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ENVIRONMENT AND ENERGY: IMPLICATIONS OF OVERLOADED AGENDAS

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During the past decade the United States government has moved vigorously into a major involvement in environmental protection, responding to the accumulation both of objective evidence and of citizen concerns that made of it a sudden but potent political issue. For similar reasons, although the specific events vary, it has involved itself equally vigorously in the subject of energy policy since 1973. In each case a sudden and sharp increase in political concern has precipitated extensive legislation, reorganization of agencies, addition of new functions of government, and expanded staff and budgets.

One unanticipated and unwelcome effect of this vigor, however, has been to overload the agenda of the Executive Branch: federal agencies have been given both more problems than they have the knowledge or resources or organization to solve, and in some cases, more resources and organizational changes—at least in the short run—than they can efficiently and effectively utilize.

This paper discusses sources, characteristics, and results of the recent overload in environment and energy agendas, and evaluates strategies for coping with them. It suggests that these strategies can and should be improved, particularly by making the establishment of priorities for administrative implementation more conscious and more accountable; and it suggests means for doing so. The issue is potentially relevant not only to U.S. environment and energy policies, the examples used here, but to any policy problem which any government seeks to “solve” by dramatic increases in authority and resources and changes in organizational structure.

BACKGROUND

American government has generally dealt with complex problems by fragmenting them among specialized agencies and bureaus, and by attending to them sequentially rather than all at once.¹ This pattern has been particularly apparent in federal and state governments. Its result is the well-known structure of mission-oriented agencies, each

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1. D. BRAYBROOKE & C. LINDBLOM, *A STRATEGY OF DECISION* (1963).

specializing in its own area—health, education, transportation, agriculture, water resource development, and so forth—with a reasonably clear mission and an authorized set of means by which to pursue it. A classic example is the U.S. Army Corps of Engineers. An engineering agency established to meet military needs during and after the Revolution, in 1824—following the dramatic success of New York State's Erie Canal—it was given a mission to improve the navigability of inland waterways, by such means as surveys and eventually snagging and clearing, dredging, and levee construction.² Its staff was comprised of individuals trained in professions directly relevant to its mission, and its task was the achievement of that mission at the least public cost—irrespective of other public values that might be affected by its activities. Other mission agencies operated in basically similar fashion: road construction agencies staffed by highway engineers, public land management agencies staffed by foresters to produce timber, public health agencies staffed by sanitarians to regulate the quality of drinking water.

In addition to fragmentation, American government has more recently come to delegate increasing amounts of administrative discretion to agencies with which to develop solutions to complex problems—and in some cases, even to define the problems themselves. Charles Reich, for instance, argues that the inherent nature of a complex society has forced the development of centralized planning and administration. He further asserts that one effect has been to transfer more and more of the legislative function from the legislature itself to administrative rulemaking procedures.³ This practice has relieved legislatures of problems too complex for legislative resolution, and increased greatly the discretionary authority of administrative agencies. To take the case of the Corps again, its modern history shows a dramatic transformation from a narrow and specific mission in navigation to a broad and discretionary mission in multiple purpose water resource development. The mission is still water resource development, and the professional means are still engineering of public works, but the agency's discretion has been broadened since 1925 to include flood control, hydroelectric power, recreation, fish and wildlife enhancement, water supply, irrigation, and other potential purposes.⁴ The tradeoffs among these objectives were left

2. Navigation Act of 1824, 4 Stat. 32.

3. Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227 (1966).

4. 49 Stat. 1570 (1936), 58 Stat. 887 *et seq.* (1944), 76 Stat. 1178 *et seq.* (1962); see also AMERICAN PUBLIC WORKS ASSOCIATION, HISTORY OF PUBLIC WORKS IN THE UNITED STATES 1776-1976, at 30-32 (1976).

largely to the discretion of the agency in each individual case, with little or no legislative guidance as to how they should be ranked.

Both these patterns were evident in early governmental efforts at environmental protection. Originally seen as a discrete problem of pollution control, environmental protection was managed at the local level by municipal sewer and water authorities, and at the state level as a regulatory function of state boards of health.⁵ At the federal level it was treated simply as a new mission (at first) for the Public Health Service.⁶ New research functions, grant authorities, and eventually regulatory functions were lodged in a specific agency of government to serve a single new mission—protecting the quality of the ambient air and water. Even the Environmental Protection Agency, created in 1970, was principally a single mission agency dealing with air and water pollution control, despite the broader image suggested by its title.⁷ Since that time the EPA, like the Corps of Engineers before it, has been subjected to enormous diversification of its missions and concomitant enlargement of its sphere of administrative discretion, in ways that will be discussed more fully below. The same is true of the federal energy agencies during the past six years.

Within traditional mission agencies there were and are quite commonly more possible projects than there are funds and personnel to execute them. This excess of ideas over resources within a given mission is a conventional and well-known kind of overload, which can be addressed by relatively well-known principles for allocating scarce resources toward the achievement of a given objective.⁸ The diversification of an agency's mission, however, presents a new problem, namely striking a discretionary balance in resource allocation among ends equally sanctioned by law. This choice problem can by itself overload an agency's agenda in some cases, and it is compounded in cases where new policy demands—even if accompanied by new resources—require action more rapidly than the agency can adapt. In these cases one finds a microcosm of some of the most vexing problems of public administration, which are intensified by overload in the very areas in which society—acting through its legis-

5. HISTORY OF PUBLIC WORKS *id.* at 414-20; J. A. TARR, RETROSPECTIVE ASSESSMENT OF WASTEWATER TECHNOLOGY IN THE UNITED STATES, 1800-1972 (1977).

6. L. B. DWORSKY, CONSERVATION IN THE UNITED STATES: WATER AND AIR POLLUTION, 8-12 (1971); Public Health Service Act, 42 U.S.C. §§ 264-272 (1976).

7. Reorganization Plan No. 3 of 1970, 42 U.S.C. § 4321 note.

8. See for instance *Guidelines for Estimating the Benefits of Public Expenditures. Hearings Before the Joint Economic Committee*, 91st Cong., 1st Sess. (1969).

lature—most wants vigorous and effective administrative response. The irony of this is unfortunate, and the phenomenon itself deserves serious attention.

OVERLOAD

Within the past seven years, the governmental agenda in the area of environmental protection has become seriously overloaded. By "overload" I mean that the range of responsibilities legislated into the domain of government agencies has expanded beyond the capability of those agencies to act upon them.⁹ It is useful to distinguish separate sources of the present overload, and then four factors affected by it.

Sources

The environmental protection agenda has been overloaded from at least four sources: increases in the *number* of government missions in the environmental protection area; increases in the responsibilities of each agency not matched by increases in its resources; increases in responsibilities *and* resources but without adequate time to absorb them effectively (crash programs); and increases in *diversity and conflict* among agency missions.

It is obvious to any observer that the number of government missions in the area of environmental protection has proliferated in the past seven years. At the federal level, for instance, environmental protection missions before 1970 were more or less limited (depending on one's definition) to air and water pollution control, wilderness and historic preservation, funding for acquisition of recreational lands, and soil conservation.¹⁰ Since that time missions have been added for energy conservation¹¹ and for reclamation of strip-mined lands¹²; for the management of water and related land resources in the so-called "coastal zone"¹³; for protecting wetlands even on non-navigable or intra-state water courses (under the Corps of Engineers "404 permit program"¹⁴); for protecting threatened and endangered

9. Note that the agenda referred to here is the agenda of administrative agencies, not, as in some political science literature, the legislature's agenda. Legislative agencies have their own problems, which are not analyzed here.

10. Andrews, *Three Fronts of Federal Environmental Policy*, 37 J. AMER. INST. OF PLANNERS 258 (1971); see also J. L. SUNDQUIST, *POLITICS AND POLICY: THE EISENHOWER, KENNEDY AND JOHNSON YEARS*, Chapter 8 (1968).

11. *E.g.*, Energy Policy and Conservation Act, P.L. 94-1963 (1975); Energy Conservation and Production Act, P.L. 94-385 (1976).

12. Strip Mine Reclamation Act of 1978, P.L. 95-87.

13. Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1976).

14. Federal Water Pollution Control Act Amendments of 1972, § 404, 33 U.S.C. §§ 1161-1175 (Supp. 1973).

species and their habitats¹⁵; for protecting the public against the introduction of new toxic chemicals¹⁶; for promoting the recovery and recycling of material resources¹⁷; and for various other purposes. To these will probably soon be added others.¹⁸ At the state level, missions have been added in some states for land use controls; for the control of erosion and sedimentation; for the preservation of agricultural lands; for billboard control; and for numerous other activities mandated by the federal missions listed above.¹⁹ Not all of these are found in every state, but the list is broadly representative.

The increasing number of government missions may or may not overload the agencies directly charged with implementing them, since many of those listed are spread across numerous agencies of federal and state government. However, they almost inevitably increase the burden upon lower levels of government and upon private parties who must deal with new public authority in these areas. State governments, for instance, may secure federal funds for coastal zone management or energy conservation efforts, but only if they first organize themselves to prepare coastal zone management plans and energy conservation plans acceptable to the federal sponsoring agencies.²⁰ Local governments must participate in "area-wide waste treatment plans" if they hope to secure federal financial assistance for the construction of sewage treatment facilities.²¹ To the extent that state and local agencies are unable to comply fully with these new federal and state environmental mandates, or in some cases even to begin to address them, their agendas have been overloaded relative to their capabilities.

A second overload is the assignment of responsibilities to any one agency in excess of its capabilities to implement. The federal Environmental Protection Agency alone, for instance, has had substantial additions to its responsibilities since 1970—the establishment of national air pollution standards; mandatory review of other agencies' environmental impact statements; the administration of a six billion dollar public works program for waste treatment plants; the identification and certification of "best practicable" and best available" technologies for water pollution control, industry by industry; the

15. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1976) (as amended by P.L. 95-1625, 1978).

16. Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601-2629.

17. Resource Recovery Act of 1970, 42 U.S.C. §§ 3251-3254F, 3256-3259 (1970); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 (1976).

18. A major issue before the present Congress, for instance, is the control of dumping of hazardous waste materials.

19. Cf. E. MOSS (ed.), *LAND USE CONTROLS IN THE UNITED STATES* (1977).

20. See Note 11, *supra*.

21. See Note 14, *supra*, § 208.

establishment of standards for noise-generating products; the approval or denial of permits for all point sources of water pollution, nationwide; the approval of area-wide waste treatment plans; and the approval of new toxic chemicals for marketing.²² This list names only a few of EPA's major new responsibilities. Moreover, all of these are added to the agency's previously existing mandates for research, enforcement, and other missions. To the extent that the EPA's resources and capabilities have not been expanded at the same rate as its responsibilities, its agenda has been overloaded.

The third source of overload is the enactment of new "crash" programs, even accompanied by substantial funding, where the inputs of resources exceed the agency's organizational capacity to use them effectively. The most obvious current example is the U.S. Department of Energy and its predecessor agencies, whose agenda includes the implementation on a crash basis of a vast amount of new legislation, composed of numerous individual mandates with few, if any, clear priorities among them.²³

Examples of these two forms of overload at the state and local level undoubtedly exist as well, but even those at the federal level cause important problems of choice for state and local governments. Perhaps the most important of these problems is uncertainty about which among its missions the overloaded federal agency will choose to implement and at what rate implementation will proceed. Lack of

22. Statutory mandates including significant new responsibilities for the EPA include the following: Clean Air Act, 42 U.S.C. §§ 1857-1858a (1976); Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1265, 1281-1292, 1311-1328, 1341-1345, 1361-1376, as amended by P.L. 94-558 (1976) and P.L. 95-217 (1977); Federal Insecticide, Fungicide, and Rodenticide Act of 1970, 7 U.S.C.A. § 135 *et seq.*; Resource Recovery Act of 1970 (omitted in the general amendment of the Solid Waste Disposal Act by Pub. L. 94-580, 90 Stat. 95, Oct. 21, 1976. Current version codified in scattered sections at Title 42.); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6986 (1976); Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918 (1976); Safe Drinking Water Act, 42 U.S.C. §§ 201, 300f-300j (1976); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1976). Its budget outlays grew from \$384 million in 1970 to \$5 billion in 1978.

23. Statutory mandates including significant new responsibilities for the Department of Energy and its predecessor agencies—in particular the Federal Energy Administration and Energy Research and Development Administration—include the following: Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801-5891 (1976); Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. §§ 791-98; Federal Energy Administration Act of 1974, 5 U.S.C. §§ 761-86; Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. §§ 5901-17 (1976); Geothermal Energy Research, Development and Demonstration Act of 1974, 30 U.S.C. §§ 1101-64; Solar Energy Research, Development, and Demonstration Act of 1974, 42 U.S.C. §§ 5551-5566 (1976); Solar Heating and Cooling Demonstration Act of 1974, 42 U.S.C. §§ 5501-5517 (1976); Energy Policy and Conservation Act, 42 U.S.C. §§ 6201, 6211, 6231-6422 (1976); Energy Conservation and Production Act of 1976, 90 Stat. 1125 (codified in scattered sections of 12, 15, 42 U.S.C.); Department of Energy Reorganization Act of 1977, 42 U.S.C. § 7131; National Energy Act of 1978, P.L. 95-617. This law is itself an omnibus combining five major bills. The budget overlays of these agencies grew from \$245.9 million in 1970 to \$8.1 billion in 1978.

knowledge on this point can leave state and local governments in a vacuum as to how to obtain authorized federal funds—or even, indeed, how to comply with requirements of federal law.

The fourth source of overload is the diversification of missions, which has caused intensified conflict both among agencies and increasingly within agencies, at all three levels of government. This diversification was recognized and heightened by the National Environmental Policy Act of 1969 (NEPA). One of the principal origins of NEPA was congressional concern that agencies were failing to consider the effects of their mission-oriented activities on other recognized public purposes, and even to consult with each other in cases where their missions overlapped or conflicted.²⁴ This concern led to the enactment of a broad declaration of national environmental policy, and to the requirement that prior to taking major federal actions, detailed environmental impact statements be prepared and reviewed by all relevant agencies. Similar requirements have been created by statute or executive order in over one-third of the fifty states.²⁵

As important in practice as NEPA, however, is the interpenetration of regulatory and planning missions among agencies. For example, the U.S. Forest Service was traditionally a mission agency with missions and authority as precisely defined as the early Corps of Engineers. Now, however, it can no longer manage its forest simply by its own professional standards of multiple use and sustained-yield. It must satisfy the air and water quality standards of the Environmental Protection Agency; it must be cognizant of coastal zone management plans in forests that fall within the coastal zone; it must take account of the Corps' requirements for permits in wetland and watercourse areas; it must search out and protect endangered and threatened species and their habitats; and it must prepare environmental impact statements for all its major actions.²⁶ Similarly, state

24. R. ANDREWS, ENVIRONMENTAL POLICY AND ADMINISTRATIVE CHANGE (1976).

25. S. HART, GREEN GOALS AND GREENBACKS: A COMPARATIVE STUDY OF STATE LEVEL EIS PROGRAMS AND THEIR ASSOCIATED COSTS (1978).

26. S. FAIRFAX (ed.), LEGAL ASPECTS OF WILDLANDS MANAGEMENT (1977). (Proceedings of a Conference held April 8-9, 1977. Ann Arbor, Michigan: School of Natural Resources, The University of Michigan, 1977.) Among the new laws affecting the public land management agencies are the following (see note 22, *supra*, for full citations): Clean Air Act; Federal Water Pollution Control Act Amendments of 1972; Federal Insecticide, Fungicide, and Rodenticide Act of 1970; Federal Environmental Pesticide Control Act of 1972; Endangered and Threatened Species Act of 1973, 16 U.S.C. §§1531-1543; Toxic Substances Control Act; Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. §§581h, 1601-1614; National Forest Management Act of 1976, 90 Stat. 2949, 16 U.S.C. §1600 *et seq.* (note); Federal Land Policy and Management Act of 1976, 90 Stat. 2744 (codified in scattered sections of 7, 16, 30, 40, 43 U.S.C.).

and local governments can no longer deal simply with their "mission" counterparts at high levels of government, but must incorporate into each action proposal consideration of numerous laws and missions that bear directly or indirectly upon the proposed action. To the extent that they are unable to comply with all of these requirements, or in many cases even to insure that they know of them, their agencies have become overloaded.

Factors

Overload is a function of the relationship between an agency's responsibilities and its capabilities. We have discussed changes in responsibilities above; it remains to identify the factors that limit agency capability. Each factor operates to cause a different form of overload, requiring a different strategy for coping with it. These factors include budget and personnel, time, knowledge, and role clarity.

Budget and personnel are lumped together for convenience, since they are the most conventional and well-recognized constraint on agency capability. They are a particularly obvious constraint when additional responsibilities are thrust upon an existing agency, such as in the EPA case mentioned above. To the extent that new resources are not included to match new responsibilities, the new mission will be in direct competition with previously existing mandates, and at least one if not both will suffer from the overload.

Two characteristic features of recent environmental legislation highlight the importance of the time factor in agency overload: new organizational structures and implementation deadlines. Examples of the former include the Environmental Protection Agency and the National Oceanic and Atmospheric Administration²⁷; the Federal Energy Administration, Energy Research and Development Administration, Nuclear Regulatory Commission, and now Department of Energy²⁸; and the Council on Environmental Quality.²⁹ Counterparts to many of these agencies have also been created in state governments. Examples of implementation deadlines include the 1977 "best practicable," 1983 "best available," and 1985 "no pollution" targets established by the Clean Water Act Amendments of 1972³⁰; the 1978 deadline for identification of all federal interest land claims in Alaska³¹; deadlines for both emission control and energy conser-

27. Reorganization Plans No. 3 and No. 4 of 1970, 42 U.S.C. § 4321 (note).

28. Department of Energy Reorganization Act of 1977, 42 U.S.C. § 7131.

29. National Environmental Policy Act of 1969, 42 U.S.C. § 4321-4347 (1976).

30. See note 22, *supra*.

31. Alaskan Native Claims Settlement Act of 1971, 42 U.S.C. §§ 1601-1628.

vation in automobiles^{3 2}; and deadlines too numerous to mention for the completion of planning and reporting requirements.

The time factor is an important constraint in two respects. First, it presents at least a short-term overload problem in any situation where a major new mission is added to government, particularly when the addition is accompanied by the creation of a new organizational structure: there is inevitably an adjustment period before the mission will be smoothly and effectively implemented. Aside from adjustment difficulties, the nature and complexity of problems may require certain minimum periods—and in some cases, lengthy periods—of time for their resolution. Second, time is a particular constraint in cases where statutory implementation deadlines have been established. Deadlines assist agency administrators in setting priorities, since the legislature has implicitly established certain priorities by setting deadlines for them; but the result can be a distortion of agency effort toward the completion of paperwork and away from substantive progress. Deadlines for the latter often are less clearly defined than the former. In cases where statutory deadlines violate either the technical constraints of the problem or the staff and budget capabilities of the agency, the result is poorer work and euphemistic reporting.

Knowledge is a particularly important constraint in the environmental area, since popular and legislative concern often outdistance reliable knowledge of how severe a problem is or how to remedy it. Many important ecological questions still can only be answered by basic research, and in many of these cases no amount of staff or money will appreciably accelerate the process.^{3 3} The same problem exists in the testing of new technologies, such as catalytic converters for auto emission control or emergency core cooling systems for nuclear power plants. To the extent that statutory mandates require results that exceed existing knowledge, agency agendas are necessarily overloaded with mandates that must either be postponed or be implemented by guesswork.

Finally, agency agendas are overloaded by the proliferation of mandates without clear priorities for implementation. Substantial time and effort are required to absorb new mandates, both for individuals and for the agency as a whole. They must be digested and

32. Clean Air Act, Federal Water Pollution Control Act Amendments of 1972 (*see note 22, supra*).

33. For instance, neither the dose-response relationships between carcinogenic chemicals and human health, nor the elastic limits of ecosystems to accept stress without fundamental change, are well understood; and neither can be well understood by short term research funding.

interpreted, delegated and routinized. They also must be weighed against previous priorities and adjustments not only made, but negotiated and coordinated with other affected units. Finally, they must frequently be implemented with the involvement of other parties. When too many new missions are added at once, the friction of this process increases even more. Even if an agency has adequate amounts of budget, personnel, time, and knowledge, its capability may be so overloaded by conflicting objectives that it cannot define clear courses of action. This potential administrative deficiency is accentuated by the expanded role of the judiciary in reviewing administrative actions over the past ten years.

Each form of overload is related, though imperfectly, to its sources. The addition of new government missions, for instance, may overload any of the four factors. The addition of responsibilities in excess of resources, on the other hand, may tend to overload primarily the budget and personnel and perhaps the time of the responsible agency. Crash programs and increased interpenetration of missions fall heaviest on goal clarity, though to some extent they affect the other factors as well.

In all these cases, however, the overload is real, and it has become an important factor, if not the dominant factor, with which public administrators in the fields of environmental protection and energy must cope. We turn now, therefore, to an examination of strategies for coping with the overloaded agenda.

PRESENT STRATEGIES FOR COPING

The problem of overload is not a product of broadened administrative discretion per se. Indeed, as the previous discussion of statutory deadlines indicates, overload would be no less possible, and in fact even more likely, if Congress were to enact stricter goals and standards of achievement. Overload occurs when an agency's capabilities are overtaxed, and as far as administrative discretion is concerned, the problem is that overload forces upon the agency a *form* of administrative discretion undesirable to administrators as well as to the public. It forces the administrator to choose among several legislative mandates of apparently equal importance. For the federal or state administrator, there is now not only far more work to do, but far more kinds of work to do than in the past. Not only are there few clear sources of priorities, but there is also a likelihood of both political opposition and lawsuits *whatever* the administrator may do. For local and some state administrators, there is the further problem of coping with uncertainty as to what mandates higher level adminis-

trators will choose to implement. The choice that is made will influence their decisions as to what requirements to comply with, what forms of aid to apply for, and what the net benefits and costs of compliance or application will be to them.

Present efforts to cope with overload on the environmental agenda appear dominated by six principal approaches. Each of these responses is understandable, but each, except possibly the last, exhibits major drawbacks as an approach to responsible public administration.

Spread Too Thin

The most obvious approach to overload is to try to do a little of everything. This approach has benefits as a defensive form of administration: it protects the agency against the charge that it is ignoring its responsibilities by enabling it in any such case to present at least some staff unit that is "working on" the issue in question. While this approach is widespread, it is costly, since the result is almost inevitably to spread available resources too thinly to achieve effective results.

In cases where overload is due to interpenetrating missions rather than merely responsibilities in excess of resources, this approach has an additional drawback: it provides no means for resolving conflicts among missions. It simply puts people to work on each fragmented piece of a problem and relies on the *ad hoc* knocking of heads to resolve conflicts.

Specific Requirements First

A second approach is to put first priority upon actions that are specifically required, following these at a more gradual pace (and perhaps with resources spread too thinly) with the actions that are more generally defined. In some cases this is a very appropriate response. When the legislature sets a statutory deadline for implementation of pollution standards, for instance, it is proper to treat this as a specific mandate that is intended to have higher priority than more general responsibilities. In other cases, however, the specificity of the task may have been relatively arbitrary (for example, specific dates attached to reporting requirements); and in such cases attachment of highest priority by the agency to the most specific mandates may distort the agency's activities. A particular case in point is the implementation of the National Environmental Policy Act, in which the preparation of environmental impact statements (its most specific requirement) has taken on a life of its own indepen-

dent of the law's substantive purposes.^{3 4} The other requirements of that law have been virtually ignored. Aside from the danger of the distortion, giving first priority to strictly specified mandates provides only a first step in establishing priorities under overloaded conditions.

Tokenism

A third approach is the use of small numbers of symbolic actions as substitutes for the full implementation that scarce resources do not permit. In enforcement proceedings, for instance, agencies have sometimes singled out major and visible polluters as targets for enforcement actions, in the hope that making examples of these firms will intimidate others into complying voluntarily (since the agency has insufficient resources to prosecute all violators). The strategy may backfire, of course, especially since major corporations can afford batteries of talented lawyers more easily than can other potential defendants. Other guilty parties may simply continue business as usual, profiting from the time delay and assuming—often correctly—that the agency may never get around to suing them. The strategy has been used nonetheless.

Another form of this approach is exemplified by President Nixon's stoppage of the Cross Florida Barge Canal, by press release. Here the apparent goal was to placate a vocal constituency with a single major symbolic action rather than applying similar criteria to all similar projects.^{3 5} In either case, this approach works only if people respond to the symbol in the way that the agency intends, an assumption that may not withstand scrutiny. In either case, a more fundamental criticism of this approach is that it represents simply a defensive political response rather than a defensible strategy for public administration.

Path of Least Resistance

A response more sensitive to public opinion, particularly in cases where overload is due to interpenetration of missions, is to follow the path of least resistance: implement the mandates that are relatively noncontroversial. In the case of water resource projects, for instance, recent decisions are sometimes based upon judgments of "project viability"—that is, the expectation that public resistance will be sufficiently low to permit efficient completion of the project. In

34. See note 24, *supra*; also, Andrews, *NEPA in Practice: Environmental Policy or Administrative Reform?*, 6 ELR 50001 (1976).

35. See note 24, *supra*, at pp. 72, n.n. 183 & 184.

state and local governments, a similar phenomenon takes the form of political opportunism in seeking funds for the kinds of actions that look most politically feasible rather than those that may be more objectively "necessary" to their jurisdictions' previous priorities. This approach has the obvious political benefit of minimizing controversy, and thus reducing the costs of friction that arise when organized opposition arises to a particular course of action. Like the preceding approaches, therefore, it is understandable. In the extreme, however, it can result in abandonment of administrative responsibility to the veto power of vocal minorities. To say this is not to point a finger at any particular group, environmentalists or industry or otherwise; it is simply to say that some controversial actions should probably be given high priority anyway, and many noncontroversial actions should not. Should EPA or DOE, or any agency, simply grease the wheels that squeak loudest? Like spreading resources too thin, following the path of least resistance is ultimately an abdication of administrative responsibility for setting priorities.

Personal Preferences

The worst of all possible approaches, of course, is to use overload as an excuse simply to aggrandize personal preferences, and to implement whatever pieces of the mandate a particular administrator wishes while ignoring others on the grounds of lack of resources. Bluntly stated in this way, all public administrators would probably consider this approach inappropriate, and most would probably consider it unethical. The approach has a more subtle form as well, however, of which many are guilty from time to time in varying degrees. This form is the subjective judgment of "political infeasibility," which leads to favoring some actions over others. In all fairness to governmental agencies, the degree of overload that has been thrust upon some of them in recent years has all but necessitated this approach. In the face of numerous new mandates, and in the relative absence of clear priorities among them, the administrator may have little choice but to pursue his own subjective judgment in deciding which to emphasize. But at best this approach lacks accountability, and at worst it may yield capricious or unethical results.

Executive Preferences

The sixth and final approach is the deliberate use of an overload situation by the chief executive and his appointees to set coherent programmatic priorities, by choice *within* the overloaded agenda. A President or governor and his agency head might, for instance, con-

siously evaluate the agency's authorities and deliberately decide to concentrate on some missions and ignore others. This approach is both legitimate and desirable up to a reasonable point, a point that was clearly overreached by President Nixon in his assertion of authority to impound budgetary appropriations.³⁶ It has the virtue of strong accountability of the administrative agencies to the chief executive, though by the same token it might weaken the agency's accountability to the legislature. The establishment of the optimum balance among these branches, however, is not within the scope of the present paper. This approach can be expected to work only when the chief executive takes the initiative, a situation that frequently has not existed in the federal government and that has been lacking in some state and local governments as well.

SUGGESTIONS FOR IMPROVEMENT

Two principles are central in the discussion above. The first is that coping with overload requires setting priorities. Each of the approaches above represents either a method for setting priorities or a way of trying to avoid setting them. In the context of overload, setting priorities means deciding at least implicitly that some statutory mandates will not be implemented soon if at all, and accepting the quasi-legislative responsibility as well as the political risks that accompany such decisions. The second principle is that such decisions must be made *consciously*, *legitimately*, and *accountably*, rather than by default, by inertia, or by bureaucratic preference. In this spirit, the following possibilities for improvement might be considered.

Integration of Mandates

An essential first step in coping rationally with overload is making a coherent analysis of the responsibilities that have caused an agency to be overloaded. In some cases such an analysis may already exist, but in many it does not. Only recently, for instance, did the state of Massachusetts contract with a consultant to pull together an integrated analysis of the laws, regulations, and policies bearing upon highway planning in that state.³⁷ This sort of analysis is a valuable

36. Appropriated funds are allocated to agencies over time by the Office of Management and Budget, and are sometimes held back until later times—if not indefinitely—by OMB for reasons such as reducing inflation. President Nixon sought to hold back funds on a more selective basis for policy reasons, which would have amounted to an item veto of Congressional Legislation. The courts held this to be improper. See A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973).

37. D. AGGERHOLM *et al.*, *ENVIRONMENTAL IMPACT STATEMENTS: A COMPEN-*

exercise in any agency, and it is vital where overload requires setting priorities. The need for such analysis is particularly acute at lower levels of government where knowledge of higher-level mandates and opportunities is often deficient.

Effective Chief Executive

A second suggestion is to urge an effective role for the chief executive—mayor, governor, or President—in setting priorities for coping with overload. This role is desirable on constitutional grounds, and because only the chief executive has perspective across agency mission lines. This approach is made possible and effective by the integrative analysis suggested above. In practice, agencies are frequently left to set their own priorities without close oversight or coordination, and the unguided administrative discretion that results is less and less viable as agencies' agendas become overloaded and mandates become closely interwoven.

Accountability for Priorities

The third suggestion is for explicit and public decisions on goals and priorities, subject to both suggestions and reactions by the affected public. Some have suggested that vague or conflicting mandates should be thrown back to the legislature for more detailed specification, but this suggestion seems somewhat unrealistic as a general practice since such mandates are often the legislature's way of clearing its own agenda of problems it cannot solve or agree upon. The real need is not for less administrative discretion, but for clearer accountability—to the chief executive and to the public—for how that discretion is used, especially in the establishment of goals and priorities.

Several recent events provide examples of how such decisions can be made. One is the passage of the National Forest Management Act.³⁸ Congress, faced with a complex set of technical problems that it could not substantively resolve itself, passed a law that provided substantial increases in administrative discretion to the implementing agency, but coupled this discretion with explicit procedural and reporting requirements to insure that the discretion was exercised on the basis of a public record, with opportunities for input and review by all interested parties. This public record also included long-term

DIVISION OF LAWS, REGULATIONS, AND GUIDELINES FOR HIGHWAYS (1975). See also U.S. DEPARTMENT OF THE ARMY, OFFICE OF THE CHIEF OF ENGINEERS, DIGEST OF WATER RESOURCES POLICIES AND ACTIVITIES, EP 1165-2-1 (1972).

38. National Forest Management Act of 1976, 16 U.S.C. § §1600-1676.

forest management plans, to be updated periodically, which would amount to publicly reviewable statements of goals and objectives as well as priorities.

A second example, or set of examples, is the recent use of goal planning in various states and regions. Well-known examples include the areawide water quality management plans required by Section 208 of the 1972 Clean Water Act amendments.³⁹ Such plans to date have been varied in their quality, but they do provide a publicly accountable basis for setting priorities—in a sense, a framework of goals to accompany the integration of mandates suggested above.

Whatever the specific examples, the establishment of priorities must be done consciously and publicly, with advance notice of proposed action, public hearings when appropriate, and opportunities for review and revision before final decisions. Without such guideposts and safeguards, overload can create incongruous and ineffective administration.

Task Forces

A fourth solution, particularly in cases where overload is due principally to interpenetration of mandates, is the more extensive use of interagency task forces that cut across the traditional mission-oriented agency structure. Task forces have recently come into more extensive use at the federal level as a means of dealing with complex planning problems: the Arctic natural gas pipeline decision is one particularly salient example.⁴⁰ The task forces suggested here are not intended to function as additional advisory committees, but as actual *implementing* bodies, where both goals and expertise can be drawn together into interdisciplinary planning and compromise. Such organizations could not be created for every decision that must be made, but they could provide a valuable forum both for setting priorities and for implementing high priority decisions.

Self-Enforcing Mandates

Finally, a long-term legislative suggestion is to substitute, wherever possible, self-enforcing mandates for those that require agency-implemented programs. One of the most important overloading factors on both the energy and the environmental protection agendas, for instance, has been the propensity of the Congress to require an

39. See note 14, *supra*.

40. This was a major federal decision requiring coordination among several federal agencies. Accordingly a task force was set up, with representation from all affected agencies and facilitation by the U.S. Council on Environmental Quality, to pull together the necessary analysis, public comment, and decision recommendations. It did not, however, have continuing authority to implement the actions proposed.

agency to set standards, award and administer contracts, enforce the laws against violations, and bear the burden of proof in each case. All of these are enormously costly and time consuming approaches to policy making. In many cases more effective as well as more efficient results could be achieved by implementation of self-enforcement devices, such as changes in legal liability of private polluters, changes in the burden of proof that an action is or is not violating standards of safety or environmental quality, and the imposition of unit prices or taxes for actions that pollute or overload environmental carrying capacity. These approaches are not costless, but they have the potential to reduce substantially the present overload on administrative agencies.⁴¹ Coupled with conscious and accountable priorities by the chief executive and administrative agencies, they might at least ameliorate some of the most vexing overload problems.

CONCLUSION

The administrative burden posed by numerous and complex environmental mandates has sometimes been used to argue that government should reduce its activities in this area in order to let other activities go forward. Reduction of governmental activity is not suggested here. The argument here is not that environmental protection (or energy) is good or bad as an area of government activity, but that its agenda has been overloaded, and that many of the agencies' strategies for coping with this overload are undesirable. The same problem could arise in any area of government policy. The point, therefore, is to suggest changes in approach that might improve the ability of agencies to cope with this overload intelligently, and avoid either floundering through it hoping that inattention to certain problems will not be challenged, or simply wishing that the problems would go away.

The flood of legislation shows no signs of abating soon, as long as legislators are rewarded for legislating, and news media are rewarded for identifying new public problems about which to legislate. Since the agencies must deal with the task of implementing these mandates, however, they must learn to do so deliberately and accountably as political decision making authorities, rather than in the traditional spirit of mere technical implementation of orders given by others. The overload is real, and it can be managed. It must be managed, however, as a problem of accountable public policymaking not merely of administrative convenience.

41. Cf. F. ANDERSON *et al.*, ENVIRONMENTAL IMPROVEMENT THROUGH ECONOMIC INCENTIVES (1977).