5259). The bill, a scaled-down substitute sponsored by Government Operations Committee Chairman John Conyers and Rep. Sherwood Boehlert, would have provided $5.4 billion in emergency relief for local governments to receive during the remainder of FY 1992 through the end of FY 1993. Conyers' original proposal (HR 3601) would have provided $53 billion over five years in emergency relief for local governments affected by the recession. Both bills targeted 39,000 local governments for funds within 60 days of enactment. With a few modifications, distribution would have been on the basis of a formula similar to that of the former General Revenue Sharing program.

Supreme Court Upholds California's Proposition 13

On June 18, 1992, in *Nordlinger* v. *Hahn*, the U.S. Supreme Court affirmed the California Court of Appeal's holding that Proposition 13 does not violate the equal protection clause of the Fourteenth Amendment. Proposition 13 limits real property taxes to 1 percent of "full cash value," with a 2 percent cap on annual increases in assessed valuations. New construction or a change of ownership, however, triggers reassessment up to current appraised value. Exempted from this reassessment are (1) transfers of principal residences between parents and children and (2) purchases by homeowners over age 55 of replacement residences of equal or lesser value. By basing property taxes on "acquisition value" rather than "current value," Proposition 13 has spawned tax disparities as high as 17-1 (500-1 for vacant land).

The Court held, 8-1, that a state classification does not require "heightened review" under the Fourteenth Amendment unless it jeopardizes a fundamental right or classifies citizens by a suspect characteristic (e.g., race). The Court ruled that the plaintiff could not assert that Proposition 13 violated her constitutional right to travel because she lived in California before she purchased her home. Nor could she identify "any obstacle preventing others who wish to travel or settle in California from asserting claims on their own behalf." The Court then held that Proposition 13 "rationally furthers at least two state interests": (1) neighborhood preservation and stability, and (2) the protection of existing owners who, "already saddled" with their purchase, do not have the option of deciding not to buy a home "if taxes become prohibitively high." The Court also upheld Proposition 13's two reassessment exemptions. "The people of California," said the Court, "reasonably could have concluded that older persons in general should not be discouraged from moving to a residence more suitable to their changing family size or income" and that "the interests of family and neighborhood continuity and stability are furthered by and warrant an exemption for transfers between parents and children." Justice John Paul Stevens dissented, arguing that Proposition 13's "disparate treatment of similarly situated taxpayers is arbitrary and unreasonable."

Supreme Court Upholds Incentive Coercion But Not Outright Coercion of States in Radioactive Waste Case

On June 19, 1992, the U.S. Supreme Court upheld two provisions of the *Low-Level Radioactive Waste Policy Amendments Act* of 1985 and declared a third provision unconstitutional. In a wide-ranging discussion of federalism in *New York* v. *United States*, the Court upheld two "incentive" provisions of the act. One allows states with disposal sites to levy a surcharge on waste from other states. One quarter of the surcharges are transferred to the Secretary of Energy who places them in an escrow account from which funds are awarded to states that meet

federal deadlines. The second provision allows states and regional compacts with sites to escalate the cost of access and then to refuse waste from states that do not meet federal deadlines. These provisions, held the Court, do not violate the two methods, "short of outright coercion, by which Congress may urge a state to adopt a legislative program consistent with federal interests." That is, (1) the "Congress may attach conditions on the receipt of federal funds," and (2) the Congress may, under the commerce clause, offer states the choice of regulating an "activity according to federal standards or having state law preempted by federal regulation."

A third provision of the act, however, stipulates that a state or regional compact that does not provide for disposal of its waste by a particular date must, on request of the waste's generator or owner, take title to the waste and become liable for all damages suffered by the generator or owner arising from the state's failure to take possession of the waste promptly. "In this provision," ruled the Court, the "Congress has crossed the line distinguishing encouragement from coercion." The Court, therefore, declared the provision unconstitutional, along lines suggested in an *amicus* brief submitted by the Council of State Governments. Three justices dissented from this conclusion, arguing that the "1985 act was very much the product of cooperative federalism, in which the states bargained among themselves to achieve compromises for the Congress to sanction." Justice Stevens added that "the federal government directs state governments in many realms. The government regulates state-operated railroads, state school systems, state prisons, state elections, and a host of other state functions. I see no reason why the Congress may not also command the states to enforce... federal standards for the disposition of low-level radioactive wastes."

Environmental Mandate Relief for Small Distressed Communities?

The Senate Environment and Public Works Committee recently approved a $500 million grant program for infrastructure development in distressed rural areas as part of this year's *Water Resources Development Act* (S. 2734). This program would provide 90 percent of the cost of complying with environmental mandates in communities with populations less than 25,000 and per capita incomes less than 70 percent of the national average. In voting for this bill, Senate Majority Leader George Mitchell said, "I believe we can no longer impose mandates on states and local governments without providing the resources to meet those mandates." Eligible projects would include construction of wastewater treatment facilities, safe drinking water systems, and solid-waste disposal facilities.

Emergency Urban Aid Approved

The Senate agreed on June 18 to a House-approved emergency supplemental appropriation for three existing programs, largely to assist in rebuilding Los Angeles and Chicago. The bill was signed by President George Bush on June 22. The three programs given additional money are for summer jobs ($500 million), emergency assistance provided through the Federal Emergency Management Agency ($300 million), and disaster loans and loan guarantees provided by the Small Business Administration (nearly $276 million). The total aid package comes to about $1.1 billion for fiscal year 1992. Other urban aid programs considered but not acted on at this time included urban education initiatives, urban law enforcement, urban enterprise zones, low-income home ownership funds, depressed cities aid, urban public works and transportation, and expansion of Community Development Block Grant funding for job creation. Some or all of these proposals are expected to get additional consideration in the Congress this year.

The National Environmental Policy Act

Dinah Bear

The *National Environmental Policy Act*[1] (NEPA) remains the most pervasive, cross-cutting environmental law affecting federal agency decisionmaking, after 22 years of growth in the field. NEPA is the only federal environmental statute that requires a holistic consideration of all reasonably foreseeable environmental impacts, whether related to noise, toxicity, or soil erosion. The reach of the law extends from procurement of new missile systems to management of checkerboard patches of grazing land, from eradication of marijuana on private land to permits for construction of gas pipelines.

Considering the act's wide reach and the later congressional practice of writing highly detailed environmental laws, NEPA is amazingly brief. Yet its implementation has generated thousands of lawsuits, millions of documents, and billions of pages. Most of that activity has centered around Section 2102(2)(C) of NEPA, which directs all agencies of the federal government to prepare a "detailed statement" (which has come to be known as an environmental impact statement) on the environmental impact of and alternatives to proposed major federal actions significantly affecting the quality of the human environment.

The Council on Environmental Quality (CEQ), established by NEPA in 1970, has ultimate oversight responsibility in the executive branch for its implementation. Immediately after NEPA's passage, CEQ issued interim guidelines for carrying out the mandate of Section 102(2)(C). Refinements to those guidelines were issued in 1971 and 1973.

As litigation and awareness of NEPA grew in the 1970s, so did the time and paperwork. Concerned by the increasing length of the environmental impact statement (EIS) process—and the documents—CEQ embarked on a major effort to bring order and reason to the process. In 1978, CEQ issued regulations binding on all federal agencies to implement the procedural provisions of NEPA.[2] The regulations were designed specifically "to make the environmental impact statement process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need for focus on real environmental issues and alternatives."[3] The regulations state that, "Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment."[4]

The CEQ regulations are replete with mechanisms for interagency coordination and cooperation, and cooperation between federal agencies and affected private interests. For example, the regulations establish a process of designating lead and cooperating agencies (including federal, tribal, state, and local governments).[5] An early and open process is mandated to:

- Determine the issues to be addressed;
- Invite the participation of all interested parties;
- Allocate assignments for preparation of the analysis;
- Identify other environmental review and consultation requirements so that required analyses and studies may be prepared concurrently with and integrated into the EIS; and
- Establish the relationship between the timing of the preparation of environmental analyses and the agency's planning and decisionmaking schedule.[6]

The lead agency may set page limits on the environmental documents[7] and time limits on the process.[8]

The regulations seek to eliminate federal duplication with state and local procedures through joint planning and environmental research and studies, holding joint public hearings, and preparing joint environmental documents.[9] Another section aims at cooperation with the private sector by directing that policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later federal action, and by consulting early with appropriate state and local agencies, Indian tribes, and interested private persons and organizations when the agency anticipates later involvement in a proposed action.[10] The regulations also provide for referral to CEQ of conflicts between agencies concerning the implementation of NEPA and Section 309 of the *Clean Air Act*.

Despite these seemingly constructive and reasonable mandates, there is no doubt that such cooperation and coordination too often proves the exception. Irritated company representatives contact CEQ on learning of "yet another layer of government review," having just completed an environmental impact assessment process for the state. Lead agencies complain that commenting agencies "wait until the last minute" to voice objections, while commenting agencies gripe that the lead agency failed to consult them early in the process. And the private citizen, stumbling into an interagency and intergovernmental morass of reviews begins to think of the environmental impact assessment process as complicated beyond their ability to affect.

From CEQ's perspective, there is no single reason for these problems, and thus, no single solution. Many of the mandated regulations that deal with the management of the NEPA process (as opposed to the frequently litigated issues of alternative analysis and public participation) frequently are not fulfilled. One problem is inadequate dissemination of information about the regulations for reducing delay, duplication, and paperwork. There appears to be considerable unfulfilled demand for NEPA training. Another barrier to efficiency oftem seems to be a reluctance to take advantage of the felixibility afforded in the regulations.

Because NEPA is most often considered a procedural statute, there is a tendency to elevate perfection of process over common sense and substance. Perfecting the process often amounts to generating more paperwork and perhaps holding additional public hearings. While, at times, additional analysis or more public involvement may be needed, process solutions should be carefully shaped to the needs of the decisionmaker. The purpose behind NEPA's process is to achieve good environmental results. The process should be implemented in a manner that serves the purpose.

Many problems stem from the tendency to fragment analysis to fit requirements of different statutes. The NEPA process offers a procedural tent under which analysis should fit into an integrated evaluation of the environmental impacts of a proposed action. However, communication difficulties and lack of early planning, as well as resource constraints, often drive the dynamics in the other direction. The result may be considerably more work performed by separate government entities at higher time and resource costs without additional benefits. Indeed, early, organized analysis can and should not only save time and money but, in many cases, lead to much more thorough environmental analyses.

CEQ is addressing these NEPA implementation issues in several ways. First, during 1991-92, we are cosponsoring a series of regional conferences in Denver, Atlanta, Boston, Chicago, and Anchorage to provide a much-needed communication between CEQ and the federal agency representatives who implement NEPA. The conferences are cosponsored with the Environmental Protection Agency's Office of Federal Activities, which has responsibility for reviewing NEPA documents under Section 309 of the *Clean Air Act*.

A major theme of the conferences is the challenge of incorporating new ways of managing natural resources into analysis required by NEPA.[11] Some federal and state land managers are moving from a site-specific context to an ecosystem approach. Ecosystems are "the functional units formed by plant and animal communities as they interact with their physical environment."[12] The systems are viewed increasingly as the key to maintaining ecological health and to preventing crises triggered by the *Endangered Species Act*. In this respect, ecosystem management can be viewed as analogous to pollution prevention; that is, rather than rehabilitating the last dozen of a particular species, the ecosystem will be managed in such a way that the species never reaches the brink of extinction. However, most people who write and review NEPA analyses are used to the site-specific level, and indeed, much of the information and many of the tools necessary to analyze the impacts of actions on a broader landscape scale are new or developing.

The conferences focus on federal agency experience in integrating on-the-ground issues into NEPA analysis, such as regional and local scale and analysis questions, fragmentation, and wildlife corridors. Information regarding tools such as the Geographic Information System (GIS) and the data available through the Nature Conservancy's Natural Heritage Program is presented. Perhaps most importantly, the conferences highlight case studies demonstrating the incorporation of ecological principles into the NEPA process. For example, the U.S. Forest Service has demonstrated how the conservation of biodiversity is incorporated into forest planning from the perspective of the North Central Forest Experimental Station in Rhinelander, Wisconsin, and will present an ecological approach to timber sale planning in the Tongass National Forest in Alaska. The Mississippi Highway Department presented information on how their engineers are factoring biological diversity considerations into highway design. The National

Park Service will discuss a regional cumulative impact analysis of placer mining impacts in Alaska.

A significant methodological challenge for all federal agencies in the NEPA context, whether addressing a forest management plan or an urban housing proposal, is the requirement to analyze cumulative impacts. For NEPA purposes, cumulative impacts are defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."

Partly because of the new interest in ecosystem management, interest in and challenges to agencies' cumulative impact analysis has risen dramatically. Predicting direct and indirect environmental impacts is difficult; predicting cumulative impacts is even more difficult, with more barriers. There is a general consensus that while cumulative impacts must be evaluated, there is no single conceptual approach or methodology. CEQ recognized the challenge and, in 1990, sponsored a series of discussions to identify opportunities to assess cumulative effects. Those discussions led to a report, authored by the World Wildlife Fund, entitled *Making Decisions on Cumulative Environmental Impacts*. This report represents one of the most complete efforts to provide a conceptual framework on which to build a methodological approach.

The next phase of this effort will be to review, analyze, and present some methodological approaches. This phase began with the regional conferences. In June, CEQ also is hosting a workshop of experts to review several methodologies. We are exploring the possibility of forming a partnership with the Canadian Research Council, which is also addressing this issue.

Other topics discussed at the regional conferences include the use of third-party contractors for preparation of an EIS, and the symbiotic relationship between the pollution prevention movement and NEPA requirements. At some of the conferences, a special focus is on the need to be aware of concerns relating to Native Americans.

A segment of each conference deals with the purpose and process of preparing an environmental assessment (EA). Envisioned by CEQ as a brief, concise document (10 to 15 pages), EAs too often look like an EIS with a different cover page and lower level of public involvement. Two common myths seem to be prevalent in regard to EAs. First, most people believe that EAs are generally prepared by agencies to determine whether to prepare an EIS. However, the results of a survey just conducted by CEQ show that most agencies do not rely on EAs for a determination of significance, but rather to provide a more modest level of environmental review for actions that do not have significant impacts. Second, many people believe that EAs do not require public involvement. However, the CEQ regulations require the lead agency to involve environmental agencies, applicants, and the public to the extent practicable in preparing EAs[13] and in certain circumstances to provide a 30-day comment period for a finding of no significant impact.[14]

At the conclusion of the conferences and survey, CEQ will revise its guidance on when mitigation can lower the threshold of a proposed action from requiring an EIS to an EA,[15] and may offer additional guidance on the EA process.

While the conferences are useful, it is clear that NEPA training on a more regular basis is needed. Beginning this fall, CEQ will cosponsor an annual week-long NEPA course at Duke University's School of Forestry and the Environment. Earlier this year, the Legal Education Institute of the Department of Justice presented the first NEPA course aimed at government lawyers, with extensive participation from CEQ. Similarly, CEQ and DOJ lawyers are helping organize a NEPA course sponsored by the American Law Institute of the American Bar Association, which will be held in Washington in November.

CEQ also is examining current courses for middle and senior level federal employees to identify the most appropriate possibilities for additional NEPA courses. CEQ also is initiating a program, in partnership with the National Association of Environmental Professionals, to identify models of successful NEPA compliance. The program will recognize excellent achievement in the federal agencies and provide examples of efficient procedural compliance with positive environmental results. CEQ will continue to work with federal agencies, state and local governments, public interest organizations, permit applicants, and citizens to improve implementation of the NEPA process. We welcome suggestions from anyone interested in progressing toward more effective and efficient work.

Dinah Bear is general counsel, Council on Environmental Quality.

Notes

[1] 42 U.S.C. 4321-4347,

[2] 40 C.F.R. 1500-1508.

[3] Executive Order 11514, as amended by Executive Order 11991, Section 3(h), May 24, 1977.

[4] 40 C.F.R. 1500.1(c).

[5] 40 C.F.R. 1501.5; 40 C.F.R. 1591.6.

[6] 40 C.F.R. 1501.7.

[7] 40 C.F.R. 1502.7.

[8] 40 C.F.R. 1501.8.

[9] 40 C.F.R. 1506.2.

[10] 40 C.F.R. 1501.2(d).

[11] See "Linking Ecosystems and Biodiversity," *Twenty-First Annual Report of the Council on Environmental Quality* (Washington, DC, 1991).

[12] U.S. Congress, Office of Technology Assessment, *Technologies to Maintain Biological Diversity* (Washington, DC, March 1987).

[13] 40 C.F.R. 1501.4(b).

[14] 40 C.F.R. 1501.4(e).

[15] The current guidance is contained in Question 40 of "The Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," 46 C.F.R. 18026.

The Clean Fuels Regulatory Negotiation

Alana S. Knaster
Philip J. Harter

Within days after passage of the *Clean Air Act Amendments of 1990*, officials of the U.S. Environmental Protection Agency were confronted with the onerous task of drafting complicated gasoline regulations to meet the November 15, 1991, deadline for promulgation. The act's clean fuels provisions required EPA to issue regulations for the certification of reformulated gasoline, which is to be made available for sale by 1995 in the nine cities experiencing the worst ozone pollution in the country. Other nonattainment areas may take part in this program on petition of the governor to the EPA administrator.

The regulations are intended to reduce emissions of toxic and ozone producing chemicals, to establish procedures for ensuring that the gasoline sold outside these areas is not any worse than that sold before 1990 (the anti-dumping provision), and to address the problem of carbon monoxide. The carbon monoxide rules were to be issued in August 1991 and the program is to be in place by the end of 1992. Adding oxygen to motor fuels reduces the emission of carbon monoxide. The 1990 amendments, therefore, require certain carbon monoxide nonattainment areas to implement a program to secure the use of fuels with an average oxygen content of 2.7 percent. Because only an average is required, the rules needed to provide a means by which it would operate—something easy to describe in principle but difficult to implement in regulations.

The debates over passage of the legislation had been contentious, and it was felt that developing the regulations would be equally controversial. William Rosenberg, EPA's Assistant Administrator for Air Programs, decided to consider using regulatory negotiation to develop the rules. Even though negotiation would be time consuming and would preclude staff from beginning drafting immediately, Rosenberg determined that the process would provide EPA with the expertise, experience, and practical insight of these parties in sorting through the complex issues. And, at least as important, it would develop a consensus on the rules.

Regulatory negotiation—known as "reg neg"—had been used several times by EPA to address difficult, controversial rules. The Congress recently endorsed the process by enacting the *Negotiated Rulemaking Act of 1990* as an amendment to the *Administrative Procedure Act*. Essentially, it provides a structured process by which representatives of the interests that would be substantially affected, including a senior representative of the regulatory agency, come together to negotiate an agreement on the terms of a rule. The negotiations are conducted under the *Federal Advisory Committee Act*, which requires that the meetings be announced in advance and be open to the public.

A consensus in this case means that each interest concurs in the recommended rule when considered as a whole; each interest, therefore, has a veto over the proposal. The agreement also provides that no one participating in the negotiations will do anything to inhibit its adoption or, to the extent the final rule is consistent with the recommended rule, challenge the rule in court. No rule that has been the subject of such a consensus has resulted in court action. The parties participate because they have a direct hand in crafting the rule.

The Convening

EPA contacted the authors, both of whom had experience conducting complex, technical regulatory negotiations, to undertake a feasibility study. This is done during the convening phase of a regulatory negotiation, during which a neutral third party—the convener—identifies potential interests, interviews representatives of those interests, determines what issues they believe will need to be considered and what information is necessary to resolve those issues, determines the willingness of the interests to participate, and ascertains the likelihood that an accommodation can be reached on the key provisions.

EPA initially chose to treat the oxygenated fuels rule and the reformulated gasoline rule separately, with the mediators each assigned the convening for one rule. Since

some parties were interested in both rules, interviews and analyses were coordinated as much as possible. The process began with extensive interviews of EPA's Office of Mobile Sources. Using an initial list of potential interests supplied by EPA, the conveners contacted each of the parties to acquaint them with the regulatory negotiations process. The limited amount of time before the rule had to be published was a key concern of nearly all the parties. EPA estimated that the negotiations phase would have to be completed in approximately three months—by mid-June—to give agency staff sufficient time to draft a rule based on the recommendations of the group. The effort would necessitate almost a full-time commitment by many of the participants. The turnaround time for staff to produce notes of the deliberations and draft proposals would be very short.

There was an almost equal concern that the negotiations not reopen the issues that had been debated and resolved during the legislative process. It would be incumbent on the neutral facilitators and the participants themselves to keep the talks productive. Accordingly, the parties were asked to provide their assessment of the feasibility of concluding negotiations in the limited time, the desirability of combining the negotiations, and the willingness to participate in a negotiation of a subset of issues if time constraints or technical complexities made a negotiation of all the issues proposed infeasible.

Accommodating the Interests

It is important to include all the key interests in regulatory negotiation. While one can never hope to get representatives of all the affected interests around the same table, the convener seeks representatives of the major interests and enough others to ensure that the issues will be adequately raised and resolved. In the case of clean fuels, the difficulty lay not in determining what interests needed to be included but in keeping a manageable number of direct participants.

There are several approaches for accommodating additional participants while still keeping the number of negotiators to a minimum, including:

1) Designating alternates to attend as many deliberation sessions as possible and to be ready to substitute for the representative;

2) Setting up technical work groups or subcommittees to do the preparatory work and submit proposals for consideration by the larger advisory committee;

3) Selecting a participating organization's executive director, chief attorney, or another appropriate staff person to represent the group, with staff to serve with one or more member representatives and coordinate the team during the negotiations; and

4) Selecting spokespersons in situations when the parties remain adamant about retaining a greater number of representatives than is ideal for the functioning of the advisory committee, especially when there is great diversity within an interest group and the members reach a compromise.

The *Negotiated Rulemaking Act* suggests that there be a maximum number of 25 members on the Federal Advisory Committee established for each negotiation. In this case, the conveners initial recommendations were in that range, but the parties insisted that the number of "seats at the table" be expanded so that all the key sub-interests within each major organization were represented.

The diversity among members in several key interest groups became an important consideration in the final design of the clean fuels negotiations process. For example, the petroleum refiners had two trade associations, one representing a broad spectrum of the industry, including numerous small refiners, and the other representing major refiners. Differences in market share, geography, and organizational structure between the large and small refiners necessitated that both associations be seated at the table. Representation was complicated further by the diversity among the major refiners, ranging from significant differences in the composition of the crude oil they used to a wide variety of investment strategies that affected companies' position on the content of the regulation. Moreover, several of the major companies were further along in their product reformulations in response to changing, stringent regulations.

To accommodate these differences, it became necessary to allot nine seats for the refining industry on the negotiating committee. Additional representation was afforded through the use of alternates and working group members. Commitments by the facilitators to ensure that alternates were accorded an equal voice in decisionmaking were important in keeping the number to nine.

The oxygenate producers—makers of MBTE, ethanol, and methanol—presented a similar representation problem. Again, although there was considerable overlap in membership among the trade associations, the significance of the rule for individual companies mandated that their representation be expanded to five. One interest, for example, requested a seat even though it was represented by another, broader trade association. With nine major cities subject to the reformulated gasoline provisions (as well as opt-in possibilities) and 40 cities affected by the winter oxygenate requirements, it was important to keep the state and local government interest caucus to a manageable size without sacrificing the ability of the representatives to speak for all the cities and states. The time commitment convinced several cities and states to allow others to participate in the negotiations on their behalf. The willingness of the executive director of the Association of State and Local Air Pollution Control Officials to coordinate the caucus effort and to obtain member input meant that this caucus could accept five seats on the advisory committee. Total representation was expanded in the work groups.

Final Process Design

EPA published a notice in the *Federal Register* announcing its intention to use negotiated rulemaking, outlining the issues involved, and describing the interests that would be represented during the negotiations. The notice made clear that any party that believed it would be significantly affected but was not otherwise represented could request to participate on the committee. A public meeting was held on February 21-22 in Washington. Because of the extensive convening phase, there were no surprises with respect to new interests demanding representation. Two hundred people attended the meeting, at which the

conveners presented the results of their interviews, including recommendations for process design and membership on the advisory committee and technical work groups.

"Umbrella" Committee and Work Groups. The conveners proposed that EPA establish an overall policy or "umbrella" committee that would be responsible for developing a consensus on a total package. The conveners recommended allocating the seats on the committee among the various interests that needed to be represented, with the designation of individual representatives left up to the interests (members would be appointed formally by the EPA administrator to form a Federal Advisory Committee). The conveners initially recommended 23 members for the committee, but this was expanded to 31 members. Advisory committee members would designate alternates and work group members. The work groups would develop consensus recommendations for review and consideration by the umbrella committee. The concept of an "umbrella" therefore connoted an oversight role.

Work Group Topics. The participants at the public meeting chose to establish four work groups—fuel certification (combining the issues of testing and modeling); anti-dumping; supply and distribution of oxygenates; and averaging, credits, and enforcement. The participants agreed to schedule meetings to ensure that participants could observe the sessions that were most important to them. After considerable debate, membership on the work groups, with minor exceptions, was kept at approximately 15 individuals. The facilitators agreed to keep observers from usurping the role of official work group members.

The Negotiations Phase

After an initial meeting of the advisory committee in mid-March, the work groups began their discussions in earnest. Each session was scheduled for a full day. Often, meetings would extend into the evening. Progress varied considerably among the different groups, especially in instances when they were waiting for data from EPA researchers and Auto/Oil, the major research consortium jointly sponsored by the petroleum and auto industries. The work groups also enabled the technical experts from the respective interest groups to solve problems collaboratively. Although the members had numerous ideological differences, they were able to develop several key provisions.

In light of the ongoing development of several EPA models and requirements, the negotiators developed provisions for accommodating these changes once they were final, including scheduling future meetings of the key participants to review the EPA products. These types of compromise approaches are unique to negotiated rulemaking.

The debate over the role of modeling versus testing of proposed gasoline formulas was a critical aspect of the negotiations. A strong case could be made that laboratory testing of each gasoline formula to ensure that it met the standard would be both time consuming and costly for the refiners—to the point of making the 1995 deadline difficult to achieve. On the other hand, modeling was not wholeheartedly accepted by all interests because of the gap in existing data on which to base the model. The final agreement incorporated a simpler model than had originally been contemplated. However, the parties established a process for incorporating new data and corresponding time frames that would result in Phase II reformulated gasoline being in the marketplace earlier than was required by the law.

The anti-dumping deliberations clearly demonstrated the advantages of negotiations over the traditional rulemaking process for accommodating the diverse needs of affected interests. The negotiators crafted a hierarchy of approaches for establishing baseline gasoline—against which the anti-dumping provisions in the law would be measured—that began with the use of actual 1990 gasoline data, allowed for variations in the recordkeeping systems of a large number of refiners, and addressed the unique problems of companies that were retrofitting their plants to meet other new gasoline requirements and therefore might not be producing gasoline in 1990. A realistic and enforceable regulatory approach emerged.

Finally, the negotiators crafted an important compromise that enabled the oil companies to agree to reductions that were greater than those contemplated when the process began. To take account of the enormously complex distribution system for gasoline and to enable refineries to smooth out production runs, the committee developed a system by which the standards could be met on an annual average, as opposed to a gallon-by-gallon basis. To meet the concern that one locality could end up with all the dirty fuel, a means was developed by which samples would be taken from around the country, and specific action would be taken if this problem occurred. That provided a creative means of meeting a standard that itself had many creative aspects.

The committee negotiated late into the night of its final meeting, putting together an outline of an entire standard. The various interests could then see the standard as a whole and decide whether they were better off with negotiation or with traditional rulemaking. They also could see how to make the standard work for them—what changes would have to be made and how to package proposed changes so that others would agree to them.

Following that marathon session, the negotiators went back to their constituents for their reactions. Each decided to continue. The bare bones of the outline were fleshed out in a series of smaller meetings that addressed individual issues. The effort culminated in an agreement that was signed by representatives of all the parties on August 16, 1991. Each party "concur[red] in principle to the outline of the proposed rules . . . when considered as a whole," and "not to challenge the . . . rules in court to the extent that the final rules and their preambles have the same substance and effect as the . . . outline concurred in by the Advisory Committee." With the major issues settled by the agreement, the parties could work together to develop specific regulatory language to implement their handiwork.

This rule clearly demonstrated the power of the process: without the direct negotiations among the affected interests, there is very little chance that the rules would have been developed anywhere close to the schedule necessary to meet the ambitious goals of the *Clean Air Act Amendments of 1990*. Although each interest could point to sections they would have preferred to craft differently, the benefits of the final rule in addressing their most important needs clearly outweighed what would otherwise be considered negative features of the resulting regulations.

Alana S. Knaster is president, The Mediation Institute, Los Angeles. Philip J. Harter is an independent attorney/mediator, Washington, DC.

Public Works for Tomorrow

Bruce D. McDowell

In 1981, a popular book entitled *America in Ruins* challenged the nation to pay more attention to the neglect of the public facilities that everyone takes for granted. Shortly thereafter, a major freeway bridge in Connecticut collapsed, with catastrophic results, and the debate was on. The need for more attention to this topic has been documented throughout the 1980s and up to the present time.

One of the most wide-ranging studies was *Fragile Foundations*, the 1988 final report of the National Council on Public Works Improvement. Its title suggested that things were not as bad as the 1981 report had charged, but that the nation was in danger of letting its public facilities become inadequate to sustain the quality of life and world-class economic productivity that Americans expect. The report called for doubling the nation's capital investment and for renewed attention to the maintenance of highways, streets, roads, bridges, airports, transit systems, waterworks, wastewater treatment plants, dams, flood control works, ports, waterways, solid waste landfills, hazardous waste management facilities, and the like.

The debate over the council's recommendations has blossomed into a cottage industry. Several economists published papers on the question of how much productivity improvement can be expected from increased public works spending. The Congressional Budget Office published two major reports in response to *Fragile Foundations*—(1) *New Directions for the Nation's Public Works* (1988) and (2) *How Federal Spending for Infrastructure and Other Public Investments Affects the Economy* (1991). The Congressional Office of Technology Assessment also published two reports on the subject—*Rebuilding the Foundations* (1990) and *Delivering the Goods* (1991).

As the debate raged, two defining events unfolded. One was the 1990 decision by the U.S. Environmental Protection Agency to veto the proposed Two Forks Dam in Colorado, signaling the end of an era of building major dams to meet growing demands for water. The other was the passage of the *Intermodal Surface Transportation Efficiency Act of 1991*. This first highway and transit act passed since completion of the Interstate highway system marks a striking transition from the dominance of highway building as the means of moving people and goods. The need to meet service demands is not denied by either event, but both eliminated the assumption that new construction is the only way or even the best or most efficient way to meet demonstrated needs.

A New Vision of Public Works

If these two events are accurate indicators, the era of massive construction programs may be over. This does not mean that we will stop building public facilities, but it does signal that there will not be any new public works programs of national scale comparable to the Interstate highway system or opening the West by supplying federal water and power. The future is more likely to focus on maintaining and getting the most out of existing facilities, keeping costs down, making public facilities fit more comfortably into the natural environment, and being more ingenious in meeting needs in the most efficient ways that science can devise.

Performance—not construction—is now the goal. And performance is being defined in increasingly complex ways. For example, it is no longer good enough simply to add more capacity to highways to handle more vehicles. The new goals are to move more people with fewer vehicles, to use less fuel, to create less air pollution, to keep highway

runoff from polluting water supplies, and to minimize noise in adjoining neighborhoods. With water development projects, the goals also have grown more complex. In-stream flows need to be maintained to meet a variety of habitat requirements, return flows need to be of high quality for reuse, priorities need to be set among competing uses of water when natural limits are reached, and conservation methods must be used to satisfy growing needs with limited supplies. In managing waste materials, the simplicity of the city dump has been replaced by a complex of approaches including recycling, nonpolluting landfills, clean waste-to-energy incinerators, and secure hazardous materials depositories. The search is on for the best results at affordable costs. This search is not simple.

The vision for future public works is no longer a pre-set design that can be drawn up on a piece of paper and worked toward for decades. The new vision is a performance management system to be followed consistently, every year, until our public facilities produce the desired results. Ensuring sound performance may not be as exciting as cutting ribbons to open new facilities, but it is a lot more important. And it can be made satisfying, at least, if properly reported and publicized.

The National Council on Public Works Improvement suggested a set of performance goals to guide this new style of management:

- Synchronize public works with development;
- Attain established levels of service;
- Support economic development and fiscal policies;
- Distribute services equitably;
- Limit deferred maintenance liabilities; and
- Enhance economic return on investment.

This list may not be complete, but it illustrates the concept of performance goals and it can be built on. For example, environmental goals and the need to ensure the reliability of services should be brought out much more explicitly.

Toward a Federal Infrastructure Strategy

In 1990, an appropriation was made to the U.S. Army Corps of Engineers to develop a federal infrastructure strategy. This work was directed to be done in consultation with other federal agencies, state and local governments, and the private sector. The Corps asked ACIR to assist in the consultation process, and the Commission approved that request in March 1991. On June 12, 1992, the Commission approved the initial report resulting from these consultations.

The Commission confirms the essential nature of the nation's infrastructure, the urgent need to improve it, the intergovernmental importance of the issue, and the presence of many opportunities to "improve investment efficiency, program coordination, and economic efficiency . . ." (*Toward a Federal Infrastructure Strategy*, forthcoming). ACIR enumerated 11 elements that should be worked on in the coming year. Four of them, which are described below, provide opportunities for federal interagency cooperation that could make a real difference in how effectively, efficiently, and accountably all governments—federal, state, and local—will provide infrastructure services in the future.

Performance-Based Needs Studies. Many public works needs studies are considered to be unevaluated, unrealistic wish lists that usually are too costly to be funded by available resources. Without clear priorities and options, they provide little guidance to decisionmakers.

Several techniques are available to improve the typical needs study. For example, U.S. Comptroller General Charles A. Bowsher recently called performance measurement "an important tool in managing for results" when testifying before the Committee on Governmental Affairs of the United States Senate. He recommended clear articulation of outcome-oriented goals, establishment of measurable objectives, and annual reporting of progress toward goals as means of ensuring citizens "that the government can effectively account for where their tax dollars go and how they are used." Recognizing that this is not an easy task, Mr. Bowsher recommended "starting with pilots. . . ."

One of the best pilots is the long-standing Highway Performance Monitoring System (HPMS) required by the Congress every two years. A similar transit data reporting system is now being merged with HPMS. These systems rely on state and local data reported in standard form to gauge national conditions, performance, and capital investment requirements. These reports have been improved gradually over recent years. The Federal Highway Administration's report on *The 1991 Status of the Nation's Highways and Bridges* is sufficiently refined to differentiate between the cost to *maintain* and the cost to *improve* 1989 conditions and performance for several different types of urban and rural highways.

Additional techniques that can be used to improve needs studies include risk analysis, benefit-cost analysis, return-on-investment analysis, and interactive simulation models for alternative policy options. These are more difficult techniques than simple performance measurements, but they are beginning to be used on a limited basis. They hold out the promise of answering questions such as: What are the safety and cost increase risks of delaying certain projects? Which projects will give the greatest return on investment? Which systemwide strategies are likely to improve performance most?

It is essential to ask and answer questions like these if needs studies are to be used as strategic investment tools.

Performance-Based Accounting Systems. Governmental accounting systems provide relatively little information for management decisions other than budget compliance. Accounts are seldom kept for costs, benefits liabilities, and assets, yet, such accounts could improve decisions about infrastructure significantly.

For example, some form of asset accounting may help solve one of the toughest infrastructure problems—def-

erred maintenance. The concept includes inspecting capital facilities regularly, determining the cost of needed maintenance, and either making the repairs or reporting the financial amount of needed repairs not made as a liability in the annual financial report. Tracking this amount would allow management, policymakers, and citizens to assess the status of infrastructure maintenance more precisely and realistically than is possible now and would save money by avoiding the catastrophic failures of facilities that often trigger large replacement costs. The recent creation of the Federal Accounting Standards Advisory Board, provides an opportunity to make progress on this issue.

Better accounting standards also could help decisionmakers assign responsibilities for costs, which is one of the biggest infrastructure financing challenges. If governments were to follow the "beneficiaries pay" principle more closely, they would need much better data on costs and benefits. Benefit and cost accounting, when done at all, is now generally limited to direct benefits and costs. Secondary benefits and costs also can be of great significance. In order to set fair and productive prices for infrastructure services and to allocate intergovernmental aid properly, public accounting systems would have to be reformed fundamentally. Relative tax capacities and efforts also would figure into such calculations.

Streamlined Environmental Decisionmaking. Many different environmental requirements must be satisfied before a public works project can move forward. Frequently, these requirements are applied sequentially. With numerous state and local requirements in addition to federal requirements, and the threat of litigation, the approval process has lengthened to many years. Sometimes, approval of a project takes so long that the rules change and the process has to start all over again.

The idea of one-stop permitting has been around for a long time, with little to show for it. Two recent events, however, give rise to optimism that progress can be made on this issue. First, the Council on Environmental Quality is more actively promoting the concept that the environmental impact statement (EIS) required by the *National Environmental Policy Act* (NEPA) can serve as a single vehicle for satisfying all federal environmental requirements (see page 17). Second, in May, Transportation Secretary Andrew H. Card, Jr., Environmental Protection Agency Administrator William K. Reilly, and Army Assistant Secretary for Civil Works Nancy Dorn signed a joint memorandum of understanding to facilitate implementation of the *Intermodal Surface Transportation Efficiency Act of 1991* by expediting environmental reviews.

Geographic Information Systems (GIS). Infrastructure planning and decisionmaking requires enormous amounts of very expensive geographic data. The data needed keep growing with every new requirement for environmental protection, archaeological and historic preservation, congestion management, and quality of life enhancement.

The federal, state, and local governments collect geographic data on natural features, demographic characteristics, and man-made features, including the location and characteristics of public works. Too often, however, there is no interagency cooperation in the type or form of the data collected. The technology is available to avoid this waste. Even relatively small public works and planning offices have computers capable of establishing GIS programs. But these systems generally are independent of one another.

Through the work of the Federal Geographic Data Committee, chaired by the U.S. Geological Survey, several types of federal geographic data are being put into standard formats using compact disc technology. If state and local data were compatible, eventually, any kind of geographic data could be shared to great advantage at affordable cost. USGS is exploring ways of involving state and local governments in its GIS work.

With the proper cooperation and data standards, federal, state, and local data could be fed into three-dimensional multimedia technologies that would allow public works decisionmakers to "walk through" current conditions, apply proposed policy options, and experience the future consequences without ever breaking ground.

Conclusion

These highlights of opportunities for federal agencies to work together to improve the performance of the nation's public works just scratch the surface. Many other improvements have been identified, including education and training, institutional relationships, materials research, and innovative finance. However, the federal, state, local, and private sector participants in our consultation process ranked information technologies at the top of strategies for improving the performance of public works. The systems highlighted above rely on those technologies to bring better information to the decisionmakers and citizens who provide and use the nation's infrastructure.

A strategy of federal interagency cooperation in infrastructure programs could benefit state and local governments in a variety of ways, including (1) improving technical and managerial practices, and (2) providing a consistent federal approach to the administrative and regulatory requirements that state and local governments must meet.

Bruce D. McDowell is director, Government Policy Research, at ACIR.

IP LETTERS

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State Taxation of Interstate Mail Order Sales

State Taxation of Interstate Mail Order Sales estimates the 1990-1992 revenue potential for states if they could require out-of-state mail order firms to collect state sales and use taxes. The revenue potential for all states is estimated at $2.91 billion for 1990, $3.08 billion for 1991, and $3.27 billion for 1992. These aggregate estimates show an increase of 73 percent over ACIR's 1985 estimates and 34 percent over 1988. ACIR estimates of the revenue potential if state and local sales taxes were collected are $3.49 billion for 1990, $3.69 billion for 1991, and $3.91 billion for 1992. These new estimates are particularly important in light of the U.S. Supreme Court's agreement to hear *Quill Corporation* v. *North Dakota*. In accepting this case, the Court agrees to review its 1967 ruling in *National Bellas Hess* v. *Illinois Department of Revenue*, which limited the ability of state (and local) governments to require out-of-state mail order firms to collect state and local sales and use taxes.

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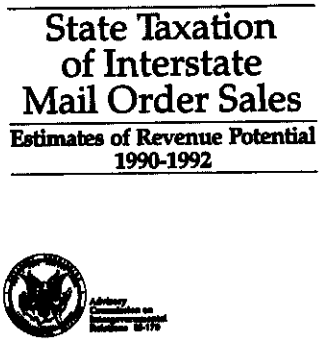

The Changing Public Sector: Shifts in Governmental Spending and Employment

The Changing Public Sector updates and broadens ACIR's 1982 analysis of expenditure and public employment data. From 1967-1987, the public sector continued to expand, and government spending priorities shifted, particularly those of the federal government. In 1987, states were spending more in relation to both federal expenditures and local expenditures than in 1967. Among local governments, county and special district expenditures increased the most. The analysis is based on the Census Bureau's five-year Census of Governments. Total spending by all governments rose from $257.8 billion in 1967 to $1,811.7 billion in 1987, or by 603 percent (115 percent in constant 1982 dollars). Per capita, total public spending grew from $1,297 in 1967 to $7,427 in 1987, a 473 percent increase (75 percent in constant dollars).

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(see page 29 for order form)

Improving the Infrastructure and Protecting the Environment

Max Whitman

Public works officials find themselves in a challenging position in this era of tight budgets. They are called on to do more with less to help reverse the decline of the nation's infrastructure while recognizing the importance of protecting the environment. In recent years, the American Public Works Association (APWA) has launched several initiatives to find environmentally sound solutions to satisfy the demand for infrastructure maintenance and improvements.

The American Public Works Association traces its lineage back almost 100 years to the establishment of the American Society of Municipal Engineers in 1894. The association defines public works very broadly to include the physical structures and facilities developed or acquired by public agencies to house governmental functions and provide water, waste disposal, power, transportation, and similar services to facilitate the achievement of common social and economic objectives. In 1991, APWA adopted the following mission statement: "The mission of APWA is to improve the quality of life by providing a forum for the development and exchange of ideas, information, and technology which enhances the delivery of public works services; promoting personal and professional growth and development for its members; and advancing public works issues on the public agenda."

Public works officials, as their primary job, provide public works and services, many of which have an environmental thrust as well. Clearly, disposal of solid waste and wastewater, if done properly, improves the environment. Properly designed and maintained streets also can contribute to environmental protection. Streets and bridges can be designed to minimize congestion, thereby enhancing air quality. If streets are properly swept and free of debris, the level of pollution in storm-water runoff can be reduced.

In 1991, an APWA Task Force was convened to develop policy guidance on the environment. A resolution was approved by the membership in August, recognizing that long-term environmental strategies are necessary to ensure sustainable development. Sustainable development satisfies existing needs without compromising the environment or the ability of future generations to adapt to evolving environmental and development needs. The resolution recognizes the importance of pollution prevention, including all forms of recycling and reuse. It also recognizes the need for the federal government, in cooperation with state and local governments, to develop a sound and effective comprehensive energy strategy that recognizes the goal of maintaining and improving the quality of the environment. Moreover, because of limited resources, environmental protection and remediation of past practices must be assigned priorities on the basis of opportunities for the greatest risk reduction. The resolution observes further that a spirit of environmental stewardship should be promoted through education, communication, and coordination. Finally, the resolution seeks a strong commitment to the enhancement of R&D activities that evaluate the environmental risk and benefits of public works policies and programs.

The problems of developing, maintaining, and rehabilitating the infrastructure are staggering—41 percent of the nation's bridges are deficient and more than one million miles of highway will need to be resurfaced by 2000. Half of the country's communities cannot accept more industrial or residential development because their wastewater facilities are operating at or near capacity. Existing landfills are approaching capacity and siting considerations are forcing new facilities to be located farther out, thus increasing per-unit disposal costs. Leaking water supply lines are causing some major cities to lose up to 30 percent of their drinking water daily. Against this backdrop of

needs, the United States has been reducing spending on infrastructure relative to GNP for the past several decades. As economist David Aschauer has pointed out, there is strong empirical evidence to show that shifting spending away from public investment has resulted in a deterioration in the flow of public services and a consequent erosion of productivity growth. The Rebuild America Coalition, which has representatives from more than 60 public and private organizations, believes that investment in infrastructure must be increased to address these pressing problems. APWA will help establish state and local coalitions to support the national efforts.

Many federal and state laws regulate and control public works activities. These laws include the *National Environmental Policy Act*, the *Endangered Species Act*, the *Resource Conservation and Recovery Act*, and the *Clean Water Act*. State and local laws also control and regulate land use in the interest of providing environmental protection. A useful vehicle for assessing the regulatory impacts of environmental legislation is Section 404 of the *Clean Water Act*. Although the word "wetland" does not appear in Section 404, court decisions and federal regulatory practices have resulted in a wetland protection program. Perhaps no other single piece of environmental legislation has caused more confusion and consternation. There is no question as to the value of wetlands to the ecosystem and their contribution to health, safety, and economic well-being. Public works infrastructure projects based on sound engineering and economic decisions also contribute significantly to the quality of life and economic well-being. A balance must be struck if the public interest is to be served properly.

The need to balance environmental protection with infrastructure improvements is not necessarily shared by those involved in the regulatory process. Responsibility for environmental protection is fragmented throughout many federal and state agencies. As a result, it is extraordinarily difficult and costly to get the necessary permits. The needs for infrastructure improvements are so great that we can ill afford to waste what little we have on unproductive uses.

The attempt to site and construct a landfill (balefill) for the Solid Waste Agency of Northern Cook County (SWANCC), which includes Winnetka and about 25 other communities, is an example. The agency spent over $17 million on land purchases, engineering fees, legal fees, and other costs to carry the project through the longest zoning board process in Cook County history. The project then went to the Illinois Environmental Protection Agency, from which a commitment for a permit was obtained. Ultimately, a request for final approval was submitted to the U.S. Army Corps of Engineers. The Corps found that the plan was operationally solid, that groundwater aquifers were adequately protected, and that other necessary precautions had been taken. However, in deference to fish and wildlife concerns, the Corps ruled that the presence of certain species of birds (unusual for this area, but widely spread nearby and throughout other parts of the country) posed an unmitigatable situation that was not addressed by efforts to provide 25 acres of "habitat." More recent contacts leave some hope that the problem can be mitigated, but untold expense and time have been wasted in achieving an important and needed facility serving 800,000 people. Clearly, the system is unworkable and needs an overhaul.

What should be done? Some balance, judgment, and discipline must be introduced into the regulatory process. One way to accomplish this is to put the costs of environmental protection to some sort of economic or cost effectiveness test. Often, at least with the federal regulations, projects go forward only if the benefits exceed the costs. Shouldn't the benefits to be derived from environmental mitigation measures required for projects also exceed the costs of achieving them? In the case of the SWANCC balefill, for example, did the presence of two species of birds uncommon for the area, but relatively common in other parts of the country, warrant the additional cost and delay associated with building this much-needed facility? Making this assessment is difficult, particularly costing out the benefits, but some attempt must be made to rationalize the process.

The process for issuing permits should be more consultative and less adversarial. It would be very helpful to applicants if the regulatory agencies would make their requirements known at the outset and remain constant throughout the process. Obviously, if the costs for environmental protection are known, the funds necessary to satisfy these needs can be budgeted for. If the requirements continually change and become more costly as a permit is about to be issued, supporting these requirements becomes an even more difficult task for the public works practitioner. Clearly, a schedule is needed to provide a timetable for decisions that can be justified by the record. Moreover, there should be limitations on information that must be developed for review in the interest of holding permitting costs to a reasonable level.

Legislative action should be taken to deal with inconsistencies in environmental law. The Section 404 program in particular must be clarified by the Congress. In an environmental policy resolution approved on August 26, 1991, APWA urged that the Congress recognize that (1) all wetlands are not of equal value; (2) in order to strike the proper balance between wetland preservation and infrastructure development, a three-tiered wetland classification system is needed that considers their relative importance (e.g., invaluable, significant, and low-value wetlands); and (3) a system for regulating and managing wetlands should be developed around this classification system that will allow development in low-value wetlands without compensatory mitigation, allow essential infrastructure development in significant wetlands with compensatory mitigation, and generally preclude infrastructure development in invaluable wetlands unless there are compelling public interest reasons and all feasible and practicable compensatory mitigation is provided.

Finally, the Congress also must come to grips with federal mandates. If the federal government believes that legislating environmental protection is in the national interest, then the federal government should be prepared to pay for its mandates. Some states attempt to do this for state-mandated expenses. Such a mandate reimbursement provision in federal law would go a long way toward imposing some fiscal discipline on environmental requirements so that the level of protection provided makes economic sense.

Max Whitman is president, American Public Works Association.

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Federal Government

RELUCTANT PARTNERS: *Implementing Federal Policy.* By Robert P. Stoker. University of Pittsburgh Press, 127 N. Bellefield Avenue, Pittsburgh, PA 15260, 1991. xv, 216 pp.

In the U.S. government, diffuse authority is an important value related to the constitutional principles of liberalism and federalism. But diffuse authority challenges national leadership by placing control of policy resources in many hands. The emphasis of this book is on constitutional principles that divide government authority and the implications for governmental effectiveness. A key supposition is that the federal government can contribute to improving social conditions. Government is not the problem, argues the author, the problem is to govern effectively. The U.S. government structure demands that state and local governments and elements of the private sector be partners in the implementation of national policy. This book deals with how to arrange effective, cooperative partnerships, with federal leadership, to implement federal policy. The book specifically examines the school lunch program and nuclear waste disposal.

Finance and Taxation

INTERGOVERNMENTAL RELATIONS: *Changing Patterns in State-Local Finances.* U.S. Government Accounting Office, Washington, DC 20548, March 1992. 58 pp. (Order from GAO, P.O. Box 6015, Gaithersburg, MD 20877.

This report presents data on aggregate state and local revenues, expenditures, and related variables from 1961 to 1990. The state-local trends are contrasted with federal trends, based on data from the National Income and Product Accounts, the Bureau of the Census, and the Office of Management and Budget. The major trends found were: (1) the state-local sector is running a deficit, which is approaching a record high, in financing its service operations; and (2) deficits have been growing because expenditures have risen even faster than revenues, but state-local tax burdens continue to rise and have reached a 30-year high. GAO also found that health care spending is the most rapidly growing area of state-local budgets.

PAYING FOR HIGHWAYS, AIRWAYS, AND WATERWAYS: *How Can Users Be Charged?* Congressional Budget Office, 2nd & D Streets, SW, Washington, DC 20515, 1992. 88 pp. (Order from Superintendent of Documents, Government Printing Office, Mail Stop SSOP, Washington, DC 20402-9328.)

The combination of budgetary pressures on all governments and increasing demands on transportation facilities has generated interest in charging users. This report examines the advantages and disadvantages of alternative fee structures, including existing taxes. The financing mechanisms are evaluated on the criteria of revenue adequacy and economic efficiency. The study concludes that existing federal taxes produce enough revenue to cover current highway spending, but charging users on the basis of pavement damage and congestion could lead to greater economic efficiency. Existing taxes are not adequate for airways, but might meet the criterion if combined with congestion charges. Current fuel taxes raise less than 10 percent of the revenues for spending for navigation purposes on inland waterways. The study suggests that users of low-cost waterways subsidize those of high-cost waterways. For transportation in general, alternative financing mechanisms that more closely resemble marginal cost pricing could promote greater efficiency.

STATE AND LOCAL TAX LEVELS: *Fiscal Year 1991.* Legislative Finance Papers (No. 80). National Conference of State Legislatures, 1560 Broadway, Suite 700, Denver, CO 80202, 1992. 31 pp.

This report examines the most recent data available on the level and composition of state and local government tax revenue. For FY 1991, combined state and local data are estimated. For FY 1990, a more detailed comparison is provided, including average property tax levels. All data are based on tax collections reported to the Bureau of the Census. Tax levels are generally measured on a per capita basis and as a percentage of state personal income. This report measures tax levels per $100 of personal income, which details changes relative to the growth in each state's economy.

STATE PROPERTY TAX RELIEF PROGRAMS FOR HOMEOWNERS AND RENTERS. Legislative Finance Papers (No. 81). National Conference of State Legislatures, 1560 Broadway, Suite 700, Denver, CO 80202, 1992. 28 pp.

This paper discusses the growth of state property tax relief programs, compares their key features, and details their costs to the states. The report is limited to direct relief programs, that is, homestead exemptions and credits, circuit breakers, and deferral programs. (Indirect measures include state aid to education, general local government aid, and state takeovers of welfare and health programs.) Property taxes are the dominant source of local government revenue and represented 24 percent of all state and local tax revenue in 1990. Property taxes also are the least popular with the voters. The states play an active role in overseeing the local property tax system, and the tax relief programs attempt to address some of the concerns while preserving the property tax as a stable revenue source for local governments.

STATE REVENUE ESTIMATING IN SOUTH CAROLINA. South Carolina Advisory Commission on Intergovernmental Relations, P.O. Box 12395, Columbia, SC 29211, 1991. 40 pp.

This report examines the state finance structure and the processes used in estimating revenues, and highlights the approaches used in other states. The commission also offers recommendations to strengthen this component of the budgetary process. The report considers the role of revenue estimating in a state budget process, the importance of forecasting, who should be involved, and the role of the state Board of Economic Advisors. The other state systems outlined are Florida, Iowa, Indiana, and Kansas.

Local Government

THE COMPETITIVE CITY: *The Political Economy of Suburbia.* By Mark Schneider. University of Pittsburgh Press, 127 N. Bellefield Avenue, Pittsburgh, PA 15260, 1989. xii, 250 pp.

This book explores the concept of a local market for public goods in which the structure of governmental arrangements can increase consumer choice and the level of competition. The book is concerned with efficiency and responsiveness. The book also considers the limited ability of suburban municipalities to control resources and to achieve the patterns of growth they want. The author notes that local decisions are driven by local needs and politics and are affected by the federal system and the openness of communities to economic and social change. He defines the goals, strategies, and resources that the key sets of actors (residents, businesses, bureaucrats, and politicians) bring to the local market for public goods and identifies points of consensus among them. He also describes the operation of the local public market and compares it to the market for private goods.

MAYORS AND MONEY: *Fiscal Policy in New York and Chicago.* By Ester R. Fuchs. University of Chicago Press, 5801 Ellis Avenue, Chicago, IL 60637, 1992. xiv, 361 pp.

This book has two objectives. The first is to demonstrate that politics has an important effect on a city's fiscal condition. The author compares fiscal policymaking in New York and Chicago because of the similarities in their local economies and the stark contrast between their political structures and fiscal conditions in 1975. The second objective is to untangle the complex political interactions in fiscal policymaking in these two cities to develop a theoretical framework for understanding why some American cities have had fiscal problems and others have not. The author examines political theory; expenditures, revenues and debt; intergovernmental relations and legal arrangements; and interest groups and political parties. Fuchs concludes that the mayor's decisions are affected by the interactions between all these elements and that the mayor must be able to centralize and control the budgetary process at the final stages of decisionmaking if problems are to be avoided. City politics, Fuchs says, works to subvert centralized control over fiscal policy and long-term planning.

Service Delivery

A COMPREHENSIVE REVIEW OF LOCAL GOVERNMENT SERVICE DELIVERY IN FLORIDA: *Service Scope, Intensity, and Dominance.* Florida Advisory Council on Intergovernmental Relations, House Office Building, Tallahassee, FL 32399-1300, 1991. 103 pp.

This report describes of service delivery responsibility in Florida municipalities, counties, and special districts. In a rapidly growing state like Florida, the structure and patterns of service delivery are prominent issues. Functional responsibility encompasses a wide range of issues. The study is divided into two parts and compares 1983 and 1988. Phase I describes service delivery patterns, identifies the scope of services and what is provided by different types of government, and examines the fiscal commitment to each service (measured by statewide per capita figures). Phase II investigates the intergovernmental structure of service delivery by examining the percentage of expenditures for each service by each type of government. Expenditure data are derived from general funds and so-called enterprise funds (e.g., water and sewer utilities, airports, golf courses, and ports).

State Mandates

STATE MANDATES STUDY. Utah Advisory Council on Intergovernmental Relations. Office of Planning and Budget, 116 State Capitol, Salt Lake City, UT 84114, 1991. 54 pp.

This report focuses on Utah's state-local mandate situation, including the total number and whether they are established by law or by rule, the costs of compliance, the categories of government affected, and the types of programs involved. UACIR is working to understand the impact of mandates on local governments and to improve the process by which new mandates are determined. UACIR also is working with local governments to improve the process of estimating the fiscal impact of proposed legislation. The study identified 11 categories of mandates—procedural, personnel, services, finances, business regulation, environmental and health regulation, public safety, infrastructure, land use, and other. The council surveyed all counties, cities, towns, special districts, and school districts. For 1991 mandates, cost data were gathered from the Legislative Fiscal Analyst and the associations of local government officials.

Water Resources

WATER RESOURCES MANAGEMENT: *In Search of an Environmental Ethic.* By David Lewis Feldman. Johns Hopkins University Press, 701 West 40th Street, Suite 275, Baltimore, MD 21211, 1991. xi, 248 pp.

This book aims to bridge the gap between policymakers concerned with environmental management and political theorists who are aware of the dilemmas posed by natural resources issues. The author says that natural resources policies are not simply the result of cumulative preferences or a reflection of the prevailing distribution of power in society. Rather they are commitments made by government to citizens. To be effective, these decisions must be seen as legitimate and trustworthy. The battles over economic development and environmental protection, he contends, are fought in the trenches of federal-state relations, and policymakers' ethical justifications for their decisions are the weapons. Feldman contends that policies have been made that favor development and economic efficiency over noneconomic principles such as fairness, environmental protection, and concern for future generations. Even the term efficiency is misleading, he says, because it is narrowly defined by engineers, planners, and water project beneficiaries. The result has been short-term economic gains for some regions at the expense of long-term economic benefits and economic stability for society in general.

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