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THE ROLE OF LOCAL GOVERNMENTS IN ENVIRONMENTAL REGULATION: SHORING UP OUR FEDERAL SYSTEM

David L. Markell†

"I'm mad as hell and I'm not going to take it anymore."¹

INTRODUCTION

A little more than three years ago, on May 13, 1991, the City of Columbus, Ohio issued a report entitled Environmental Legislation: The Increasing Costs of Regulatory Compliance to the City of Columbus.² The New York Times characterized this report as "the first major study to identify the cost of complying with Federal environmental regulations."³ According to the Times' article, the re-

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port "showed that environmental costs were about to swamp Columbus in red ink—or generate a revolt." The *Columbus Study* itself summarized the significant investment of local funds required to comply with federal and state environmental laws as follows:

Over the past few years . . . [t]he number of environmental mandates has increased substantially to the point where an average of 22 different federal and state mandates have been implemented in each of the last three years. The funding available from federal and state government bodies to assist with compliance with the new mandates has been decreasing at an alarming rate, while the share of costs to local governments has been increasing at a dramatic rate.  

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4. Patch of Weeds, supra note 3, at A16; see also Philip H. Albertson, *Regulatory Costs*, 259 Science 159, 159 (Jan. 8, 1993). This last article refers to the *Columbus Study*, remarking that

[o]n 20 January, the Democrats become sole heirs to a phenomenon of regulation gone amok. In April 1992, 59 regulatory agencies with about 125,000 employees were at work on 4,186 pending regulations. The cost during 1991 of mandates already in place has been estimated at $542 billion. The fastest growing component of costs is environmental regulations, which amounted to $115 billion in 1991 but are slated to grow by more than 50 percent in constant dollars by the year 2000.

Twenty years ago, costs of federal environmental regulations were not visible to the public. However, the number and stringency of unfunded federal requirements have since increased markedly. New and tighter regulations have drained funds from cities, towns, school districts, and individuals. A result is the beginning of a revolt. There is a growing questioning of the factual basis for federal command and control actions and of the scientific competence of the regulators.

Albertson, supra note 4, at 159.

5. *Columbus Study*, supra note 2, at Abstract. The Study notes that [s]ome perspective on the magnitude of these costs can be gained by realizing that the *entire* City budget for 1991 is $591 million. Identified environmental compliance costs in 1991 are $62 million or about 11% of the total budget. . . . It is expected that the City will increase its expenditures on
Several other cities throughout the country have emulated Columbus' pioneering effort to evaluate the impact of federal and state environmental mandates and have similarly concluded that the simultaneous increase in costs imposed by these mandates and reduction in funding support threatens to "swamp" local government.6

environmental compliance from near the $62 million level in 1991 to some $107 million in 1995.

Id. at 3. While this article focuses primarily on EPA-imposed environmental mandates, other federal agencies promulgate environmental mandates as well, including the National Oceanic and Atmospheric Administration ("NOAA"), the Army Corp of Engineers, the Department of Interior, and the Occupational Safety and Health Administration ("OSHA"). See, e.g., COLUMBUS STUDY, supra note 2, at 6. The Columbus Study's reference to environmental mandates is not limited to EPA-imposed obligations.

One issue concerning the Columbus numbers is that, as ACIR notes in its report, only incremental costs are properly attributed to federal mandates; that is, only the portion of a mandated activity that is attributable to federal prescription rather than state or local option is counted. If a jurisdiction is engaged in a mandated activity prior to the federal requirement, for example, the costs should not be attributed to the mandate unless the jurisdiction would have chosen to stop providing the service without the federal prescription. The costs of a mandated activity also should not be included in this estimate if a jurisdiction would have provided the service regardless of the federal requirement. ACIR REPORT, supra note 3, at 59.

Andrew Spielman of the EPA's Office of Policy Planning and Evaluation ("OPPE") made the same point, using the example of a city providing the water supply for its residents:

"The city is going to incur certain costs for the provision of a basic service, e.g., pumping and transporting drinking water. These costs may be independent of the costs associated with mandates to treat the water under federal environmental law. Consequently, it is not appropriate to include the former costs in calculating the cost to implement federal environmental mandates."

Telephone conversation with Mr. Andrew Spielman (Sept. 9, 1993).

Nevertheless, in its recent report on the impact of federal environmental mandates on local governments, the EPA appears to agree that both the number and cost of its mandates have increased significantly, and that these significant increases make implementation of the mandates "problematic," noting as follows:

"Increasingly, . . . the [drinking water supply, wastewater and solid waste collection and disposal] services [that local governments provide] are subject to larger numbers of complex federal environmental regulations. . . . Complying with these federal regulations has required a level of service that has stretched the capacity and the resources of these local public works departments and in many cases made implementation very problematic."


6. See, e.g., ANCHORAGE REPORT, supra note 3; U.S.E.P.A., TESTIMONY ON THE REVIEW OF EXISTING REGULATIONS, "THE REGULATORY FLEXIBILITY ACT," CITY
The confluence of increasing federal mandates and decreasing funding from the federal government has proven frustrating to local governmental officials. The Environmental Protection Agency ("EPA") summarizes the message it received from one of the five cities it studied: "We are going to see a revolution by local governments. They will say, 'EPA, if you want it done then do it your-

The dramatic increase during the past few years in federal mandates did not occur on a blank slate. In the 1960s and 1970s, "[f]ederal regulation in many fields began gradually and grew incrementally." ACIR REPORT, supra note 3, at 9. Citizens began to doubt the ability of the states to deal effectively with environmental dilemmas, and "a more active federal role was deemed necessary to deal effectively with problems that spilled across state and local borders." Id.

As the number and rigor of federal mandates increased, however, states began to question the whole scheme of federal regulation. As the ACIR Report notes, "[b]y the early 1980s, the Congress had enacted a series of statutes designed to restrain the growth of federal intergovernmental regulation . . . ." Id. at 10. Additionally, the executive and judicial branches took steps to decentralize regulation. Id.

These efforts did not free state and local governments from federal obligations. Instead, "Congress began passing the buck to the states by greatly reducing revenue sharing, at the same time keeping the programs it formerly funded, and adding even more costly new programs." ANCHORAGE REPORT, supra note 3, at 24, 27.

A recent report issued by the City of Chicago briefly summarizes this portion of the history behind the trend of increasing mandates accompanied by decreasing funding:

In the early 1980's, the Reagan administration proposed a set of reforms generically know [sic] as the "New Federalism." The Reagan proposals called for severely reducing the federal role, deregulation, and a general reduction in governmental activism. Although much of the Reagan agenda was never carried out, a general reduction in federal aid to state and local governments was a clear result of the policies of the 1980s. Federal funding was cut, but mandated requirements on states and localities were not. According to the Advisory Commission on Intergovernmental Relations, federal grants constituted 26.5 percent of state and local outlays in 1978 but fell to 18 percent in 1988. . . .

Reagan's "New Federalism" proposals, to the extent they were put into effect, were widely criticized as being more illusion than reality. Instead of creating more flexibility for state and local governments, "New Federalism" turned out to be a tale of broken promises: Funding for various programs was cut while the promised revenue "turnbacks" and local flexibility never occurred. "New Federalism" was legitimately blamed for provoking a budget crisis for states and localities. As one observer stated, the "New Federalism" approach to government created "the worst of both worlds: Federal controls and red tape, with a diminishing federal pocketbook."

CHICAGO REPORT, supra note 6, at 8-9.

OF LEWISTON, MAINE (May 15, 1992) [hereinafter MAINE REPORT]; PUTTING FEDERALISM TO WORK FOR AMERICA, TACKLING THE PROBLEMS OF UNFUNDED MANDATES AND BURDENSOME REGULATIONS, CITY OF CHICAGO (Nov. 19, 1992) [hereinafter CHICAGO REPORT].
self.’ ’ 7 A resolution that Dekalb County, Georgia adopted on August 10, 1993, articulates this frustration, terming “unfunded federal mandates” a “breach [of] the underlying principles of federalism which assumes a working partnership and shared responsibilities between [sic] federal, state and local governments.” 8

According to one commentator, 9 while the issue of unfunded governmental mandates imposed on local governments has been important since the 1960s, it is now “the number one intergovernmental issue in the United States due to the cumulative impact of state and federal mandates.” 10 According to the New York Times,

7. EPA REPORT, supra note 5, at B32.
9. Dr. Bruce McDowell of the Advisory Commission on Intergovernmental Relations.
10. INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION (ICMA), ENVIRONMENTAL MANDATES TASK FORCE MEETING, MEETING NOTES, at 1 (Mar. 5, 1993) [hereinafter MEETING NOTES]. See also, Shelley Emling, Mandates Drying Up County Funds Enough, THE ATLANTA J. AND CONST., Aug. 24, 1993, at B1 (“Gripes about unfunded mandates are not new, but they’re growing louder as the demands grow more costly.”).

This recent wave of complaints and organized opposition at the local level to federal mandates has not occurred on a clean slate. In the 1970s and early 1980s, Congress and Presidents Carter and Reagan took a series of actions that were designed to address this issue. As ACIR notes in its recent report, “[b]y 1981, mounting concern over the ‘mandate problem’ had produced a surge of regulatory relief and reform efforts on the part of all three branches of the federal government to address the problems posed by regulation.” ACIR REPORT, supra note 3, at 1. Among the actions that Congress took were its enactment of the Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520 (1980), the Regulatory Flexibility Act, 5 U.S.C. §§ 601-G12 (1980), and the State and Local Government Cost Estimate Act, 2 U.S.C. § 653 (1981).

In terms of activity in the Executive Branch, President Reagan established a “Task Force on Regulatory Relief” early in his first term, and he issued three executive orders designed to (1) institutionalize presidential control over the regulatory process (Exec. Order No. 12,498, 50 Fed. Reg. 1036 (1985)), (2) restrain the issuance of costly mandates (Exec. Order No. 12,291, 46 Fed. Reg. 13193 (1981)), and (3) require that agencies consider the federalism implications of their regulatory actions (Exec. Order No. 12,612, 52 Fed. Reg. 41685-41688 (1987)). Id. at 1.

Despite these efforts, however, the “federal government’s overall regulatory burden on states and localities continued to rise during the 1980s.” ACIR REPORT, supra note 3, at 1, 2.

Despite concerted presidential action to control federal rulemaking activity, the burdens imposed on state and local governments by administrative rules and regulations continued to increase during the 1980s. . . . Between 1981
the Columbus study's findings have prompted various groups representing local governments to make it a priority to revisit the nation's environmental laws to address the mounting costs they impose.\footnote{11}

In recent months, national leaders of both political parties have seemingly recognized the potential force of this incipient rebellion against federal environmental regulation. For example, they too have inveighed against the federal government's enactment of "unfunded environmental mandates"—i.e., mandates that the federal government imposes on local governments without enacting corresponding appropriations to help local governments pay for the activities needed to fulfill these requirements. In a recent speech, President Clinton said that "he hoped the 're-inventing government' study led by Vice President Gore would result in a 're-affirmation of the idea that the federal government should not

and 1990, the Congress enacted 27 statutes that imposed new regulatory burdens on states and localities or significantly expanded existing programs. This record of regulatory expansion was comparable to, and in some respects surpassed, the unprecedented pace of intergovernmental regulation compiled in the 1970s, when 22 such statutes were enacted.  

*Id.*

The *ACIR Report* provides its analysis of the flaws in these tools. *Id.* at 4.

Further, the "[m]ore prescriptive regulations added programmatic requirements and compliance costs." *Id.* at 24. The *ACIR Report* describes this situation as "a continuing increase in intergovernmental regulation during the same time the federal government mounted the most direct attack ever on federal mandates." *Id.* And it contrasts the 1970s and 1980s with earlier decades: "[T]he 1970s and 1980s stand out from earlier decades in their reliance on regulating state and local governments, rather than providing financial subsidies to these entities, to influence their actions." *Id.* at 55.

11. *Patch of Weeds, supra* note 3, at A16 (Stating that, "prompted by the *Columbus Study*, the National League of Cities has made updating the Nation's environmental laws—and through that reducing costs—one of its top five political priorities in Washington.").

Frustration with mandates is not limited to the environmental field. On August 30, 1993, the *New York Times* reported that the town of Meriden, Connecticut voted to refuse to institute a state-mandated free-breakfast program at one of its elementary schools, quoting the Mayor as stating, "The feeling I get is [the Board of Education members are] fed up with all these mandates, and enough is enough.... I think people have had it." *A School Board and State Fight Over Free Breakfast: Blue-Collar Defiance Risks Court Action, N.Y. Times, Aug. 30, 1993, at B5.*

Two other signs that the level of frustration is mounting are (1) the call for a "National Unfunded Mandates Awareness Day," see *DEKALB RESOLUTION, supra* note 8, at 2, and (2) the scheduling of an October 7-9, 1993, conference in Washington, D.C. on "Re-inventing the Federal Local Partnership to Protect the Environment" by the National Association of Counties.
continue to put unfunded liabilities on the states.' "12 Senate Minority Leader Robert Dole made a similar point at the same meeting, stating as follows:

Mandates sound like a great thing when they come on the Senate floor in Congress. But I know they are not well received for good reasons by state legislatures all across America. If we are going to pass mandates, then we ought to fund the mandate or we shouldn’t do it in the first place.13

Section I of this article describes the criticisms that local governments have made in recent years concerning the increasing burden that federal environmental regulation places on local government. Section II offers some preliminary thoughts concerning the actions the federal government should consider taking to address these concerns.

I. THE "ENVIRONMENTAL MANDATE" ISSUE

This section summarizes the concerns that local governments have raised regarding federal and state environmental mandates.14 These criticisms can be divided into four major areas, discussed

12. Peter A. Brown, Federal Mandates Pass the Buck to 50 States, ALBANY TIMES UNION, Aug. 9, 1993, at A-1, A-10; see also David Broder, Clinton Isn’t Forgetting that States Deserve Federal Mandate Relief, ALBANY TIMES UNION, Aug. 15, 1993, at E-5 ("[President] Clinton clearly understands that the partnership of local, state and national governments is badly frayed and in need of repair.").

13. Id.

14. Much of this section was developed by reviewing the EPA’s own very recent report on environmental mandates, see supra note 5, and by reviewing the major studies on the issue that cities themselves have conducted, including the Columbus Study, see supra note 2, the City of Anchorage’s report, see supra note 3, and the City of Lewiston, Maine’s report, see supra note 6.

In addition to having the virtue of providing the views of five different cities in a single report, the EPA REPORT notes that the EPA selected these cities “to ensure a mix of community characteristics such as size, economic base, geographic location, and ecological conditions,” EPA REPORT, supra note 6, at i, 3, although it continues that its sample “is in no way intended to be statistically valid or representative.” Id. at 3.

In addition to these reports, the American Public Works Association, Southern California Chapter has prepared a report entitled A STUDY OF NATIONWIDE COSTS TO IMPLEMENT MUNICIPAL STORMWATER BEST MANAGEMENT PRACTICES (May 1992); the State of Ohio also recently issued a report entitled THE NEED FOR A NEW FEDERALISM: FEDERAL MANDATES AND THEIR IMPACTS ON THE STATE OF OHIO; nine cities in Ohio have issued a report entitled OHIO METROPOLITAN AREA COST REPORT FOR ENVIRONMENTAL COMPLIANCE (Sept. 15, 1992); and the City of Chicago has prepared a report entitled PUTTING FEDERALISM TO WORK FOR AMERICA, TACK-
A. The "Unfunded Mandates" Complaint or the "Putting your money where your mandates are" criticism.

As suggested above, local governments are complaining that the number and cost of federal mandates have increased dramatically in recent years, while the federal funding to implement these mandates has simultaneously diminished. The confluence of


Mandates are imposed in a multitude of environmental programs addressing a variety of environmental problems, including water and air pollution, and solid and hazardous wastes. In its report, the EPA notes that municipalities often are involved in mandates involving the following environmental programs: (1) wastewater collection and disposal and the NPDES permit program; (2) industrial discharges and the NPDES pre-treatment program; (3) stormwater discharge and control and the NPDES stormwater program; (4) provision of drinking water and the PWSS program; and (5) collection and disposal of municipal solid waste and the RCRA subtitle D program. EPA REPORT, supra note 5, at 11, A1-15. The report provides a summary of these programs and their potential impact on local governments. Id. In addition, municipalities may face mandates that create significant expense at the local level under the Superfund and Underground Storage Tank programs. Id. at 14.

In its report, the City of Anchorage notes as follows regarding the specific focus of environmental mandates:

In the past, water pollution control programs mandated primarily by the Clean Water and Safe Drinking Water Acts have been responsible for about half of municipalities' compliance costs, according to the Environmental Protection Agency.

The agency estimates that another third of compliance costs results from mandates of the Clean Air Act. The remainder is attributed to a variety of land pollution programs mandated by [RCRA], [CERCLA] and [TSCA].

Also included in the final category are [EPCRA] and [OSHA]. ANCHORAGE REPORT, supra note 3, at 5 (referencing U.S.E.P.A., ENVIRONMENTAL INVESTMENTS: THE COST OF A CLEAN ENVIRONMENT (Dec. 1990)).

15. To some extent these categories are artificial. Several of these complaints overlap with one another. For example, in its report, the EPA at one point combines the concern relating to increasing numbers of mandates with the critique that these mandates do not address real risks: "Interviewees object to having to impose higher rates and taxes on their residents to pay for new environmental mandates. Weak economic bases and a lack of "buy-in" on the assessment of risk underlying the requirements reinforce this reluctance." EPA REPORT, supra note 5, at ii.

In addition, this list of criticisms is not necessarily all encompassing. For example, in its report, the EPA also mentions that local officials complained that "the current regulatory approach targets them disproportionately in assigning responsibility for protecting the environment . . . ." Id. at ii, 25-26.

16. COLUMBUS STUDY, supra note 2, at 2, 7 ("On a national level there has been a significant change in the policy on funding at the same time as the federal mandates have been increasing. While the environmental mandates are increasing in frequency
these trends has exacerbated local governments’ difficult financial situations. As a March, 1993, article entitled *Escalating Environmental Mandates: Can Local Governments Cope?*, which summarizes the first meeting of ICMA’s Environmental Mandates Task Force on December 8 and 9, 1992, stated: “The cumulative effect of 20 years of environmental legislation threatens to overwhelm many local governments.”

According to the Anchorage report, even the EPA anticipates that local government costs to comply with environmental mandates will increase by 60% to 120% in the 1990s. *ANCHORAGE REPORT, supra* note 3, at 38. The City’s own estimate is that the cumulative cost of federal environmental mandates per household between 1991 and 2000 will increase from $153 in 1991 to $631 in 2000. *Id.* at 49.

In a report he prepared for the Regulatory Information Service Center, Thomas D. Hopkins, Gosnell Professor of Economics, Rochester Institute of Technology, concluded that the evidence regarding the costs that the private sector and state-local governments bear in complying with federal regulation “remain[s] spotty and riddled with definitional and accounting inconsistencies.” Thomas D. Hopkins, *REGULATORY INFORMATION SERVICE CENTER, COSTS OF REGULATION: FILLING THE GAPS*, at 1 (Aug. 1992) [hereinafter *FILLING THE GAPS*]. Professor Hopkins went on to conclude, however, that the annual cost of complying with federal environmental regulations will increase from $42 billion in 1977 (in 1991 dollars) to an anticipated $178 billion in 2000 (in 1991 dollars). *Id.* at 2. He noted that the federal government’s July 1992 Mid-Session Review of the 1993 Fiscal Year Budget lists 25 new regulations from the EPA that will increase compliance costs by approximately $14 billion. *Id.* at 5. And he further observed that “[a]ll of these cost estimates are generated by the regulatory agencies themselves . . . [T]hey are more likely to understate than to overstate compliance costs.” *Id.* at 7. See also *ACIR REPORT, supra* note 3, at 24 (Discussing the impact of all federal programs on state and local governments: “[a]s requirements mounted [between 1981 and 1986], the costs of compliance also generally rose, but federal assistance declined.”).


The cover letter to the City of Anchorage’s report, which is signed by the Mayor of Anchorage and mayors from cities in forty-nine states, similarly notes that “[i]n the past seven years, both the number and costs of these [unfunded environmental] mandates have mushroomed. Tomorrow their costs may be intolerable.” *ANCHORAGE REPORT, supra* note 3, at 1 (cover letter).

In the foreword to the report, Mayor Fink of Anchorage describes the emerging concern with the substance of environmental mandates as follows:

It is difficult to address the subject of environmental mandates without being depicted by certain groups as “anti-environment.” Mayors may disagree with intolerable costs of a rule, with the necessity for regulating when risks are negligible, with the regulatory process itself, or because the science is lacking, or a particular mandate lacks flexibility. *None of these positions means they are anti-environment.*

To the contrary, many mayors contend the laws and regulations should be more stringent than they are today. Regardless of where they stand on
The call to match mandates with funding to implement them as one solution to this problem appears to have won broad national support among local government officials. According to the Anchorage Report, at the June, 1992, Conference of Mayors in Houston, Texas:

Mayors speaking ... were far more vocal this year than last over the ever-growing costs of unfunded federally-mandated programs. ... The mayors countered that, if the environment is such a high national priority, Congress ought to back up its commitment with the necessary funding or, at the very least, help pay for it. To reinforce that position, a strongly-worded position statement opposing unfunded federal mandates was adopted at the Houston conference.18

And the Anchorage Report indicates that Knoxville, Tennessee Mayor Victor Ashe, who chaired a workshop on unfunded mandates in Houston, made these comments during the session:

Congress does not have the money to fund ... the types of programs that get members re-elected. As a result, more and more mandates have been passed with less funding or no funding at all. It is wrong for Congress to create programs it is unwilling to fund ....19

the issue of environmental protection, very few are optimistic that they, and the populations they serve, will be able to finance an ever-growing list of unfunded national environmental imperatives.

Id. at iii (emphasis in original).

The Anchorage Report ultimately labels unfunded environmental mandates as a "major contributor to community financial woes ...." Id. at 1.

18. Id. at 13.

19. Id. at 14. In its report, the EPA similarly notes that officials from the case study communities "believed that EPA or the State should pay for all or part of the costs incurred by local governments in carrying out some EPA requirements." EPA Report, supra note 5, at 23. According to the EPA, these officials "object to having to impose higher rates and taxes on their residents to pay for new environmental mandates." Id. at ii, 23-24. Reflecting the overlap between the various categories of criticisms discussed herein, the EPA report continues that this reluctance is "reinforce[d]" by a "lack of 'buy-in' on the assessment of risk underlying the requirements ...." Id. (i.e., this reluctance is reinforced by the "belief that EPA's assessment[s] of risks are often incorrect or not well-founded," id. at 23) (i.e., Criticism # 4, infra).

The Dekals Resolution, supra note 8, at 1, captures the frustrations of municipalities relating to the growing number of unfunded environmental mandates succinctly, couching its recommendations as follows: (1) "no money, no mandates"—i.e., counties and cities should be relieved of their obligations to implement new mandates unless funding is provided; and (2) "reimburse[ment] [of] local governments for the costs of complying with existing federal mandates ...."
In short, the position that many local governments have articulated is that if the federal or state government believes that an environmental requirement is important enough to implement, it should fund its implementation.\textsuperscript{20}

B. Lack of flexibility in the regulatory approach and The "Nth" Degree/Negligible Risk Issue.

The Anchorage, Alaska report articulates the concern that the existing environmental regulatory scheme lacks flexibility, thereby sometimes requiring expenditures for "non-existent" problems:

\textit{[M]ayors take exception to paying for nonexistent problems. A Florida mayor (where the water table in his city is within a few feet of the surface) says costly controls for protecting groundwater in his community are worth every cent. But he argues other cities shouldn't necessarily have to abide by the same rules. As he says, if "the water table is a thousand feet down, it's dumb to waste money on groundwater." Another official asked: "Why should we pay to test for pesticides that aren't even used here?"\textsuperscript{21}}

Echoing this concern, the EPA's report notes that:

Case study communities believe regulations are often too prescriptive, requiring local governments to do work that does not solve local environmental problems. In some cases, local officials argued that compliance with EPA requirements prescribes an approach that they find inappropriate to their conditions, and they believe they are denied the latitude to choose a different approach.\textsuperscript{22}

And it adds that, more specifically, "[i]n several case communities local officials believed that EPA regulations required them to take

\begin{itemize}
\item\textsuperscript{20} See, e.g., Anchorage Report, supra note 3, at iv:
If recent private-sector and government forecasts are reliable indicators, today's environmental programs will not be affordable tomorrow. Add to today's costs the potential billions of dollars needed for pending and proposed laws and regulations, and the nation's communities could well face irreversible ruin. . . . The United States Congress has created the problem. It is up to Congress to fix it.
\textit{Id.; see also Maine Report, supra note 6, at 8 ("If the Federal Government mandates an expense through regulation, then the Federal Government should pay for it, not the local property taxpayer.").}
\item\textsuperscript{21} Anchorage Report, supra note 3, at 10-11.
\item\textsuperscript{22} EPA Report, supra note 5, at ii, 20-22.
\end{itemize}
action to address an environmental threat that did not exist locally."^^23

Similarly, in its policy recommendations to Congress and the EPA for improving the country's environmental regulatory scheme, the International City/County Management Association Environmental Mandates Task Force highlighted the lack of flexibility accorded municipalities in complying with federally-created environmental mandates and called for change:

Local governments should be able to seek a waiver or exemption if they can show that the exposure model, risk assumptions, or other factors that underlie a regulatory requirement are not valid in their situation. In those cases, EPA or the state should be authorized to provide a process such as an informal hearing or to determine if a waiver or exemption from the requirements is warranted.^^24

The Anchorage Report describes local governments' concern that implementing certain environmental mandates will have, at most, a negligible effect on health, stating as follows:

Mayors . . . want it understood that they aren't seeking to overthrow environmental laws. They just don't like to waste money. When they are forced to implement unfunded environmental mandates that will, at best, have a negligible effect on health, they get angry. They expect common sense in the policy arena,

23. Id. at 20. The call for more flexibility is echoed in an article by Edward F. Hayes, Vice President for Research for Ohio State University and the chair of Columbus, Ohio's Environmental Science Advisory Committee, in which Mr. Hayes uses Columbus's experience with the Safe Drinking Water Act to support his call for additional flexibility, as follows:

New amendments to the SDWA illustrate both the rigidity and uncertainty of some federal regs. Under the amendments, water utilities must analyze drinking water for at least 133 specified pollutants, beginning in 1993. Many of the substances are not present in significant quantities in Ohio. One of them, DBCP, a chemical whose use was discontinued 15 years ago, was used almost entirely on pineapples in Hawaii. EPA's promised guidelines on the conduct of "vulnerability assessments"—which project local impacts of a particular pollutant—to obtain local waivers have not appeared. Regulations that let state and local governments develop their own water quality programs could produce better results at lower costs.


and they expect a balance between needs of people and the needs of the physical environment. Without balance, a regulatory backlash will be inevitable.

More and more, local officials say, if environmental policies don't reflect community needs, they have no alternative but to oppose them.25

Along the same lines, the Anchorage Report provides:

Local officials respect the need for an umbrella of environmental regulations that responds to careless acts of the past and prevents them in the future. What they don't respect or need are edicts by distant bureaucracies to clean up the final "nth" degree of a pollutant, regardless of its cost.26

Also related, some cities criticize what they characterize as Congress' tendency to overcompensate for suspected dangers of pollutants.27 In its report, the City of Lewiston, Maine articulates this concern as follows: "The rules must meet the problem and not

26. Id. at 10.
27. Additionally, the New York Times' characterization of the approach that federal legislation has taken in light of the inherent uncertainty regarding the nature and extent of environmental risks is that "[m]ore than 10 years ago, the Federal Government adopted the view that when there is any doubt, it is better to take the prudent approach than do nothing." Patch of Weeds, supra note 3, at A16. And, the Times' assessment of this strategy was less than complimentary: "But a decade later, the economic costs of this policy are painfully clear while the benefits remain largely unmeasurable." Id.

One of the resolutions that Dekalb County adopted makes the same point:

BE IT FURTHER RESOLVED that Congress and the Administration are urged to include in any future mandate, a provision that requires federal departments and agencies to provide scientifically sound assessments of purported health, safety or environmental risk prior to the imposition of any new mandate on local governments . . . .

See Dekalb Resolution, supra note 8, at 2.

Senator Moynihan observed this trend toward local governments' questioning the legitimacy of environmental regulatory objectives in a recent article:

Obviously, we are seeing a new trend. Federal environmental laws are being questioned by state and local governments, which say they can't afford to comply with all environmental laws . . . . An editorial in the Jan. 8, 1993, issue of Science magazine alerts us to the "growing questioning of the factual basis for federal command-and-control actions," all because of concerns over regulatory costs. The message is clear. State and local governments will hold Congress and EPA more accountable in the future about obligating them to spend their resources on federal requirements. They will want "proof" that there is a problem and confidence that the legislated solution will solve it. California's threat to return enforcement of its drinking water program to EPA last spring speaks volumes. The most environmentally ad-
go beyond the ability to pay or an acceptable level of correction. . . . Base requirements on quality and ‘bang for the buck’ instead of arbitrary requirements [are what is needed].” 28 Several members of Congress recently seemed to accept this criticism of their actions. The New York Times summarized their views as follows:

[O]ne lesson of environmental policy-making in the 1980’s was that acting on the basis of being safe rather than sorry had unintended consequences. Not the least of them has been many costly rules that are not producing measurable improvements in public health or the environment. 29

In short, at least some local communities believe that the federal environmental requirements are overly rigid and that this defect, together with a tendency to pursue a problem to the “nth degree,” raises significant cost-effectiveness and credibility issues.

C. Failure to Coordinate and to Prioritize Among Risks.

The critique of environmental regulation relating to a failure to coordinate and prioritize, contains several components. First, local officials complain that the EPA fails to look at environmental problems systematically or prioritize among them. 30 These officials claim that there is not enough money to do everything at once. 31 Accordingly, there is a need to analyze all of the environmental protection and other needs that communities face and then develop comprehensive strategies for addressing these needs in a prioritized fashion that targets the worst problems first.

During the past few years, high ranking EPA officials have be-

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29. Keith Schneider, Second Chance on Environment: Opportunity to Redefine Core of American Policy on Pollution, N.Y. TIMES, Mar. 26, 1993, at A17. The same New York Times article indicates that the environmentalists’ position is that requiring stronger proof of risk before acting is “a recipe for ‘disaster,’” quoting Dr. Adam Finkel of Resources for the Future: “As a scientist, we always hope to have more research to answer complex questions . . . . But in 1993 we don’t have the scientific basis for rejecting the current approach, which says we should be prudent when faced with uncertainty.” Id.
30. See, e.g., CHICAGO REPORT, supra note 6, at 17.
31. See, e.g., id. at 31.
gun to voice this criticism, that the federal government fails either to evaluate risks systematically or to prioritize among risks. Former EPA Administrator Reilly often spoke about the need to prioritize among risks. In 1989, he asked the EPA's Science Advisory Board to "assess and compare different environmental risks in light of the most recent scientific data . . . and to recommend improved methodologies for assessing and comparing risks and risk reduction options in the future." In its 1990 report, Reducing Risk: Setting Priorities and Strategies For Environmental Protection, the Science Advisory Board highlighted the importance of matching resources to risks so that we tackle the worst problems first, stating as follows:

The environment is an interrelated whole, and society's environmental protection efforts should be integrated as well. Integration in this case means that government agencies should assess the range of environmental problems of concern and then target protective efforts at the problems that seem to be the most serious.


34. See REDUCING RISK, supra note 33, at ii.


The ICMA Environmental Mandates Task Force has voiced similar concerns about the EPA's failure to prioritize among risks:

Too often EPA targets enforcement actions without regard to other sources of pollution that may be causing equal or greater harm to the environment. Under Superfund, a small town in Wisconsin faces the prospect of paying over $50 million to clean up two landfills that may be contaminating a creek. Yet even after those sites are cleaned up, the creek will still be contaminated by pollution from three other landfills, a golf course, airport, and agricultural lands that drain into the creek. A regional plan would evaluate all of these sources and decide what priority to give each instead of spending extraordinary amounts on two sources while ignoring others.
Former EPA General Counsel E. Donald Elliott made the same point in a recent article:

This country is long overdue for a national debate on our policies toward environmental risk. . . . We cannot maintain forever the fiction that we are rich enough (or foolish enough) to spend whatever it takes to eliminate all risks, even trivial ones, instantly from our environment. We must set rational priorities based on the best science available and devote our limited resources first to the areas where the opportunities for risk reduction are greatest.\(^{36}\)

Second, and related, some cities criticize the regulatory scheme for being "oriented more to public pressure and special interest groups instead of a risk or science-based system."\(^{37}\) Several officials have termed the federal approach to environmental regulation "reactive" to public fears, not responsive to scientific analyses. As former EPA Administrator Reilly put it:

We need to develop a new system for taking action on the environment that isn't based on responding to the nightly news. . . . What we have had in the United States is environmental agenda-setting by episodic panic. . . .\(^{38}\)

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37. COLUMBUS STUDY, supra note 2, at 9; Browner Letter, infra note 41, at 2 (citing a need to "[i]mprove the science behind EPA's decision making," noting that "many local governments . . . question the health and environmental benefits of EPA's requirements.").

In REDUCING RISK, the EPA's Science Advisory Board indicated its view that the environmental laws "are more reflective of public perceptions of risk than of scientific understanding of risk." REDUCING RISK, supra note 33, at A30.

38. Keith Schneider, New View Calls Environmental Policy Misguided, N.Y. TIMES, Mar. 21, 1993, at A1, A30. The same article indicates that Richard D. Morgenstern, the acting administrator for policy planning and evaluation at the EPA, explains the problem this way: "our society is very reactive, and when concerns are raised people want action. . . . We're now in the position of saying in quite a few of our programs, 'Oops, we made a mistake.'" Id. at A30.

At least some local government officials appear to share this concern, as reflected by the following statement in a recent ICMA Newsletter:

More and more frequently, state and local officials, public health officers, and even many scientists agree that legislation is not based on sound research. According to a New York Times article of March 21, 1993, panic and popular perceptions of risk guide the formulation of many environmental statutes. For example, after government scientists concluded that asbestos was a carcinogen, Congress reacted to public hysteria and passed the 1985 law that led cities and states to spend $15 to $20 billion to remove it
Third, and also related, there is the sense that the focus of attention is constantly shifting from one set of problems to another, instead of identifying certain major concerns that require priority attention. This constant shifting of priorities and focus, and the continual establishment of new obligations and the revision of existing requirements, creates an enormous burden on local governments simply to stay current, to understand the content of current environmental requirements, and to plan and budget to meet these constantly shifting obligations.39

Fourth, the Columbus Study identifies concerns that are inherent in the current media-specific approach and the resulting failure to evaluate problems (and possible solutions) holistically:

With the passage of the above mandates comes a myriad of federal and state agencies that are now responsible for assuring compliance. This has imposed additional burdens on local government because the enforcing agencies lack coordination. They take a single issue compliance schedule approach.40

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39. EPA REPORT, supra note 5, at ii (“All of the communities interviewed noted that both the increasing volume of regulatory requirements, as well as the fact that regulations and standards do not stay static, pose significant problems and costs for them across several different environmental services.”). Id. at 18 (“The climate of uncertainty... over what regulation will be published and when, and what the regulation will require, makes it difficult for local officials to plan and budget for the future.”).

40. COLUMBUS STUDY, supra note 2, at 6.

ICMA’s Environmental Mandates Task Force made a related recommendation that the EPA begin to shift from a media-specific approach to a more comprehensive one in its letter to Administrator Browner, noting as follows that the EPA should focus on achieving integrated environmental goals and not on unduly rigid prescriptions for action:

EPA should change its orientation from rigid regulation toward focusing on goals and goal attainment schedules .... EPA’s watershed, estuary, and other geographic-specific initiatives are good models for taking multimedia, ecosystem approaches with clearly defined environmental goals. To the extent possible, EPA should promote similar initiatives in other areas such as the clean up of contaminated properties .... EPA has begun to issue rules
In sum, local officials, and many federal officials as well, believe that the federal government needs to shift to a new paradigm for addressing environmental problems. This new paradigm would involve (1) to the extent feasible, using "good science" systematically to define the environmental problems most in need of attention; and (2) evaluating a local government's environmental problems comprehensively and developing strategies and priorities based on this complete understanding of the problems that need attention.

D. "Process Flaws:" (1) Onerous Paperwork Requirements; (2) A Lack of Credibility Concerning the Cost of Complying; and 3) A Lack of "Partnership."

In addition to the substantive concerns discussed above, local governments also raise a number of "process" issues relating to federal environmental regulation. One such criticism relates to the heavy paperwork requirements that federal and state regulatory requirements impose, combined with a practice of underestimating the cost of preparing such paperwork. According to the Anchorage Report, the EPA's approach in the stormwater arena is a case in point:

that affect industrial sectors such as the pulp and paper industry and steel industry in "clusters." These rules cover several media so that air, water, and other requirements are considered at one time. They are effective for five or more years, thus enabling the affected industry to plan with the certainty of these requirements. Local governments would also benefit from a similarly integrated, multi-media approach to rules that affect them. EPA should create a work group including representatives of local governments to explore the development of such a rule making.

Browner Letter, infra note 41, at 2-3.

For a thorough discussion of the need for a "holistic," or "integrated," approach in dealing with the environment, see Frances H. Irwin, An Integrated Framework for Preventing Pollution and Protecting the Environment, 22 ENVTL. L. 1 (1992).

There are not 11 different environments, each defined by a major statute. There are not even 25 different environments, each defined by a congressional committee jurisdiction. In fact, there is but 1 natural environment. The components of that natural environment are interrelated in many complex ways, and pollutants tend to travel from one part of the environment to the other.

Id. at 6 (citing THE CONSERVATION FOUND., NEW PERSPECTIVES ON POLLUTION CONTROL: CROSS-MEDIA PROBLEMS 1 (1985)). For a discussion of the need for an integrated approach specifically relating to ocean law and the law of the sea, see Martin H. Belsky, The Ecosystem Model Mandate for a Comprehensive United States Ocean Policy and Law of the Sea, 26 SAN DIEGO L. REV. 417 (1989).
Anchorage Municipal Engineer Ross B. Dunfee contends "EPA deserves a public flogging for its extraordinarily bad estimating in determining the cost to file the municipal stormwater application." Anchorage is spending an unexpected $1.5 million to file its Part I application, not the less-than-$50,000 projected by the EPA; "only" a thirty-fold miscalculation.

Other stormwater permit coordinators report similar high costs. They speculate EPA deliberately underestimated the permit costs so it would not be subject to the national threshold limits established by Executive Order 12291, which requires a more thorough analysis. Had that analysis been performed, the legislative outcome might have been more responsible.41

Local governments also charge that the federal government does not view local governments as partners. They believe that this feeling is manifested in several areas. First, communities feel that the EPA fails to share information with them.42 As a result, as the EPA's report notes, local officials are "not kept informed of federal environmental requirements."43 Therefore, local governments "often [are] unaware of EPA requirements or [become] informed about the regulations after an important deadline has passed."44 Second, at least some communities apparently believe their relationship with the EPA is more adversarial than cooperative. As the EPA Report notes:

Case study communities are dissatisfied with the current Federal-Local relationship—which they view as often more adversarial than cooperative. Local officials believe they are not treated respectfully as partners in environmental protection

41. ANCHORAGE REPORT, supra note 3, at 14. In its January 20, 1993, letter to EPA Administrator Carol Browner, the ICMA Environmental Task Force noted that this concern, relating to the EPA's underestimating costs, is not limited to completing paperwork, but instead applies to compliance with its requirements generally, providing as follows: "Frequently EPA's estimates for the cost of compliance do not reflect the costs to local governments or are off by orders of magnitude." Letter from Environmental Mandates Task Force to Carol Browner, at 3 [hereinafter Browner Letter].

Professor Hopkins notes that "any regulator has a natural incentive to estimate conservatively the costs it is imposing on others. Those who must comply with the regulations tend not surprisingly to believe their actual costs exceed these estimates . . . ." FILLING THE GAPS, supra note 16, at 13.

42. See e.g., EPA REPORT, supra note 5, at 18 ("[local governments] . . . obtain[] information more often from private consultants and supply vendors than from the Federal Register.").

43. EPA REPORT, supra note 5, at 16.

44. Id.
which erodes goodwill.45

Third, the EPA Report notes that several local officials criticized the federal environmental regulatory process on the ground that "they had very little opportunity to contribute to the development of EPA regulations in order to make them more implementable at the local level."46

Thus, at least some local officials feel that they are being told what to do; that they do not have a meaningful opportunity to offer their views; and that these already serious problems are exacerbated by the EPA's failure to have adequate lines of communication to ensure that local governments are aware of their responsibilities, its imposition of burdensome paperwork requirements, and its flawed estimates of the costs of compliance.

II. PRELIMINARY REFLECTIONS CONCERNING POSSIBLE STRATEGIES TO ADDRESS FEDERAL/LOCAL GOVERNMENT TENSIONS

A. Recognizing that a Problem Exists.

The first step in addressing the criticisms that local governments are making regarding federal environmental mandates is to determine whether these criticisms have merit. The federal government appears to have taken this step and concluded that adjustments to its environmental regulatory scheme are warranted. First,

45. Id. at iii. One local government representative pointed to an EPA Guidance document as an example of what is wrong with the EPA's attitude toward local governments. This representative noted her view that the title of the document, "Using State and Local Officials to Assist in Community Relations," spoke volumes. Using State and Local Officials to Assist in Community Relations (OSWER Directive #9230.0-17) (Sept. 28, 1990).

46. EPA REPORT, supra note 5, at 27. In its letter to Administrator Browner, ICMA's Environmental Mandates Task Force makes the same point, citing a need to "[o]pen the Regulatory Development Process," and "strongly recommend[ing] that EPA ensure that local governments and other stakeholders have an opportunity to participate in a regulatory negotiation or advisory process before a regulation is proposed . . . . [L]ocal governments should have a role in developing the regulations they will ultimately be responsible for implementing." Browner Letter, supra note 41, at 1.

The Meeting Notes from the March 5, 1993, ICMA Environmental Mandates Task Force reflect that one local government official said that "the idea of partnership only exists when discussing who will pay for the mandates." MEETING NOTES, supra note 10, at 7. This official continued that "[l]ocal governments are not involved in developing regulations . . . [and] that it is difficult to be a partner to someone who [will] not allow you to play a role in the process." Id.
the statements from President Clinton and Senator Dole quoted above reflect a recognition that unfunded mandates do not come without cost, even though the money does not come from the federal treasury.\textsuperscript{47}

Second, high level EPA officials in both the Bush and Clinton Administrations have acknowledged that the federal requirements are partly to blame for the tensions between the local and federal governments. In September, 1992, then EPA Deputy Administrator F. Henry Habicht II said that the EPA is "rethinking its relationship with local governments" in light of the escalating costs of environmental compliance.\textsuperscript{48} He also indicated that the EPA recognized that some mandates required "inefficient and ineffective expenditures," and he said that the EPA was trying to improve its approach to environmental regulation to eliminate these expenditures.\textsuperscript{49} Current EPA Administrator Carol Browner, in testimony she gave to Congress on March 31, 1993, acknowledged the need for providing "relief" to local governments from environmental mandates:

State, tribal and local governments feel overwhelmed by the breadth, complexity and cost of existing environmental needs, mandates and expectations, and must get some relief. If States, tribes, and local governments fail in their environmental management efforts, and they are in danger of failing, the EPA fails. . . . Responsible stewardship of the nation's environmental agenda requires exercising the utmost leadership in bringing together the best of federal efforts and State, tribal, and local efforts.\textsuperscript{50}

Third, institutionally, the EPA has begun to investigate this issue and has reached the same conclusion. First, as noted above, in August, 1993, the EPA issued what it termed its first report on the cumulative impact of environmental mandates on local govern-

\textsuperscript{47} In October 1993, President Clinton issued Executive Order 12875 for the purpose of curtailing the creation of unfunded environmental mandates by Executive agencies. 58 Fed. Reg. 58,093 (1993).
\textsuperscript{48} 23 ENV’T REP. (BNA) 1430, 1430 (Sept. 18, 1992).
\textsuperscript{49} Id.
\textsuperscript{50} Testimony of Carol M. Browner, Administrator, U.S. Environmental Protection Agency, before the Comm. on Environment and Public Works, U.S. Senate, (Mar. 31, 1993) (on file with author) [hereinafter Browner Testimony]; see also Browner Says EPA Will Pursue Flexibility in Dealings With State, Local Governments, 24 ENV’T REP. (BNA), at 358-59 (June 25, 1993).
This report found that local governments experience a wide variety of problems implementing and complying with environmental mandates, including: (1) financial problems, (2) ineffective communication, (3) uncertainty about future requirements, and (4) a lack of governmental partnership between the EPA and local governments. Second, in its December 18, 1992, report entitled "Environmental Requirements for Local Governments Dialogue Group," the EPA noted that the federal-local "partnership" has changed dramatically—concluding that from origins based on federal support for local environmental protection efforts, this partnership now is characterized by aggressive mandates:

The original theory of providing environmental protection by means of a federal/state/local partnership by furnishing federal support—through financial and technical assistance—has been lost through a heavier emphasis on aggressive Federal regulation and mandates. An increasing number of local governments now lack the financial resources to meet the publicly prescribed requirements. Environmental statutes, regulations, and implementation procedures too frequently rely on incomplete cost, needs, and scientific data. Moreover, for a variety of reasons—some statutorily imposed, some imposed through administrative discretion—there is insufficient flexibility for local jurisdictions to adapt to the distinctive, specific characteristics of individual areas. Therefore, the limited resources available are not being used to address the most pressing health and environmental problems. The result is less than optimal environmental protection.

In short, it appears that the federal government has begun to recognize not only that tension exists, but that some of the local governments' criticisms have merit.

51. EPA REPORT, supra note 5. According to this report, "no study had previously been undertaken by EPA or any outside group to provide Agency decision makers with both a multi-media perspective and a multi-issue characterization of the types of problems being experienced by local governments in implementing EPA mandates." Id. at 1.

52. Id. at 15.


54. Laurie Goodman, then EPA Associate Administrator for Regional Operations and State/Local Relations, predicted in March 1993, that "the environmental
B. Addressing the Funding Issue.

It appears to be virtually undisputed that along with the increase in mandates, federal financial contributions to local government efforts to meet federal mandates have decreased dramatically in recent years. This funding-portion issue has two components. First, to what extent (if any) is it appropriate for the federal government to subsidize or otherwise provide financial support to local governments in their efforts to meet federal environmental mandates? Second, if such financial support is appropriate, what form should it take?

In terms of whether the federal government should provide funding support to local governments, the EPA's report notes that local governments play a dual role, acting both as public service providers and regulated entities:

Although local governments are one of the largest sectors of the regulated community, they are different from other regulated entities in their provision of essential services to the public. As a result, local governments are an integral part of the public sector environmental management framework and should therefore be treated differently than other regulated entities. EPA needs to change the way it interacts with local governments—which is primarily as regulated entities comparable to private industry—and achieve a balance between interacting with local governments in their role as public service entities and in their role as regulated entities.

Regarding their activities as public service providers, it appears to be widely accepted that local governments may warrant some level of federal financial support. More sophisticated analysis, however, needs to be given to the appropriate parameters for financial assistance. For example, the case seems to be stronger for federal financial assistance to fund environmental mandates relat-
ing to a local government’s provision of a public service such as a water supply, than it is for funding environmental mandates relating to a local government’s carrying out other functions, such as operating municipal golf courses.

Concerning the forms of financial assistance, the federal government needs to be creative in evaluating and establishing alternative mechanisms. Local governments obviously would welcome renewed and expanded use of the grants approach employed under the Clean Water Act for funding water treatment plants. The era of such grants, however, appears to have ended and seems unlikely to be revived, given the federal government’s budget constraints. Other approaches that the federal government is using include the State Revolving Fund loan program, also for Clean Water Act water treatment plants, and the Clean Air Act requirement that states which seek to administer the Clean Air Act create funding sources that will ensure an adequate infrastructure to implement these responsibilities.

In exploring funding options, the federal government should evaluate the efficacy of strategies being used at the state level. Two examples from the New York State experience are instructive.


59. See sources cited supra note 58.

60. 33 U.S.C. §§ 601-610 (1988); see also ENVIRONMENTAL LAW PRACTICE GUIDE, supra note 58, § 18.14[3].

61. 42 U.S.C. § 7410(a)(2)(E) (1988). The latter approach will be of use for situations in which local governments are acting as the regulator charged with overseeing implementation of an environmental mandate by others.

62. As Justice Brandeis said in his famous dissent in New State Ice Co. v. Liebmann, 285 U.S. 262 (1932), the states may serve as the “laboratories” of “social and economic experiments without risk to the rest of the country.” Id. at 311.

Paradoxically, the CHICAGO REPORT suggests that mandates undermine the contribution as “laboratories” that local governments otherwise might make:

The imposition of unfunded federal mandates upon state and local governments undermines their role as laboratories of democracy in two ways. The continually expanding slice of the state and local budgetary pie consumed by unfunded federal mandates crowds out funding for non-mandated state and local governmental services and programs. Taxes cannot be raised continually. This results in a stifling of experimentation and innovation. Local problems and concerns often go unrecognized in Washington.

Additionally, the mandated areas themselves are largely immune from state and local modification to suit local needs and conditions.

CHICAGO REPORT, supra note 6, at 12.
First, in July, 1993, the State enacted the New York State Environmental Protection Act.\textsuperscript{63} This Act creates a revenue stream that is devoted to environmental programs.\textsuperscript{64} Among other purposes, these funds may be used:

to design, acquire, construct, improve and install certain landfill closure, waste reduction, recycling, solid waste management planning, park and protected area[s], local waterfront revitalization plans and secondary materials marketing projects, and . . . open space conservation projects, including the provision of assistance to local governments.\textsuperscript{65}

Second, New York State has created a legislative scheme that provides a State subsidy to municipalities for their share of liability for State Superfund sites for which they are liable because of their status as owner or operator of the site.\textsuperscript{66} This program of providing state funding for municipally owned or operated sites appears to have facilitated the expeditious handling of such sites. At least one commentator has strongly urged that the willingness by municipalities to bear a portion of the cleanup costs greatly promotes partici-

\begin{thebibliography}{99}
\bibitem{63} Environmental Protection Act, Act of Nov. 28, 1990, ch. 43-B, § 3, 1993 N.Y. Laws 610 (codified at N.Y. ENVTL. CONSERV. LAW §§ 54-0101 to 54-1301 (McKinney 1993 and Supp. 1994)).

\bibitem{64} Enactment of this Act followed several years of failed attempts to create a fund for local governments, including the attempt in 1990 to pass an “Environmental Bond Act.” The concept of an ongoing revenue stream may actually preferable to that of a Bond Act, since a Bond Act is a fixed sum that eventually will run out. In contrast, the Environmental Protection Act is designed to produce revenue annually for municipalities to use to meet their environmental obligations.

In enacting this law, the legislature explained its rationale as follows:

The legislature finds and determines that there is a need to assure that the state has the capacity to protect the environment and public health, safety and welfare through the provision of assistance to state agencies, public benefit corporations, public authorities, municipalities and not-for-profit corporations . . . .

\textit{Id.} at 1517.

\bibitem{65} \textit{Id.}

\bibitem{66} Under New York law, municipal owners and operators are eligible to receive 75% funding of their share of the cost of investigating and remediating a Superfund site, if they meet certain conditions. In particular, to become eligible for a state contribution to its remedial obligations, a municipality must, \textit{inter alia}, sign an Order committing it to conduct the work deemed necessary by the State’s Department of Environmental Conservation. In addition, the municipality, under this Order, must commit to make all reasonable efforts to secure payments from other responsible parties and it must make such efforts to obtain coverage from its insurers. N.Y. ENVTL. CONSERV. LAW § 27-1313 (McKinney 1984 & Supp. 1993); N.Y. COMP. CODES R. & REGS. tit. 6, § 375.2 (1986).
\end{thebibliography}
pation by private parties, and it is clear that the State commitment to fund seventy-five percent of the municipality's share contributes to the municipality's willingness to come forward.\textsuperscript{67}

In sum, assuming the policy judgment that federal financial assistance is appropriate to help local governments meet federally required environmental infrastructure needs, the federal government should systematically determine where such assistance is appropriate and most needed, and it should look to state as well as federal experience in designing financial assistance strategies.

C. Lack of Flexibility and Negligible Risk.

Creating adequate flexibility in our environmental regulatory system is an immense challenge. This is so in part because this objective competes, to some extent, with two other extremely important components of environmental regulation: (1) the need to keep things as simple as possible for ease of administration of our regulatory system;\textsuperscript{68} and (2) the critical role that the federal government plays in maintaining a level playing field throughout the country.\textsuperscript{69} One relatively straightforward fix is to improve the variance process that is designed to allow for flexibility within this national regulatory framework to accommodate individual differences. In particular, the federal government needs to change

\begin{itemize}
\item[\textsuperscript{69}] For an example of how the federal government attempts to maintain a level playing field throughout the country, see David L. Markell, \textit{The Federal Superfund Program: Proposals for Strengthening the Federal/State Relationship}, 18 WM. & MARY J. OF ENVTL. L. at 53-54. See also Weyerhauser Co. v. Costle, 590 F.2d 1011, 1042 n.46 (D.C. Cir. 1978).
\end{itemize}
iables, its structure to avoid situations such as that recounted by Mr. Hayes, Vice President for Research for Ohio State University, in which the EPA sets national standards and, while promising to establish variance procedures later on, experiences delays in this second phase that greatly reduce needed flexibility in the regulatory scheme. The federal government's practice should be to create national standards and variance procedures simultaneously, so that it immediately can begin to apply these standards in a reasonable way, including allowing variances from them when appropriate. Other strategies undoubtedly would help to balance these objectives as well. One of the primary charges of the Advisory Committee that has been established to address the application of environmental regulations to local governments should be to develop such strategies.

**D. Revisiting Substantive Norms.**

Perhaps the most difficult task for the federal government is revisiting the appropriateness of some of its requirements. Some commentators have suggested that the federal government rarely reduces its requirements and that changes almost always are in the direction of additional regulation.

This is the area of future debate as to which environmental groups are likely to be most leery. As the New York Times noted, one of the issues that the "nascent movement" to revisit regulations raises is whether environmentalists will realize their "fear [that] the issue of cumulative burden may become a Trojan horse for deregulation."
In light of the EPA’s expertise and its role of maintaining a “level playing field” throughout the country, some argue that it is and should be the federal government’s responsibility to establish national standards of acceptable risk.\textsuperscript{73} Several local government representatives, however, have challenged the quality of the federal government’s performance in carrying out this and related responsibilities. For example, they have criticized the philosophy

\textsuperscript{73} Numerous commentators have urged a need for uniform national environmental standards, in a variety of contexts. In connection with Superfund, for example, Lance Miller, the Vice President of the Association of State and Territorial Solid Waste Management Officials (“ASTSWMO”), suggested that,

U.S. EPA’s role in a delegated Superfund program [should] first and foremost be to ensure the proper implementation of the program throughout the nation thereby providing all citizens are equally protected from the effects of contaminated sites. . . . U.S. EPA could be responsible for . . . establishing national guidance and policy; . . . In particular, U.S. EPA should focus efforts on establishing guidance for national cleanup approaches, standards, and/or methodologies to ensure cleanup decision consistency.

\textit{Testimony of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) for the Hearing of the U.S. House of Representatives Subcomm. on Transp. and Hazardous Materials on the Issue of State Role in Superfund, 103d Cong., 1st Sess. 15-16 (Oct. 28, 1993) (statement of Lance Miller, Assistance Commissioner of Site Remediation for the New Jersey Dep’t of Environmental Protection and Energy, and Vice President of ASTSWMO) (emphasis added).}

Also, in order to improve the functioning of environmental programs on a nationwide basis and soothe the relations between federal and state authorities, “EPA should retain substantial responsibilities both for managing nondelegated sites and for ensuring that the remediation process under both Federal and State programs is proceeding effectively and efficiently. The Agency’s specific responsibilities should include . . . conducting research, setting national standards, and pursuing innovative technologies . . . .” \textit{Testimony before the Subcomm. on Transp. and Hazardous Materials Comm. on Energy and Commerce, U.S. House of Representatives, on the Role of the States in Superfund, 103d Cong., 1st Sess. 11-12 (Oct. 28, 1993) (statement of Dr. Edwin H. Clark, II, President, Clean Sites, Inc.) (emphasis added).} Similarly, the National Governors’ Association, in a Policy Statement adopted in August, 1993, recognizes that,

EPA, states, and responsible parties have been hampered in site cleanup decisions by the lack of a clear definition of “how clean is clean.” EPA should be directed to work in close cooperation with states to develop criteria or guidelines for the national contingency plan on the level of remedial action that is acceptable to protect public health and the environment.

\textit{National Governors’ Association, Policy, NR-5.2, at 1 (Aug. 1993).}
that it is better to be "safe than sorry," and that, given the uncertainty surrounding the risks associated with exposure to toxic and other pollutants, it is appropriate to over—rather than under—regulate these pollutants.\footnote{See supra notes 27-28 and accompanying text.} Further, they have challenged the EPA's basic methodologies for assessing degree of risk.\footnote{See \textit{COLUMBUS STUDY}, supra note 2, at 9; see also note 32 and accompanying text.}

Resolving these issues is beyond the scope of this article. They currently are receiving considerable attention.\footnote{See \textit{Markell supra} note 68, at n.200.} One point that deserves highlighting, however, is the need for the federal government to improve its consistency in approaching these issues. Different regulatory programs differ dramatically in the amount of risk they tolerate. For example, cleanups under the federal Superfund program generally are much more stringent and much more expensive than are cleanups under the Underground Storage Tank (UST) program.\footnote{See generally \textit{Congress' Environmental Turf}, \textit{THE ENVT'L FORUM}, Jan./Feb. 1994, at 34; Richard J. Lazurus, \textit{The Neglected Question of Congressional Oversight of EPA: Quis Custodi
det Ipsos Costodes (Who Shall Watch the Watchers Themselves)?}, 54 \textit{LAW & CONTEMP. PROBS.} 205 (1991).} Such inconsistencies need to be identified and justified or eliminated.

\textit{E. The Need for More Comprehensive Regulatory Approaches.}

The federal government needs to continue to move in the direction of evaluating the entire landscape of environmental concerns comprehensively, rather than from a piecemeal, media-specific perspective. The overriding question in this area is whether the EPA has the ability (and the will) to make this change through administrative adjustments, or whether legislative changes are needed as well.

Numerous institutional impediments exist to shifting to a multi-media, or holistic, approach to identifying and solving environmental problems. First, Congress' structure is not conducive to such an approach. A multitude of different committees share jurisdiction for environmental legislation.\footnote{See generally Congress' Environmental Turf, \textit{THE ENVT'L FORUM}, Jan./Feb. 1994, at 34; Richard J. Lazurus, \textit{The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Costodes (Who Shall Watch the Watchers Themselves)?}, 54 \textit{LAW & CONTEMP. PROBS.} 205 (1991).} Ensuring coordination among these disparate groups is a significant impediment to comprehensive analysis. The division of responsibility between Congressional committees responsible for environmental legislation...
and those vested with responsibility for appropriations is an additional impediment.\textsuperscript{79}

The extensive number of media-oriented environmental statutes is a second barrier to coordinated decision making. Different statutes create different mandates for action with their own time frames.\textsuperscript{80} These mandates typically are established without regard to the other items on the "EPA's plate"; their existence as independent obligations serves as an impediment to rational, coordinated decision making. For all of these reasons, some commentators have concluded that legislative change is needed if the environmental regulatory structure is to be improved significantly.\textsuperscript{81}

The EPA's own institutional structure also guarantees media-specific concerns a prominent voice and complicates the evaluation of problems from a multi-media perspective. To a significant extent, the EPA is organized by media (e.g., there is an Office of Air and Radiation, an Office of Water, and an Office for Solid Waste and Emergency Response).\textsuperscript{82}

It is not clear whether the EPA is capable of comprehensive analyses of environmental issues, given its current institutional structure and the structure of its governing statutes and of Congress itself.\textsuperscript{83} In a recent article, two EPA employees raised this issue as well, stating as follows:

Is there a better way to organize EPA? The agency has long been structured according to media—air, water, land—often limiting individual programs to a specific environmental problem. The result—isolated, sometimes fragmented, programs—often leads to cases where an industry [or local government] is subject to repetitive or even competing regulations from various EPA offices.\textsuperscript{84}

\begin{itemize}
\item[79.] See Lazurus, \textit{supra} note 78.
\item[81.] ACIR \textit{REPORT}, \textit{supra} note 3, at 27.
\item[82.] In addition to these media-specific offices, there are offices with a broader focus (e.g., the Offices of Enforcement and Compliance Assurance, General Counsel, and Policy, Planning and Evaluation).
\item[83.] The \textit{COLUMBUS STUDY} raised the failure of the federal government to coordinate internally. \textit{COLUMBUS STUDY} \textit{supra} note 2, at 6.
\end{itemize}
They continue that the EPA's recent use of "an innovative management tool, 'the regulatory cluster,' helps to avoid these potential problems." They describe such clusters as follows: "These clusters combine broad, cross-cutting issues, directing action to our overall mission rather than to more narrow, program-specific concerns." Similarly, the Anchorage Report notes that the EPA's "cluster"-oriented strategies towards the pulp and paper industry hold promise within the existing structure and deserve careful review as an alternative to a more fundamental realignment of responsibility.

In this early period of her administration, Administrator Browner needs to evaluate the viability of the existing EPA structure, and determine whether to retain this structure in its current form or refine it. One sign that Administrator Browner is not completely comfortable with the existing structure is her recent decision to centralize more fully the enforcement function within the Office of Enforcement and Compliance Assurance, reducing the power and autonomy of the media-specific offices.

The EPA also should analyze the implications of its governing statutory scheme, and the nature of Congressional oversight, and develop an analysis of what changes, if any, should be made in the Legislative branch to facilitate a more comprehensive approach to environmental issues in this country.

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85. Id.
86. Browner Letter, supra note 41, at 3.
87. See Alfred A. Marcus, EPA's Organizational Structure, 54 LAW & CONTEMP. PROBS. 5 (1991), for a description of the EPA's organizational structure, and a discussion of how the current structure evolved.
88. As one part of such an analysis, the Administrator might review the myriad of EPA efforts listed in the Appendix of the EPA REPORT referred to in note 5, supra, that are currently ongoing and are planned to address local governments. It would be worthwhile for EPA, working with a group of local government officials, to "audit" these groups, clearinghouses, handbooks, technical assistance efforts, and internal efforts. The EPA should evaluate these efforts comprehensively to determine whether collectively they are meeting the needs of local governments, and how they can be improved, including whether a different institutional structure, including one organized by type of regulated entity, would be more effective and efficient.
89. SUPERFUND REPORT, July 28, 1993, at 27; ENV'T REP., July 30, 1993, at 547 ("Browner said the move to centralization would lead to stronger enforcement, which she said is the 'backbone of environmental protection.' It would also produce a greater emphasis on multimedia enforcement."); Steven A. Herman, The Reorganization of EPA's Enforcement Function, NAT'L ENVT'L. ENFORCEMENT J., (Aug. 1993), at 13-14.
90. Senate Bill 965, also known as the Toxic Cleanup Equity Act of 1993, which Senator Lautenberg introduced in May 1993, suggests the need to evaluate problems
systematically in an even broader context. See S. 965, 103d Cong., 1st Sess. (1993). Intended for the Superfund arena, it would codify the principle that the extent of a municipality's liability should be linked to its ability to pay. Id. Further, it would require that the EPA's analysis of a municipality's ability to pay include an analysis of a municipality's other environmental obligations. Id. And, it also provides that if a settlement demand "would lead to a significant, demonstrable risk that the local government would be forced into bankruptcy, default, or budgetary cutbacks that would unduly impede public health and safety activities, EPA will be required to tailor its settlement demands accordingly." Id. In proposing this legislation, Senator Lautenberg explained his reason for linking Superfund settlements to a municipality's ability to fulfill its other public health and safety obligations as follows: "You cannot get blood out of a stone—particularly if you end up cannibalizing other public health and safety obligations." Id.

In this bill received the support not only of municipal groups, but also of environmental groups. Id. Senator Lautenberg indicated support from the Sierra Club, the Environmental Defense Fund, the Natural Resources Defense Council, the U.S. Public Interest Research Group, and Friends of the Earth, as well as support from local government groups such as the National League of Cities, the National Association of Counties, the U.S. Conference of Mayors, and the National Association of Towns and Townships. Id. Senator Lautenberg noted that,

as these endorsements suggest, there will be no sacrifice in environmental protection here. [W]hat we will assure through the legislation is the consideration of appropriate, special constraints and repercussions on a local government's ability to pay for a Superfund judgment. If we don't do so, we may end up hurting, not helping, the public health and safety of our citizens. Id. This recognition that environmental liability concerns need to be considered together with local governments' other public health and safety obligations suggests that accommodation may be possible between those who are concerned with municipal budgets and municipal ability to fulfill existing mandates, and members of the environmental community who have tended to take a more narrow view of municipal responsibilities.

The Anchorage Report favors such a broad approach:

Too few policymakers considering the advisability of a particular regulation ask how their costs will affect the individuals who pay for them. What are the increased rates of accidents, illness, premature death and social upheaval—to name likely outcomes—from diet deficiencies, inadequate child care, substandard housing and lack of health insurance when scarce family resources go instead to pay for this regulation?

A case in point, Boston's water and sewer bills rose 39% over the past two years to pay for cleaning up Boston Harbor . . . . Water shutoffs tripled during that period . . . . Officials say that was only the beginning, that more than 100,000 households are having trouble paying their utility bills, forcing them to cut back on food, clothing and medical care . . . . One reason given as to why impacts on consumers are given little consideration is that it has been virtually impossible to predict costs on a per capita or per household basis. Congress needs this information when debating the costs versus benefits of environmental proposals . . . . The public health risks of economic devastation may be difficult to quantify, but they are no less significant than the public health risks of pollution.

ANCHORAGE REPORT, supra note 3, at 27.

In its report, Lewiston, Maine similarly notes as follows:
F. "Process Fixes."

The EPA should continue its efforts to involve local governments (and other members of the regulated community) in the early stages of rule and policy development. Among other steps, the EPA should continue its efforts to foster meaningful involvement through use of the negotiated rulemaking process. More extensive local involvement, if taken seriously by both the federal government and local government participants, should help in terms of improving the sense of partnership; improving the substance of the rules; and improving the accuracy of estimates of cost of compliance.

Municipalities, like the City of Lewiston, recognize the need for environmental regulation. However, the Federal Government must recognize that municipalities are not a bottomless pit of cash. The attitude of some Federal Officials that the cost of implementing a requirement is not a consideration is extremely offensive to local officials, who deal with cost issues every hour of every day. It is time to rollback unfair or unrealistic regulations and to start to look at the real impact of the regulation instead of the 'supposed' impact. The economic impact of a regulation on local communities must be weighed with the environmental impact. Problems will continue until local elected officials and citizens can see the benefit of meeting a regulation from both an economic and environmental aspect. For example, how do you convince someone with rusty tapwater that the City of Lewiston needs to spend millions of dollars on its water supply, which is excellent, but cannot afford to replace the old water pipe installed in 1878 in front of his/her house because of the expenditure on the water source? Until questions like this can be answered to the satisfaction of our citizens, we will not be doing our job.

MAINE REPORT, supra note 6, at 8 (Introductory letter Robert Mulready).

The difficulty, of course, lies in the additional complexity this approach creates. How does one create a system that prioritizes among “environmental risks,” (defined narrowly to include only those risks that the EPA regulates)? No consensus has emerged on this relatively limited issue. Achieving a consensus on the far more broad issue described by the Anchorage Report would be much more difficult.

Furthermore, lumping pollution control issues with other local concerns greatly increases the likelihood that the former will receive a much lower priority than they do currently. As Marcus, supra note 87, notes, a key reason for the EPA’s creation as an independent pollution control agency was the concern that environmental control programs would suffer if merged with other issues under the Department of Health, Education and Welfare (now the Department of Health and Human Services). Id. at 8-20.

91. The EPA’s Local Government/Small Community Dialogue Group identified the need to include local governments in the rule and policy development process as well. See supra note 53.

Further, the federal government needs to do a better job, not only of determining what role costs should play in setting environmental standards, but also of estimating costs associated with specific mandates, and associated with mandates collectively. Congress has already made an initial effort in this area, passing the State and Local Cost Estimate Act of 1981. This statute requires the Congressional Budget Office ("CBO") to prepare "fiscal notes" that estimate the costs that "significant" bills (i.e., bills that will cost $200 million or more) will impose. The supporters of this process "believed that one cause of excessive regulatory costs was inadequate information." Congress directed the CBO to prepare these "fiscal notes" to avoid "costly, unintended consequences" of its legislative efforts. ACIR identified a number of flaws with this process in its report. In his comments during the March 5, 1993, meeting of the ICMA Environmental Mandates Task Force, James Blum of the Congressional Budget Office stated that the CBO has been preparing analyses of the cost impacts of federal legislation for 10 years. But, he said that "the analysis seems to be an afterthought, and only in a few instances did it have any impact whatsoever.

In sum, it appears clear that the current process Congress has established to help it balance costs and benefits as it considers legislation is flawed and needs refinement.

Third, the federal government should consider expanding the scope of the Facilities Compliance Act to all local governments. This is one of the few bills that Congress has passed that provides for a multi-media analysis of environmental issues as applied to a particular segment of the regulated community. In particular, it addresses the impact of environmental regulations on very small towns (defined to be towns with fewer than 2,500 residents). As

94. Id.
95. ACIR REPORT, supra note 3, at 61.
96. Id.
97. Id. at 62-68.
98. MEETING NOTES, supra note 5, at 3.
99. H.R. 1056, 101st Cong., 2d Sess. (1989). Numerous other bills have been introduced in Congress in recent years to address the issue of federal mandates. Four types of bills are discussed briefly below.

First, a number of bills have been introduced that would, if enacted, purport to "end the practice of imposing unfunded Federal mandates on States and local govern-
ments and to ensure that the Federal Government pays the costs incurred by those
governments in complying with certain requirements under Federal statutes and regu-
lations." See, e.g., the Community Regulatory Relief Act (May 1993, S. Kemptonne);
States and local governments from being obligated to take any action required by any
new Federal law, unless: (1) all expenses associated with such obligation are fully
funded by the Federal government; and (2) each Federal agency that has authority to
administer a Federal mandate publishes a schedule of compliance costs.").

A second type of bill is exemplified by the Fiscal Accountability and Intergovern-
mental Reform Act ("FAIR Act"), introduced in the 103d Congress by Representa-
tive Moran in March 1993. This bill is intended to "improve Federal decision making
by requiring a thorough evaluation of the economic impact of Federal legislative and
regulatory requirements on State and local governments and the economic resources

In an August 22, 1993, editorial entitled Mandates Impose Unfair Burden, the
Atlanta Constitution endorsed this bill as follows:

What has mayors and county executives around the nation tearing at
their hair are the increasing funding loads that they are being asked to bear.
In Georgia, for instance, local governments spent 20 percent of their budgets
in 1990 on federally mandates projects; just three years later, they are spend-
ing 25 to 30 percent. Municipalities with tight budgets are being confronted
far too quickly with the unhappy choice of cutting services or raising taxes
and fees.

This conundrum is not to be solved by trying to squeeze more funds out
of a federal government that routinely runs up $300 billion deficits of, con-
versely, by suspending the vital mandate function. Congress and federal reg-
ulators, however, ought to have to contemplate the potential impact of new
standards before they put them in action.

That is the intent of a bipartisan bill sponsored by Reps. James . . . and
co-sponsored by 140 others. . . . Under its provisions, the Congressional
Budget Office would raise a flag on any federal mandate that would cost in
excess of $50 million over three years and the feds would have to choose the
lowest cost of the workable options for carrying out the mandate.

Of all the ideas being floated for lightening the mandate burden, this
seems the most sensible, best-informed approach.


Senator Moynihan's proposed Senate Bill No. 110 takes yet another tact but also
is intended to address one of the major issues that local governments have raised. See
S. 110, 103d Cong., 1st Sess. (1991). This bill, entitled the Environmental Risk Reduc-
tion Act, is intended to "help advance the practice of environmental risk assessment
and cost-benefit analysis." Id. Senator Moynihan introduced a bill to accomplish the
The Senate Committee on Environment and Public Works held a hearing on this bill
on September 18, 1992. Hearing before the Senate Committee on Environment and

A fourth legislative proposal, which Senator Lautenberg introduced, entitled the
Toxic Cleanup Equity Act of 1993, would require that environmental mandates be
viewed in the context of all of a municipality's obligations. S. 965, 103d Cong., 1st
Sess. (1993). This concept that environmental obligations should not be viewed in-
dependent of other responsibilities also is embodied in a February, 1992, decision by
the United States Court of Appeals for the District of Columbia Circuit. See Compet-
part of the Facilities Compliance Act, Congress enacted a "small town environmental planning" requirement that requires the EPA to take several actions to address the concerns that small towns have raised concerning environmental regulation, including, *inter alia*, the following:

EPA must establish a "Small Town Environmental Planning Task Force," which shall, *inter alia*, (1) identify federal environmental regulations that pose significant compliance problems for small towns; and (2) review proposed environmental regulations and suggest revisions to improve the ability of small towns to comply with them;101

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100. See *supra* note 56.

101. The Clinton Administration recently established the membership of this Task Force (the Task Force will be a subcommittee of the Environmental Requirements for Local Government Policy Dialogue Advisory Committee that was chartered in November 1992). September 10, 1993, telephone call with Denise A. Zabinski, Acting Leader of the Local Government Team, Office of Regional Operations and State/Local Relations [hereinafter Zabinski]. *See POLICY DIALOGUE, supra* note 45.

This Advisory Committee was formally chartered as a Federal Advisory Committee under the Federal Advisory Committee Act (FACA) in 1992. 5 U.S.C § 1-15 (1992) The predecessor to this Advisory Committee was the EPA's "Local Government/Small Community Dialogue Group." *See Memorandum from Judith Kertcher, Acting Associate Administrator, EPA Office of Regional Operations and Statistical Relations, to Dialogue Group Participants and Observers* (Feb. 9, 1993). According to then Acting Associate Administrator Kertcher's February 9, 1993, memorandum, the Dialogue Group met a total of four times, with the first meeting held in September 1992. From September 1992 to December 1992, the Dialogue Group "worked to develop problem statements and action items in three areas—financing environmental requirements, regulatory cost and benefit data and information needs, and regulatory flexibility (including risk-based prioritization and local government participation in regulatory development)." *Id.* at 2.

The Dialogue Group identified the following issues as needing attention: (1) "establish[ing] a process and structure that will authorize priority setting . . . that will produce better environmental results and more efficient expenditures based on area specific problems. . . . This will allow finite, limited financial resources to be devoted
EPA must publish a list of environmental requirements that apply to small towns. EPA has completed a draft Guidebook, as of September 1993, that it hopes to send to be printed within the near future, and EPA must implement a program to notify small towns of these requirements (and proposed future requirements). According to EPA officials, this program is under development.

Reviewing the results of these actions and, if the results are positive, considering how best to expand their application to all local governments, will help to strengthen the federal-local partnership.

Conclusion

In recent years local governments have increasingly complained about what they believe is an unfortunate confluence of trends in the area of environmental regulation (a decrease in federal funding and an increase in federal-imposed obligations or to the highest and most effective environmental use based on local conditions); (2) including local governments in the rule and policy development process; (3) creating "one-stop" shopping for local governments to streamline the permitting process; (4) increasing federal investment in environmental infrastructure; and (5) providing federal technical assistance to assist local governments in complying with environmental requirements.

1. Id.
2. Id.
5. In its August 1993 report, the EPA includes an Appendix F, in which it catalogs EPA activities related to local governments. See EPA REPORT, supra note 5, at App. F. The Appendix provides a useful summary of EPA activities, despite its qualification:

This list does not provide a historical perspective nor does it serve as an all inclusive detailed directory of these types of activities. The compilation of this catalog does not necessarily imply that these activities are being effectively or frequently used by local governments, are cost effective, or have helped resolve the concerns of local government.

6. Id. at 1 (emphasis in original).
7. Among other activities, the EPA has established at least seven "task forces, committees and groups" to address local government issues (see Appendix F2-F3); it has created a number of "data/information systems, networks, and clearinghouses" that it believes may be of some help to local governments (see Appendix F15-F16); it has prepared a number of "guides/handbooks" that it similarly believes may be of some help (see Appendix F12-F14); it has created a large number of technical assistance programs (see Appendix F4-F10); and it has conducted a number of "internal agency efforts and studies related to local governments" (see Appendix F17-F19).
mandates). Other local government concerns with federal environmental regulations identified above have exacerbated this tension between the different levels of government (e.g., the federal government's purported failure to listen to local governments in creating the regulatory strategies; local governments' difficulty in understanding the need for these strategies; and the inefficiencies stemming from the lack of flexibility in the federal scheme and its failure systematically to prioritize among environmental concerns or address them comprehensively, instead relying on media-specific approaches).

The criticisms that local governments are making regarding the environmental regulatory structure should not diminish its accomplishments over the past twenty plus years. Nevertheless, the challenge that local governments are posing to the existing regime deserves serious attention. Many of these challenges raise questions concerning fundamental features of our environmental regulatory regime, including the following:

1) Is it time to develop a coordinated environmental regulatory policy in this country;

2) If so, how do we overcome the barriers that exist to our creating such a policy (e.g., the multitude of Congressional committees, the multitude of media-specific environmental statutes, and the EPA's own organizational structure);

3) How inclusive should our environmental regulatory process be, and what steps should we take to make it more inclusive;

4) How should the goals of ensuring a "level playing field" and having a regulatory structure that is relatively easy to administer and enforce be balanced with the need for flexibility;

5) What role should costs play in the standard setting process, and what information needs do we have in this area;

6) How should environmental needs (however they are defined) be balanced with other societal needs; and

7) How should the responsibilities for identifying environmental problems, setting priorities, and developing, implementing, and paying for strategies to address these problems be allocated within our federal system of government?

Local governments have provided a service by raising these

issues. Actions like the Moynihan and Lautenberg bills, and the Facility Compliance Act, described above, suggest that these issues are beginning to percolate at the national level. The EPA, as the nation's environmental regulatory agency, should continue in former Administrator Reilly's footsteps to push these issues. One step the Agency should take is to continue to make changes at the administrative level where possible. Identifying and implementing strategies to "remake" the Agency's own operations undoubtedly will prove to be neither simple nor painless enterprises. The second "next step" that the Agency needs to take will be at least equally challenging—identifying and confronting impediments in its governing statutes and in the nature of Congressional oversight to addressing these issues effectively.