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THE UNFUNDED MANDATES REFORM ACT: OPPORTUNITIES FOR IMPROVEMENT TO SUPPORT STATE AND LOCAL GOVERNMENTS

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY AFFAIRS AND FEDERAL
MANAGEMENT

OF THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

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THE UNFUNDED MANDATES REFORM ACT: OPPORTUNITIES FOR IMPROVEMENT TO SUPPORT STATE AND LOCAL GOVERNMENTS

WEDNESDAY, FEBRUARY 24, 2016

U.S. SENATE,
SUBCOMMITTEE ON REGULATORY,
AFFAIRS AND FEDERAL MANAGEMENT,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:33 a.m., in room SD–342, Dirksen Senate Office Building, Hon. James Lankford, Chairman of the Subcommittee, presiding.

Present: Senators Lankford, Portman, Ernst, and Heitkamp.

OPENING STATEMENT OF SENATOR LANKFORD

Senator LANKFORD. Good morning everyone. We meet today to discuss the burden Federal laws and regulations have on State and local governments. This is a hearing on the Unfunded Mandates Reform Act (UMRA) and some opportunities to be able to do some improvement to support it for State and local governments.

The Unfunded Mandates Reform Act of 1995 intended to relieve State and local governments of many of the burdens that come down from the Federal Government. We will also discuss how we can build upon UMRA's successes and the ways that we can address some of those.

The Unfunded Mandates Reform Act was the result of bipartisan recognition that many decisions made by the Federal Government have significant costs, particularly to State and local governments.

UMRA has provided better quality information to Congress and the agencies as we contemplate new requirements that will add cost burdens to local governments. But the benefits of UMRA on State and local governments have fallen short of their intended goals.

UMRA is complex and contains many exceptions, and as a result, Federal actions that affect State and local governments do not benefit from the consultation and analysis required by UMRA.

The Government Accountability Office (GAO) has found that issued regulations seldom trigger UMRA's reporting and consultation requirements. There are many reasons for this. It could be because the rule was promulgated by an independent agency or the regulation was issued without a Notice of Proposed Rulemaking or perhaps the requirement in the regulation was considered vol-

untary as a condition for Federal aid or the regulation did not meet the dollar threshold for UMRA. All of these complications allow a lot of opportunities for a lot of loopholes.

Implementation of UMRA could be improved. Various experts also told GAO that the process used to consult with State and local officials needed to be more consistent and that more could be done to involve State and local governments in the rulemaking process. This goes back to a basic principle that we have, that individuals who are affected by a rule should actually have a voice when that rule is done.

I have heard these same sentiments from several officials in State and local governments. The very public servants that will later implement a regulation are not consulted early enough to improve the regulation or are not given enough time to make the changes required to be in compliance.

The provisions of UMRA require us to ask hard questions about the balance between our Federal Government and the governments closer to the people. We cannot pass the burden to them in times of scarce resources without due consideration.

During my tenure in the House, we held three hearings on the effects of UMRA and potential improvements on the statute. I look forward to hearing more insights today.

It is time to revisit UMRA. H.R. 50, The Unfunded Mandates Information and Transparency Act (UMITA), proposed by Representative Virginia Foxx—who is here as a witness to begin this hearing—and its Senate companion, S. 189, introduced by Senator Fischer, was conceived to strengthen the original 1995 UMRA legislation. Representative Foxx, I want to acknowledge your leadership on this issue and your tenacity on behalf of State and local governments, and I have been honored to work with you over the years on this important issue. I know this has already passed the House and has been a point of conversation of how do we actually move it through the Senate.

UMITA improves on UMRA by reflecting much of what we have already learned since the original UMRA passage. It updates the legislation to reflect current Congressional Budget Office (CBO) practices, addresses current exceptions to UMRA analysis and consultation, allows for analysis of mandates to States and local governments as conditions about their grant aid, and it codifies the Office of Management and Budget (OMB) directives to agencies on how to consult with State and local governments in an effort to enhance consistency of these efforts.

H.R. 50, when it passed the House in February 2015, was supported by major stakeholders representing State and local governments. I am optimistic about its prospects in the Senate, but I do understand full well the challenges that we face.

I look forward to hearing from our panel today about the real costs of Federal decisions on State and local governments, how UMRA has worked, and actions that Congress could take to create a more thoughtful decisionmaking process about the balance between State and local governments.

With that, I recognize Senator Heitkamp for opening remarks.

OPENING STATEMENT OF SENATOR HEITKAMP

Senator HEITKAMP. Thank you, Chairman Lankford, and thanks for calling this hearing. As a former State official myself, I completely understand and appreciate, having worked with my legislature and having served in State government, the challenges that we face every day when we have two regulatory regimes and trying to make those balance and understand the impacts. And so as I have said before, it is critical that we examine this kind of legislation, and it is critical that we look at what has worked and what has not worked. And so I am grateful for this hearing.

But we cannot lose sight that regulations are a critical part of how the Federal Government keeps our products safe and our food safe as well as ensuring a level playing field for our businesses.

To get good regulation, we need a strong regulatory process, and part of that strong regulatory process is engaging stakeholders early. As Senator Lankford and I know, we look at these regulations, and we say we need the regulators to talk earlier with industry, labor groups, and other stakeholders when they are developing the rules rather than doing this in a vacuum and then presenting the rule as a completed effort with no real opportunity for comment.

So I believe strongly that consultation with State and local and tribal governments is part of the necessary outreach that is critical to this regulatory process. Congress should always consider the compliance costs of legislation and how States and local and tribal governments will be impacted. Appropriate consideration must always be given to how decisions are made in Washington and how those decisions affect the bottom line back home.

This analysis and consultation means we can create a safer and more equitable Nation without unneeded regulation but with the right amount of necessary regulation. And so out of this need and out of this discussion, Congress passed in 1995 the Unfunded Mandates Reform Act. This law has worked to keep us and the executive agencies accountable in their home States and in our communities to help ensure that those of us on the Hill understand how our actions affect budgets beyond our own. It requires agencies to consult with those individuals who have boots on the ground and know how those rules could be followed and what works and what does not.

It is important, then, as we approach the 21st anniversary of President Clinton signing this bill into law that we take a step back and review it a retrospective review, if you will—that we check that our States and local partners believe that we are doing the right thing in terms of making sure that they have an opportunity to participate and have an opportunity to weigh in, in terms of those additional costs.

And so I look forward to hearing from these witnesses today. I look forward to continuing this dialogue in this Committee with Senator Lankford and with all of the Members of the Committee who have worked so hard to try and achieve bipartisan solutions to maybe some of the more contentious issues that we have in Congress. And so I welcome the Honorable Congresswoman and look forward to her testimony.

Senator LANKFORD. Thank you, Senator Heitkamp.

I am glad to be able to welcome my colleague, Congresswoman Virginia Foxx. She has been a tenacious advocate for this, for good reason. This is one of those things that most people do not know and do not track, but it has a tremendous impact on the day-to-day effect of State and local governments and entities around the country when the Federal Government creates a new mandate and then expects someone else to pay for it. She has been a very clear, articulate spokeswoman for this process and has continued to work very hard in the House for its reform. So I am glad to be able to receive words that you need to say. I know you have to get to a House hearing in just a moment, so you will not be able to stay for the full time as well, but I am glad to be able to receive whatever statements that you would like to make about UMITA and the UMRA process.

TESTIMONY OF THE HONORABLE VIRGINIA FOXX,[1] A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Ms. FOXX. Thank you so much, Chairman Lankford, Ranking Member Heitkamp, and distinguished Members of the Subcommittee. I particularly appreciate your opening comments today, and, Senator Heitkamp, we welcome you as a cosponsor of the bill with your eloquent comments. Senator Lankford, you summed up the bill so well. I am going to talk about some certain things today, but you have done a wonderful job, and I am very grateful.

I thank all of you for the opportunity to appear before you today to discuss the unfunded mandates imposed on State and local governments by the Federal Government through the legislative and regulatory processes. Like some of you, I served as a State Senator and can testify to the difficulty of balancing the State's budget when there are dozens of complicated unfunded Federal mandates that must be taken into account. Those experiences convinced me of the need to bring accountability to Federal regulatory structures that so often tie the hands of State and local governments.

In 1995, in a model of bipartisanship, Congress passed the Unfunded Mandates Reform Act. It passed the House with close to 400 votes and the Senate with more than 90 votes and was signed by President Clinton, as Senator Heitkamp has indicated.

UMRA focused on Washington's abuse of unfunded Federal mandates and passed on the principle that the American people would be better served by a government that regulates only with the best information.

UMRA was designed to force the Federal Government to estimate how much its mandates would cost local and State governments, which was previously not the case. UMRA was not intended to prevent the government from regulating but, rather, to ensure that decisionmakers had the best information possible when regulating.

I have always admired the purpose and spirit of UMRA, but weaknesses in the law have been exploited in the intervening decades and need to be addressed.

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[1] The prepared statement of Hon. Foxx appears in the Appendix on page 36.

My bill, the Unfunded Mandates Information and Transparency Act, seeks to address these shortcomings and will help UMRA meet its unfulfilled potential.

There are five main components to UMITA:

First, UMITA ends the exemption that most independent regulatory agencies have from UMRA's transparency requirements. These agencies include the Securities and Exchange Commission (SEC) , the National Labor Relations Board (NLRB), and the Federal Communications Commission (FCC).

Second, UMITA treats "changes to conditions of grant aid" as mandates for cost disclosure purposes. If Federal legislation or regulations force States, localities, or the private sector to make costly changes in order to qualify for Federal grant aid, these costs will be included in UMRA's cost analysis. For example, if Congress ever passes another law such as No Child Left Behind that changes the rules that States must follow to continue receiving Federal funds, then those changes and the resulting costs will be disclosed and considered.

Third, UMITA guarantees the public always has the opportunity to weigh in on regulations. Currently, UMRA cost analyses are required only for regulations that were publicly announced through a formal Notice of Proposed Rulemaking. UMITA requires agencies to complete cost analyses for all regulations, whether or not such a notice was issued, while providing an accommodation for emergency regulations.

Fourth, UMITA equips Congress, regulators, and the public with better tools to determine the true cost of regulations. Analyses required by UMITA will factor in real-world consequences such as costs passed on to taxpayers and opportunity costs when considering the bottom-line impact of Federal mandates.

And, finally, UMITA ensures the Federal Government is held accountable for following these rules.

UMRA contained little in the way of enforcement, so UMITA provides that if the transparency requirements are not met, States and local governments have access to a judicial remedy.

It is in these ways that UMITA will ensure public and bureaucratic awareness about the costs in dollars and in jobs that Federal regulations impose on the economy and local governments.

Let me be clear. UMITA is not an anti-regulation bill. It is intended neither to stall nor to prevent the regulatory process from working as it should. UMITA is a bill to make our regulatory apparatus more efficient, effective, and transparent.

UMITA has bipartisan DNA and is purely about good government, openness, and honesty about the cost of regulations. These principles do not belong to either party. That is why my Democrat colleagues Loretta Sanchez and Collin Peterson join me as cosponsors, and it is why the bill passed the House with votes from both parties.

Republicans and Democrats can agree that every unfunded mandate the Federal Government imposes should be both deliberative and economically defensible. It is my hope that this hearing will be a first step toward an improved and more transparent regulatory process that eases the burdens passed on to State and local governments.

Thank you for giving me this time and for your consideration of H.R. 50.

Senator LANKFORD. That is great. Thank you. Representative Foxx, I appreciate you being here and getting a chance to walk us through this.

Let us take just a short moment, and we are going to transition the witness table and introduce our expert witnesses that are here to talk about the bill today.

[Pause.]

At this time we will proceed with testimony from our expert witnesses. Let me introduce all four of them, and then we will swear you in and then get into your testimony as well.

Senator Curtis Bramble is the president of the National Conference of State Legislatures (NCSL), a post he has held since August 2013. He is also president pro tem of the Utah State Senate, serving in his fourth term. He previously served as Senate majority leader. Thank you—you have a very busy schedule—for being here as well.

Commissioner Bryan Desloge is the first vice president of the National Association of Counties (NACo). Mr. Desloge is from Florida, serves as the Leon County Commissioner. He is a board member and past president of the Florida Association of Counties. Thanks for being here.

Paul Posner is the Director of the Graduate Public Administration Program at George Mason University. He has served as the president of the American Society for Public Administration and as chairman of the board of the National Academy of Public Administration. He has also served as the Director of Intergovernmental Affairs of the Government Accountability Office where he led the office's Federal budget work. He has written extensively on UMRA and related topics. Thank you.

Richard Pierce is the Lyle T. Alverson Professor of Law at George Washington University Law School. He is also a member of the Administrative Conference of the United States and has taught and researched in the fields of administrative law and regulatory practice for 38 years.

Gentlemen, I would like to thank you for being here in front of us today. It is the custom of this Subcommittee that we swear in all witnesses before they testify, so if you would please stand and raise your right hand. Do you swear that the testimony you are about to give before this Subcommittee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. BRAMBLE. I do.

Mr. DESLOGE. I do.

Mr. POSNER. I do.

Mr. PIERCE. I do.

Senator LANKFORD. Thank you. You may be seated.

Let the record reflect that all the witnesses have answered in the affirmative.

We are using a timing system today. You will see a countdown clock in front of you. Your written testimony, I appreciate you submitting that in advance. That will be a part of the permanent record. Whatever you say orally, you can go off of your written record or add to it. Either one is just fine.

There is a countdown clock in front of you, and we would like to ask you to stay within the 5-minute time period so we can have a maximum amount of time for questions in the days ahead.

Mr. Bramble, you get the privilege of being first in this based on your position at the table, so we are honored to be able to receive your testimony now.

TESTIMONY OF THE HONORABLE CURT BRAMBLE,[1] PRESIDENT PRO TEMPORE, UTAH SENATE, AND PRESIDENT, NATIONAL CONFERENCE OF STATE LEGISLATURES

Mr. BRAMBLE. So this is the hot seat. Thank you, Mr. Chairman.

Chairman Lankford, Ranking Member Heitkamp, and distinguished Members of the Subcommittee on Regulatory Affairs and Federal Management (RAFM), as indicated, my name is Curt Bramble, president of the National Conference of State Legislatures and president pro tem of the Utah Senate. I appear before you today on behalf of NCSL, the bipartisan organization representing the 7,383 legislators of our Nation's States, Commonwealths, Territories, possessions, and the District of Columbia.

Thank you for the opportunity to discuss the Unfunded Mandates Reform Act of 1995 and the opportunities for improvement to support State and local governments. NCSL applauds the leadership of the Committee for having this discussion, as the fiscal impact of Federal actions on State and local governments is often overlooked.

Mr. Chairman, I would also like to specifically thank you, Senator Deb Fischer, a former NCSL executive committee member, Congresswoman Foxx, and the Ranking Member, Senator Heitkamp, for your leadership in seeking to strengthen the provisions of UMRA with the introduction of the Unfunded Mandates Information and Transparency Act of 2015.

UMRA was adopted over 20 years ago in an effort "to curb the practice of imposing unfunded Federal mandates on State and local governments." While at that time it renewed the commitment to cooperative federalism and brought attention to the growing reliance of mandates as a policy instrument, the law's definition of "intergovernmental mandate" is limited, and as a result, the true impact of Federal actions on States in many cases is not reflected in the cost estimates.

An example is the 1986 law called the Emergency Medical Treatment and Labor Act (EMTALA). The cost to the States of EMTALA and the Federal requirement of providing health care to anyone that presents themselves may be very good policy, but the unfunded mandate and the cost is a real challenge sometimes for States to meet.

Mr. Chairman, State legislators across the country view a Federal mandate much broader than is now defined in UMRA. We would include situations when the Federal Government establishes a new condition of grant-in-aid for longstanding programs; uses fiscal sanctions to coerce States into taking some action, for example, in the transportation arena, if you do not do X, you may not get

[1] The prepared statement of Hon. Bramble appears in the Appendix on page 40.

Federal funding; or where it intrudes on State sovereignty. These just give you a few examples.

So what is the solution? Provisions in UMITA that strengthen the analysis and oversight of intergovernmental mandates is a step in the right direction. In Utah, we actually have a Federal Funds Commission. We do stress testing to see what our State budget would look like without any Federal funds.

In particular, NCSL supports provisions of Senate bill 189 that allow any Chair or Ranking Member of a Committee in the Senate or House of Representatives to request that CBO compare the authorized level of funding with the prospective costs of carrying out a condition of Federal assistance imposed on the States, local governments, or tribal governments. Changes to grant requirements for established State and Federal programs often result in new prescriptive requirements that shift costs to State governments. While statutorily these programs are deemed "voluntary," in some cases these are State-Federal partnerships that have existed for decades.

NCSL also supports provisions in UMITA that modify the definition of direct cost in the case of Federal intergovernmental mandates. On the regulatory side, NCSL supports the provisions of Senate bill 189 that expand UMRA's reporting requirements to independent regulatory agencies, creates a mechanism for congressional requests for a regulatory "lookback" analysis of existing Federal mandates, and provides for enhanced agency consultation with State and local governments.

In addition to provisions included in UMITA, NCSL would also encourage Congress to consider other reforms of UMRA that are outlined in my written testimony.

Mr. Chairman, NCSL recognizes the need for the Federal Government to reduce its annual deficits, curb growth in the national debt, and achieve a sustainable fiscal path. Provisions in UMITA are critical to ensuring that these efforts be made with a full understanding of the fiscal impact on State and local governments. This is not about blocking legislative or regulatory action. This is about transparency and government responsibility and accountability by ensuring the full potential impacts of intergovernmental mandates in legislation and regulations are known.

Mr. Chairman, thank you for this opportunity to testify before the Subcommittee, and I look forward to answering any questions the Members may have.

Senator LANKFORD. Thank you. Mr. Desloge.

TESTIMONY OF THE HONORABLE BRYAN DESLOGE,[1] COMMISSIONER, LEON COUNTY, FLORIDA, AND FIRST VICE PRESIDENT, NATIONAL ASSOCIATION OF COUNTIES

Mr. DESLOGE. Thank you. Thank you, Chairman Lankford, Ranking Member Heitkamp, and distinguished Members of the Committee. I am honored to testify today on how the Unfunded Mandates Reform Act can be improved.

My name is Bryan Desloge. I am an elected county commissioner from Leon County, Florida. I am representing the National Association of Counties, which is 3,069 counties across the country.

[1] The prepared statement of Commissioner Desloge appears in the Appendix on page 46.

I would like to share with you three points today to consider as you work to update and improve UMRA.

First, UMRA was established as a framework for improved communication and collaboration between the Federal agencies and their State and local partners. The process has been helpful in raising awareness regarding unfunded mandates. However, challenges do exist, and the work today presents us with an opportunity to strengthen this.

UMRA does require that Federal agencies consult with local governments in the regulatory process. We have found that there are lots of inconsistencies about how this requirement is applied. Consistency in the process and meaningful consultation in the early stages of rulemaking would increase awareness of the real impact of Federal regulations on local governments. It is important to note that counties are often responsible for implementing and funding policies and programs established by the States and Federal Government, and counties play a key role in the ultimate success of the process.

It is in our shared interest that counties be engaged as partners throughout the entirety of these discussions and actively participate in the planning, development, and implementation of the rules. In current practice, we too often are limited to the comment period offered to the general public. One example I would like to highlight is the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) final rule on Waters of the U.S. Counties repeatedly requested to be at the table to develop a practical rule to protect our water resources, and, unfortunately, the EPA refused to meaningfully consult with local governments, and this lack of collaboration has resulted in a final rule that created more confusion than clarity and significantly expanded the EPA's jurisdiction over county-owned and—maintained infrastructure.

We are concerned that agencies are conducting the rulemaking process without truly consulting their intergovernmental partners. As a result, the rules are not as effective as they could be because they lack the informed perspective of local leaders. The bottom line is Federal regulations are the most effective when they are developed in consultation with State and local leaders.

Second, if the process is not addressed, local governments will continue to face increasing fiscal pressure. Counties across the country are mandated to provide a growing number of services while operating under greater State and Federal restrictions on how we generate revenue. In fact, there are 40 States across the country today that limit the ability of local governments to generate revenue. In Florida, the combined fiscal impact of Federal and State mandates on counties is substantial. Our counties in Florida contributed $281 million to the local share of Medicaid costs this year, $57 million last year for a portion of the costs for juvenile secure detention, $525 million last year for court-related costs, and $1.8 billion in fiscal year (FY) 2013 and 2014 for county roads, bridges, and tunnels.

Shifting implementation costs of Federal policies and programs on a local government creates budgetary imbalances, leaving local governments with a choice between cutting services like fire, law

enforcement, emergency rescue, education, and infrastructure or increasing revenue. Unfunded mandates hide from policymakers the true impact of Federal programs when the costs of implementing them is shifted on to local governments that are already stressed.

And, finally, our system of federalism requires that there is a strong State, Federal, and local partnership to achieve common goals. At the end of the day, it is all taxpayer dollars, and where it goes and how it comes, we should do a better job, I think, of working together.

Government works best when we all work together, and we hope that you will work toward creating policies that not only achieve our shared objectives but will also provide adequate funding to ensure that no one level is left to shoulder the burden of policy implementation. Counties stand ready with innovative approaches and solutions to work side by side with our Federal and State partners to ensure the health, well-being, and safety of our citizens.

Mr. Chairman, we are encouraged by initiatives like the Unfunded Mandates Information and Transparency Act, that you cosponsored with Senator Fischer and that Representative Foxx led in the House. Although UMRA established a framework to consider intergovernmental mandates in legislation and regulation, UMITA presents the opportunity to improve the process even more.

Thanks for the opportunity to testify. I would be happy to take any questions.

Senator LANKFORD. Thank you. Mr. Posner.

TESTIMONY OF PAUL POSNER, PH.D.,[1] DIRECTOR, CENTER ON THE PUBLIC SERVICE, GEORGE MASON UNIVERSITY, AND FORMER DIRECTOR OF INTERGOVERNMENTAL AFFAIRS, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Mr. POSNER. Thank you, Chairman Lankford, Ranking Member Heitkamp, and other Members of the Subcommittee. This hearing is an important stocktaking on unfunded mandates, and it will deliver much needed attention to this whole area.

It is hard to believe, given how much we focus on this, that before the 1960s, generally Congress displayed considerable self-restraint with regard to State and local government. Major mandates applied to the private sector were exempted from coverage in the State and local sector—Social Security, fair labor standards, among others. Most of the national expansion that we saw with the New Deal and the Great Society occurred through cooperative federalism, through grants and collaboration, through the carrot not through the stick.

Something changed in the late 1960s through the present day, and that is shown on page 4 of my testimony, the Advisory Commission on Intergovernmental Relations (ACIR) showed the rapid growth of preemptions through the following three decades, through Democratic and Republican Congresses and administrations alike. This is a bipartisan phenomenon.

I want to just say before we talk about UMRA that there are very strong forces at work here that continue to this day to promote what I call the "switch from cooperative to coercive fed-

[1] The prepared statement of Mr. Posner appears in the Appendix on page 87.

eralism." One is the way that Members of Congress and other national leaders get elected. It used to be there was strong collaboration with State and local party leaders. There is still that, but now members are increasingly on their own to develop coalitions and the like to campaign and get reelected for public office, sometimes in competition with State and local officials.

There has been a nationalization of problems deposited on the Federal doorstep. Private troubles are increasingly converted to public problems deposited on Washington's doorstep first, not last resort. Businesses have been converted from allies of States to the leaders of the preemption parade.

State and local governments face extraordinary pressure defending these kinds of issues. I was at the National Governors Association (NGA) conference this week, and they said that the Every Student Succeeds Act (ESSA) was the first education bill NGA had been able to take a position on for 20 years, and that is true with most of the major legislation in Washington. The State and local groups have a very difficult time reaching agreement, their political leaders from all sides, obviously, and mandates are particularly difficult. I used to work for the mayor of the city of New York leading our work on Federal relations, and I know how he struggled with things like special education and environmental policies. It is very difficult to take positions against such compelling issues.

Now, against this strong tide, I think UMRA was a modest reform that has achieved a modest result, which is not a small accomplishment by any means. I think it was cleverly designed. It went beyond just providing estimates and information to providing a point of order. And it is important to understand how that point of order has worked. It has been raised about 60 times in the House and about 3 times in the Senate since 1996. But that is not the way mandates are stopped. Most of those points of order did not stop the bills. It is through the threat of the point of order, the threat of shame. There is still residual concern about State and local costs that members often modify bills to stay under that limit or even withdraw them entirely, and I have several examples in my statement where that has been laid out.

I think I totally agree with the other witnesses that the focus of UMRA has been narrow and focused on direct orders, and most of the mandates that really bother State and local officials happen through preemptions and grant conditions, particularly grant conditions. Grants, maybe widely characterized as gifts, are not a gift horse. They are a Trojan horse into which are packed many different requirements and particularly, as one of the witnesses said here, existing grants that are then piled on with retroactive conditions become particularly onerous.

Now, the courts long agreed with the UMRA view that the only true mandates are direct orders. But with the Sebelius decision under the health reform, they now join the notion that it is not just direct orders that commandeer State and local resources, in the Court's words. It is grant conditions that are onerous on the States, like the Medicaid expansion. Whatever you think of it, it was viewed by the Court as a mandate that was covered by constitutional issues.

So I think the UMRA legislation does a lot of good things, including, I think, very sensibly extending coverage and information to State and local government. The consultation needs much more attention than it gets. I have suggested creating an Office of Intergovernmental Advocacy like we have Small Business Advocacy, because in the past we have learned that not only are Federal agencies uneven, but State and local governments do not pay as much attention as they should on their own. I think they need some help in that department.

I want to say one more thing. Changes in the law, as well intentioned and as important as they are, are not going to solve the problem. We need to get the backing of institutions that focus on intergovernmental issues and federalism in this town, and unfortunately, those have largely been eliminated. In 1980, we had an Advisory Commission on Intergovernmental Relations. We had Intergovernmental Subcommittees in this Congress. OMB had a major division focusing on domestic grant programs and the like. Even the State and local groups had an Academy of State and Local government. All those have shrunk and disappeared. In some way, we have a barren institutional landscape to support the concerns that we all share, I think that you particularly share on this Committee.

I am concerned that this dissolution of institutions reflects a lower priority to federalism as a rule of the game. I fear until we change that, nothing significant is going to happen.

Senator LANKFORD. Mr. Pierce.

TESTIMONY OF RICHARD J. PIERCE, JR.,[1] LYLE T. ALVERSON, PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY SCHOOL OF LAW

Mr. POSNER. Thank you, Chairman Lankford, Ranking Member Heitkamp, and the other distinguished Members of the Subcommittee on Regulatory Affairs.

I wanted just to start by saying I agree completely with what has been expressed by the Chairman and the Ranking Member and the other witnesses. UMRA is a very important statute in its application to State, local, and tribal governments. I frankly do not have any idea why it applies to private regulated firms. That strikes me as a complete mismatch. They are the most effective participants, most active participants in the agency decisionmaking processes, and they are fully protected by the series of Executive Orders (EO) that began with Executive Order 11291 and continue today that Senator Portman knows well. He implemented them for years. This statute, the application of this statute to private parties seems to me completely duplicative, unnecessary, and counterproductive. But in its application, core application to county, State, and tribal governments, I think it is terribly important.

Now, turning to this particular bill and the proposed changes, with one notable exception, I oppose them as they apply to Federal agencies. I am not going to take a position on how they might or might not improve things, and I do not have enough knowledge of how Congress functions, your rules of procedure, to know, to be able to express an informed opinion on that.

[1] The prepared statement of Mr. Pierce appears in the Appendix on page 104.

As to their application to Federal agencies, I oppose all but one because they are either duplicative and potentially counterproductive in their unintended adverse effects or are directly counterproductive.

Now, let me begin with the one that I support enthusiastically, and that is Section 5, which would extend UMRA to independent regulatory agencies. I have expressed my view strongly in support of Senator Portman's bill, Senate Bill 1607, on many occasions. I continue to support it, and really all of the same principles that I invoke as my basis for supporting that bill apply here equally. It does not matter whether it is an independent agency or, how you label the agency. What matters is whether the agency imposes an unfunded mandate on a State, local, or tribal government. And so I am strongly supportive of that.

When I look at the other provisions and their potential applications to agency decisionmaking, it seems to me they fall into one of two categories. Many of them are just paraphrases of existing requirements, some of which are drawn from court opinions, some of which are drawn from Executive Orders or from other statutes. I always dislike legislation that attempts to reenact existing requirements using new words. What that does is create massive uncertainty for decades. Nobody knows what those words mean until some court decades later tells you what they mean. And in many cases, it comes as a shock to everyone, including the Members of Congress who thought they knew what this was going to do until they read the court opinion and said, "Oh, dear."

So I think anything that simply attempts to paraphrase something that is already an existing requirement is potentially very problematic and certainly unnecessary, because the requirement is already there. In most cases, the requirements we are talking about are in Executive Orders 11291, 12866, 13342, the series that I referred to earlier.

Some of these provisions I oppose for other reasons. They obviously go beyond what 11291, 12866, and 13342 impose, and we already have a big problem. It is called "rulemaking ossification." Just to give you an illustration, over the last few years Federal agencies have failed to comply with over 1,000 deadlines contained in Federal statutes about rules they are supposed to issue. Why? Because of rulemaking ossification. The decisionmaking procedures take too long, they are too resource-intensive, and the agencies simply cannot comply with all of those and do the job of issuing the rules that you have told them to issue. Plus all of these requirements apply to amendments and to rescissions as well, and there are lots and lots of obsolete rules that simply cannot be amended or repealed because of rulemaking ossification. I oppose any effort by you to impose more burdensome, time-consuming, costly decisionmaking procedures on Federal agencies.

Senator LANKFORD. Thank you, Mr. Pierce.

I would like to ask unanimous consent that we move to Senator Portman first. He actually has another meeting he has to get to quickly as well. Without objection, Senator Portman, you are up.

OPENING STATEMENT OF SENATOR PORTMAN

Senator PORTMAN. Mr. Chairman, thank you very much, and I appreciate the fact that you and Senator Heitkamp are holding the hearing and, more importantly for today's purposes, the way you conduct yourself at these hearings, including letting members ask questions and sometimes before you have had the opportunity to do so yourselves, because you are going to be here until the end, as Senator Heitkamp once told me, which I also like about you guys.

So as the Republican author in the House of the Unfunded Mandates Reform Act, it is difficult to see your child be criticized. [Laughter.]

But I agree with most of the criticism, and in the sense that, I do think it was a significant move forward. It was not easy, and many of you supported this at the time. And, frankly, we never could have gotten it done without the input from State and local government, which is really where the pressure was applied. It was part of the Contract with America. It was the first one that was passed into law. It was Gary Condit and I. He was the Democrat, former mayor, and it was also bipartisan here in the Senate. As you know, Senator Glenn and others helped it. So it is time after 20 years to take a look at it and say, "OK. What worked and what did not work?" So I agree with all that.

I do think, Professor Posner, you put your finger right on where this has been most effective, and it is here nobody pays much attention, which is the threat of a point of order being raised has changed the entire way we legislate, particularly in the House, because that point of order in the House, which was the most difficult piece of this, as you know—and the Rules Committee fought us on this consistently—has made a huge difference. Not only do you get now the CBO analysis we did not have before, and, we have all got thousands of different analyses of what the costs of these mandates are, but I have just got to tell you, for our State and local folks who are here, when you want to come up with a bill and you know you have to run through that gauntlet and you could be embarrassed on the floor of the House, trust me, it makes a difference. And it never gets out of committee.

So that has been the biggest impact probably and maybe, the unheralded one until, Paul, you raised it this morning. So thank you.

But I do think there is an opportunity to fix it. I am not on UMITA. I have some concerns with some aspects of it, but I think it is generally in the right direction.

I also think the legislation that Senator King and I have proposed—and it was bipartisan over the last 3 or 4 years, which is called the Regulatory Accountability Act—also gets at some of these same issues. And what it says, basically, is that the agencies have to bring State and local shareholders in early. And I know both the Chair and Ranking Member agree with that, and they have legislation that also directly affects that. But that is in the Regulatory Accountability Act, and I think that is a significant improvement to the current UMRA. There have been, as was said, 60 points of order raised, but so many that were not raised that provided that threat.

On the independent agencies, Professor Pierce has been very brave. He has taken some slings and arrows from some folks who do not want the independent agencies to be under the same rules or even similar rules to the executive branch agencies. Let me just give you a little data on this.

In 2014, the last year for which we have the data, nine agencies proposed 17 major rules. These are independent agencies. Only one of those rules contained a full cost-benefit analysis. I can go back to 2013 when none of the 18 major rules did. "Major" is over $100 million of impact of course. In 2012, only one of the 21. So I appreciate your standing up on this. I know you have taken some heat on it. But it is the right thing to do.

And, by the way, President Obama says it is the right thing to do. He does not want it codified necessarily, but we ought to codify it, and this is something that I hope—and, again, this Subcommittee has been great on this issue. There is just this big yawning gap here of the independent agencies, and it does relate to what we are talking about here because they do not have to live by the same State and local consultation and so on. So I appreciate you, Professor Pierce, sticking your neck out on that one and continuing to talk about it.

I have so many questions for you guys. Let me just ask you this, Professor Posner, if I could. Your testimony talks about the fact that OMB has guidelines for Federal agency consultation with State and local governments, and you talk about how UMITA seems to codify much of that. What do you think the benefits are of codifying that guidance from OMB? And how would that help in terms of implementing UMRA in a more effective way?

Mr. POSNER. Yes, I think this is a tradition. Codifying executive rules and legislation helps give it more leverage with the agencies and secures its survival across administrations. The Government Performance Modernization Act of 2010, for example, codified a lot of the things that OMB had already been doing, and it made them kind of more a factor to deal with.

So this is an area, I think, that needs far more attention, and it has some notable successes, but it also has many lapses. And the old Advisory Commission on Intergovernmental Relations used to do this on behalf of the State and locals. They collated the State and local comments, delivered them to Federal agencies, and tried to serve as a broker.

Now, they have been eliminated, but one of the things they reported is that not only did a lot of Federal agencies never come to them with proposed regs, but a lot of the State and locals did not respond to the invitation to comment. And so that is where I wonder if we need some more proactive institution as an intermediary, like an Office of Advocacy, like the small business community has to serve as a proactive hub to bring Federal statehood organizations on proposed regulations.

Senator PORTMAN. That is well beyond what UMITA does, but——

Mr. POSNER. That is right.

Senator PORTMAN [continuing]. Just to establish a structure, as you said earlier, an institution.

Well, my time has expired. I thank the gentlemen for your testimony today and for your advocacy of this issue and the pressure on it. Thank you, Professor Pierce, and thank you to my colleague from Iowa for your forbearance.

Senator LANKFORD. Thank you. Senator Ernst.

OPENING STATEMENT OF SENATOR ERNST

Senator ERNST. Thank you, Mr. Chairman, and thank you, Senator Heitkamp.

Thank you, gentlemen, for being here today. This is an important discussion and one that I am very familiar with, having served at the county level as well as at the State level. So thank you so much.

Mr. Posner, you mentioned the Help America Vote Act (HAVA), in your written testimony, of which I am intimately familiar with because, as a county auditor, I served as the Commissioner of Elections at the time that HAVA was being implemented. So this was given as an example of a prominent mandate that was not considered to be an unfunded mandate under UMRA, and I would like to visit with you about that today.

I actually had some folks from the Iowa Association of Counties in my office on Monday, and they brought up this piece of legislation. Another one of the visitors that I had was a county auditor as well and a member of NACo. So it was good to see them.

But although the act was well intentioned, it did place a number of burdens upon the small counties, the rural counties, economically challenged counties, which is where I came from, and it negatively impacted the already stretched budgets.

As you know, through the legislation States are required to purchase new voting machines, and oftentimes the technology far outpaces what States are comfortable with and what they are able to purchase on a rolling basis. There is also a number of maintenance costs, the programming costs that are always ongoing, and it was always very tough for us as a small county to absorb these costs in our county budget.

So if you could talk a little bit about that issue and just maybe what we need to do to solve those issues.

Mr. POSNER. You obviously have a lot more experience than anybody certainly that I know, and we have done a little work in Virginia and have encountered the same issue. Basically, we took one of the most voluntaristic parts of our public administration system and imposed quite a number of requirements in a very short period of time. And I think for purposes of this hearing, it was not considered to be an unfunded mandate for purposes of UMRA, partly because it delivered it in the form of grants and conditions of aid. And I think Congress bent over backward to try to avoid having a large Federal agency manage this. But even with that, just the requirements themselves, as you say, came down in a way that really had a lot of unanticipated effects. And I think it is one of the reasons why we need to be more cognizant and more accountable when we do this up front.

Senator ERNST. Right.

Mr. POSNER. Exactly the same thing you are talking about.

Senator ERNST. Thank you, and I appreciate that. The issue, of course, grants did flow through our Secretary of State's office because that is where elections are housed in Iowa, and then on down to the county level. And what happened, a number of counties would purchase equipment. It quickly became outdated. You move on to the next version and the next version and new software and new requirements, new accessories that are required. And, unfortunately, all of that is not funded. So the unintended consequences after that initial purchase of equipment, and that is just one of the many examples that we could push forward today. But thank you for that. I appreciate it.

Mr. Desloge, you did mention Waters of the United States and, of course, I have been pushing that quite heavily on the expanded definition with a number of my Senate colleagues. I have significant concerns about the impact, and this was another issue that was brought up by the Association of Counties members that stopped in the other day. You specifically mentioned that the EPA did not meaningfully consult counties prior to the proposed rule. Can you walk me through NACo's experience and process with the EPA and the Corps of Engineers? And were there any efforts by the folks at OIRA or OMB to work through these conflicts?

Mr. DESLOGE. I can probably address it at about 40,000 feet. We tried to engage early on and lodged concerns, and the devil is in the details. Obviously, we are all about clean water, which is the pushback we always got: "You do not like clean water."

Senator ERNST. Exactly.

Mr. DESLOGE. But there is language in there that will cripple us eventually, and I will give you an example in my home town. We have a storm going through there today. The schools are closed in north Florida, and a couple of inches of rain, probably. I promise you, the last 48 hours I have had all my public works people out there cleaning out storm water conveyances and making sure that nothing is going to flood. We have concerns that some of that we are going to have to stop and say, well, we need to touch base with the Corps and see if need to get a permit for this. So I do not have that kind of latitude. So there is a cost, and in this case there is a safety issue as well.

We lodged complaints early on. It seemed that the Corps and the EPA were not in tandem on this, and we got kind of conflicting messages. We felt like we did not get all the information, and in the end we kind of felt like we got run over. And, again, the intent is honorable, and the whole issue here is this is, I think people start off with the best of intentions, but as you get further down the road in the implementation, we end up taking the heat. And it is a big one. And there are a number more like that if we are not careful. Ozone is another one coming in the same kind of scenario. But good question, thank you. And thank you for your county services.

Senator ERNST. And I loved my time in county service, so thank you so much. And thank you, Mr. Chairman.

Senator LANKFORD. Senator Heitkamp.

Senator HEITKAMP. Thanks to all the panel, just very reasoned and measured responses, and I think a great opportunity to have a dialogue with all of us here. And I do not mean to hijack this

from the topic, but since I have someone from the counties and someone from a State legislature, I want to talk about an issue that I think is also critical. And maybe, Professor Posner, it goes to an additional issue that we could include in an intergovernmental aspect. Senator Lankford and I opened up a portal which said Cut——

Senator LANKFORD. Cut Red Tape.

Senator HEITKAMP. Cut Red Tape. I always want to say "the red tape." Cut Red Tape. And we invited criticism and, we invited people to tell us what is working, what is not working. A lot of criticism that we got was of State regulation. It was of local regulation. It was about duplication between Federal regulation and State and local regulation. And that adds to the burden, it adds to the confusion, and it certainly adds to the costs of achieving a public purpose that we are all trying to move toward.

Now, this is a situation where a fair application of the Tenth Amendment, you can say, "Well, if the States are regulating, the Federal Government ought to think twice about whether they ought to do it." I am a big Tenth Amendment person. I hate preemption and—because I think these are the laboratories of democracy, which are State governments.

So when you were talking, Commissioner, about the regulation, a lot of what you talked about on consultation involved not Federal mandates, but mandates coming from State legislatures and from executive agencies.

My question is really to the Senator: Do you know of any model legislation that States have adopted on unfunded mandates that deal with just State regulation and pushback from counties and cities, from townships, from local government, that really can help us inform a model beyond the model that we are working with here?

Mr. BRAMBLE. Thank you for the question. One of the challenges, with the premise of the question is that there is a different relationship between the Federal Government and the States than there is between State governments and the political subdivisions within the State. The vast majority of States—there are a few States that have a home rule difference, but the vast majority of the States, the political subdivisions—the cities, the counties, the towns, school districts, all of those special service districts, et cetera—derive their sole authority from State statute. And so the comparison saying, well, doesn't the same problem exist in the States, where if the State legislature tells its political subdivisions what they should do and they do not provide funding, is not analogous to the Federal Government.

Well, Madison in Federalist No. 45 had something to say about that. Talking about the proposed Constitution, he said, "The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which remain in the State governments are numerous and indefinite."

Senator HAITKAMP. I get all that, and I do truly understand the Tenth Amendment and the Eleventh Amendment. But my point is—and it is not to say we do not have an obligation here to look and see what the Federal-State relationship ought to be. But as I have pointed out frequently—and I think if I were a county commissioner who had my limitations on my property taxes restricted

by State legislature, only to receive a mandate on my share of the Medicaid expenditure, I might take issue with that relationship. I see my commissioner laughing a little bit. And I do not mean to cause a fight between local and State government, but I have been in State government long enough to know that that tension exists.

What I am trying to get at is, we looked very closely at what other models there might be, whether they are international or whether they are, within our system itself, on how we could do a better job coordinating between all the levels and all the branches of government. And so for me, this issue is bigger than just Federal unfunded mandates. It is how do we work together on a layered basis to actually achieve results.

And I want to go to Waters of the United States. We have been litigating Waters of the United States for, what, 30 years? We have been arguing about what is jurisdictional waters under EPA. It is time that Congress do its job and legislate what waters are, to create the lane, because without Congress legislating, they are going to be wandering around out there in my wetlands, in my potholes, for the rest of my life.

And so, we can deal with the stay that we have now. I have legislation. I know it has been endorsed by both the organizations. I really appreciate the support. But I want to get to Professor Posner's idea about some kind of more institutional framework for dialogue and consultation, because I agree with you, I do not believe there is enough consultation on the front end. I think that is true not only for State and local governments; we believe it is true for stakeholders as well. And so we have a bill headed up by Senator Lankford to require additional, notice before rulemaking begins so that we can get comments earlier.

I begged EPA to reissue the rule, Waters of the United States. They said they did enough consultation. I do not agree. I do not think the courts of the United States agreed either. And so here we are once again creating this great uncertainty when maybe that could have been avoided with an institution that was greater dialogue on the front end. And we are not here to litigate individual legislation. We are here to talk about how we can structure the relationship in a way that it actually gets rid of the conflict and achieves the result.

And so I know if I talk to my colleagues about creating yet another intergovernmental agency or another agency, the groans will come up. You heard it, right? You heard the groan. But, I am curious how you react to the groan and what persuasive argument you can make for your idea.

Mr. POSNER. Look at all the major Federal systems in the world and in the Organisation for Economic Co-operation and Development (OECD). We are the only ones without a real extensive consultation mechanism. Germany, Australia, Canada have very extensive consultations that——

Senator HEITKAMP. And very robust subnational involvement.

Mr. POSNER. Exactly. And staff. They staff it, too. So it is not just an honorific kind of an issue.

I think these kind of things obviously take a lot of work, but I think one of the things that happens sometimes in our system that you alluded to is we focus on these different titles—Title 1, Title

2 of UMRA. Sometimes Congress sets up the agencies to have difficult problems because they do not adequately consider the impact of legislation on State and local government.

Senator HEITKAMP. Right.

Mr. POSNER. I think about the REAL ID Act of 2005 where, basically the State motor vehicle administrators have worked a bill that Congress approved that was going to use regulatory negotiation with the Department of Transportation (DOT) to work out a national ID—I will call it a national driver's license—that was hardened. And then Congress literally 3 or 4 months after that imposes REAL ID with much more stringent requirements and no consultation at all with the State and local community and transfers it to DHS, and then they wonder why it has taken 10 years to implement it with all the State pushback.

So I think a lot of this consultation—if we had done something before Congress even approached that through some kind of intergovernmental process, I think we might have been better off in the long run. That is the idea.

Senator HEITKAMP. Professor Pierce, you said one of the things that you are concerned about is we are not currently meeting deadlines in terms of regulation. And I could give a concrete example where failure to regulate actually had tremendous costs, and that is in the tank car regulation that DOT just did. They waited too long. The industry went ahead and built a new generation of tank cars. All of those tank cars that just rolled off the factory line now have to be retrofitted to meet the guidelines. I am not saying that was the wrong answer. I am just saying failure to engage and regulate actually costs money. So we need to remember that regulation many times can be clarifying for industry and can achieve a result.

So what is your response to a commission that would be charged with managing this relationship?

Mr. PIERCE. Let me just start by expressing my complete agreement with you and with Professor Posner that I think this is the core problem, and it is just difficult, really difficult for a lot of reasons.

First, the issues, the substantive issues we are addressing here divide everyone. The Supreme Court, Waters of the United States—I teach that case every year. The Supreme Court divided 4–1–4. There were not five Justices in support of anything. There were two Justices, each of whom "was on a different side"—the Chief Justice and Justice Breyer—who said, "You have to make a rule, get together and make a rule. Get a rule together, and we will support it."

Well, I was not sure I believed them when they said that, but a decade later we have a rule and, predictably, no one likes it.

When you try to get 50 States to agree today on anything important, that is not going to happen. Right now in the context of climate change, the initial judicial action of the Supreme Court was instigated by a State, and now the reaction is 28 other States oppose. So nothing——

Senator HEITKAMP. I think people forget that.

Mr. PIERCE [continuing]. Is going to produce agreement among the States.

Senator HEITKAMP. Let us go back to the question, which is finding some kind of institutional place for this dialog. Do you believe that that would assist in at least getting early indication of those conflicts?

Mr. PIERCE. I do not know, because the next problem is each State has its own unique governmental structure, and I have tried to help Federal agencies who in good faith have tried to go out in consultation, and they discover not only do the States differ with one another, they differ within. And one State institution, the Governor's office, will say, "Our position is X," and another State institution says, "We are the ones who control this, and our position is Y and not X."

So trying to figure out with whom you consult, and then the result when you wind up tallying votes after a lengthy consultation process and conclude that 23 States are on one side, 23 States are on the other——

Senator HEITKAMP. Now you are just depressing me, so——

Mr. PIERCE. And the others disagree internally on what should be done. I do not have an answer to the problem. I agree completely that is the problem. [Laughter.]

Senator HEITKAMP. Thank you.

Mr. POSNER. Could I just maybe turn one light bulb on, as dim as it is? There have been some examples. The Federal Government was threatening to take over the property casualty insurance business from the States under Gramm-Leach-Bliley, and that prompted the States to get together and do their own voluntary codes, which, significantly helped, at least in some people's minds, the State of play in the States.

The other one, which you are familiar with, is a simplified sales tax initiative which 25 States bought into, which has been a real help.

Now, you are right. It is not all of them. We have some significant States that are outliers, but that provides a foundation, and they said it could not be done.

Senator HEITKAMP. We can go back to the Uniform Commercial Code, which is a great example of State cooperation to avoid a Federal commercial code. I appreciate and understand, having come from State government, having refereed these dialogues as the Attorney General (AG). But I am looking for systemic reforms that, No. 1, we can sell to our colleagues, because our really good ideas are having a hard time. Right, James?

Senator LANKFORD. Though they are really good ideas.

Senator HEITKAMP. Really good ideas. We really like our ideas, and they are having a hard time. And so we need to be as persuasive as we can and get consensus on our ideas.

Senator LANKFORD. And it is the grand challenge, because when you talk about regulations, immediately there is a whole group—going back to your statement, Mr. Pierce, it is this one whole group that says, "Oh, my gosh, we need to not do more regulations, not make this more difficult," and another group that says, "It is already incredibly difficult. We cannot fix it unless we streamline it and work our way through the process on it."

I am interested—Senator Bramble, your comment earlier about—let me see if I can get this term right—a Federal stress test in

Utah that you are trying to evaluate the cost of—Federal dollars that are coming to it, what that actually costs the State, and I am assuming—is it worth it based on the mandates, or as Professor Posner had mentioned before, the Trojan horse coming to you of the grant with the requirements in the back of it? Is that what that is? Tell me a little bit more about that.

Mr. BRAMBLE. We have what is called a Federal Funds Commission, and one of the concerns that we have at the State level is you have the State budget that we control, and then you have all of the Federal programs that come into the State. And for most States, the Federal moneys dwarf the State budget.

Senator LANKFORD. Right.

Mr. BRAMBLE. And so the challenge for the States, if you look at what has happened during the economic downturn from 2009 forward, what happens when Federal funds are not there, in the West payment in lieu of taxes is a major issue for our States. That is the equivalent of property taxes. When a State like mine has roughly 70 percent—it is actually about 68 percent of the land mass owned and controlled by the Federal Government, and the payment in lieu of taxes (PILT), is not in the Federal budget, what does that do to the State? And that triggered us to take a look not just at that one issue, but across the board, what would our State budget look like, what would our financial affairs look like with a reduction in Federal funding across the board in all the programs? And the street test——

Senator LANKFORD. Right, which is entirely likely. So let me ask this: Have you been able to determine, for instance—I am just going to pick a program: education. Most States, education dollars coming to their State, between 8 and 10 to 12 percent of the dollars for education are Federal dollars that are coming in. Have you been able to determine, if we said no to those Federal dollars, what the cost would be and what the difference would be and how do you actually measure that?

Mr. BRAMBLE. On education in our State it is a little over 7 percent of the total education budget comes from the Federal Government, and we actually have a plan that we could implement if those funds were no longer available. The issue is: How would the State continue to maintain government services, maintain its role without the Federal funds? And it was more than just an idle curiosity because of the challenges that the Federal Government has with debt, deficit, those kinds of things. It seemed to be the responsible thing to do at the State level to look and say what would the impact be.

Senator LANKFORD. So then the question, have you been able to determine what you spend a year on education just fulfilling Federal mandates and how that lines up with the dollars that are actually coming into the States?

Mr. BRAMBLE. We have but I do not know what that number is.

Senator LANKFORD. That is fine. The reason I ask is this has been an interesting conversation among multiple States trying to determine, as now, as you mentioned before the Trojan horse coming to you and saying, "Here is a grant, here is an opportunity for you to be a partner. We will give you additional Federal dollars if you do this." There are some States that have asked the question,

I am spending more, I think, fulfilling the Federal mandate than the Federal dollars actually coming in for this. But most States do not have the resources or the process in place to be able to actually answer that question. They think that is true, but they have never had the opportunity to be able to actually evaluate it.

If you all have developed a method to be able to measure that, that is something multiple other States would be interested in and maybe something that would be of great benefit to many States, if that makes sense.

Mr. BRAMBLE. That is actually part of the process of what we call our Federal Funds Commission. What is the cost of the unfunded mandates? What are the costs of the Federal programs?

Senator Heitkamp, if I could go back to your question about between the State and the locals, I will put on my hat as a Utah Senator rather than president of NCSL to answer that. In our State we have an administrative rules committee. We pass legislation, and then we authorize the Executive Branch to promulgate rules to implement. When those rules are being drafted, when there are prospective rules, they go before the administrative rules committee, and we take input from the stakeholders. And that may be the Utah League of Cities and Towns. It may be the Utah Association of Counties. It may be the Association of Special Service Districts. It may be stakeholders across the spectrum. And whether that rule gets implemented, modified, or put on hold is a direct function of that input. And then for rules that are already in place, we guard jealously the legislative prerogative of setting policy, and we expect the Executive Branch to carry out that policy.

We just had an example that demonstrates that: ultra-low NOx water heaters. We have a problem with our air quality in Utah because of mountain valleys and inversions. There is broad-based support for a requirement that all water heaters, new water heaters sold in the State should be these low nitrogen—ultra-low NOx. Our Department of Environmental Quality issued a rule that required that. It went to the administrative rules committee, and that rule is being repealed in favor of the legislature. There is a bill before the legislature—we adjourn March 10, but there is a bill that is being heard today, as a matter of fact, dealing with that requirement. And while we repealed the administrative rule because we did not believe the department had the authority, the legislature is now debating what that authority should be, because at the State level we guard that jealously. We do have a process for the local political subdivisions to weigh in both during the promulgating of the rule and after the implementation of the rule.

Senator HEITKAMP. Yes, we have the same kind of rules committee in North Dakota. I think that can be a fairly common model.

I have to issue my apologies. I have to run off and give a floor speech. But this has been very enlightening, and I know we will continue the dialogue. I am sorry.

Senator LANKFORD. That is great. I am going to talk about retrospective review while you are gone, then. I will stick with some of your favorite subjects. [Laughter.]

Let me bring that up because this is a big deal for Senator Heitkamp and me both to deal with retrospective review, and it is one of the challenges that we seldom get information. Once an esti-

mate is made by CBO and they say this is going to cost $95 million or $150 million dollars to the economy—whatever the number may be—we are now 5 years past, it is fully implemented, it is rolled out. No one ever goes back to ask the question, "Was that correct and is that regulation working as effectively as we thought?"

So one of the areas I know are in Representative Foxx's bill deal with this idea of a lookback from a Committee, for a Committee Chairman or Ranking Member to be able to make the request and say let us go back and revisit that regulation. Did it meet the target costs that we expected? And is it accomplishing what it said it was going to accomplish? The logical question is: If it is not working or if it is costing 10 times as much, maybe there needs to be a change in the statute or maybe it needs to be revisited in the regulation.

Comments on that from anyone on the process? Because that is a major part. Mr. Desloge.

Mr. DESLOGE. Yes, I do not think you are going to want to do that for everything, but if you said, when State and local governments stepped in and said, "This is not working for us, your estimates are way off," that could trigger that. I think you would put an onerous kind of burden if you tried to do it on every piece of regulation that came down the pike. But, yes, it would give us, at least at a local level, a chance to argue our case and say, "Hey, this really did not turn out the way we thought it would." And I think that would be beneficial for us.

Senator LANKFORD. OK. Mr. Pierce.

Mr. PIERCE. I certainly agree with you completely that retrospective review is a very important function, and I am sure you know, each of the last three Presidents has issued an Executive Order that requires every Executive Branch agency to engage in that process.

Senator LANKFORD. But do they?

Mr. PIERCE. No, because they do not have the resources because of rulemaking ossification, because it takes too many resources to perform that function at the same time they are unsuccessfully attempting to issue the rules that you say have to be issued, amend the rules that need to be amended. They simply do not have the resources to perform those functions, and the particular mechanism in this piece of legislation raises very serious constitutional questions under a series of Supreme Court opinions in which the Court has basically said the task of Congress is to legislate. And when a Member or even a Committee of Congress gets into the business of directing a Federal agency to do something, it at least raises serious questions of constitutionality.

Senator LANKFORD. So the basic oversight role of Congress is also there, and that has been supported by multiple Supreme Court cases as well, that any committee could reach into an agency, as this Committee has done multiple times, and say, "Here is a list of questions, and we need information and facts." And that agency then provides us the facts and the details. This type of retrospective review asks the question: "This is the estimate that you made as an agency 5 years ago. Did it prove to be correct?" That is an oversight role. If an agency gave an estimate that was far out of bounds, we would want to know why and how can we change that

process so that we get a more accurate look at it or to be able to evaluate the fact that you created a regulation in hopes that it would do XYZ, it did not, it did ABC instead. I think that is a fair part of oversight.

Mr. PIERCE. I agree with that. I would just go back to they do not have anything like the resources necessary to—that is a very difficult task.

Senator LANKFORD. Yes, sir.

Mr. PIERCE. And it takes a lot more than the resources they now have to do it.

Senator LANKFORD. All right. Mr. Posner.

Mr. POSNER. This reminds me a little bit of something that Senator Portman, when he was head of OMB, did under the Bush Administration called Program Assessment Rating Tool. They tried to review every one of the 1,500 programs in the Federal budget, 300 every year. It was far too much. It beat everybody up. Nobody could pay attention to it.

I certainly support the retrospective process. I think you might want to organize it more on a priority basis, as was suggested, maybe by a portfolio. So maybe one year you look at all agencies regulating food safety and you do a regulatory lookback on them and kind of a reassessment of how well all 19 agencies are doing inspecting food, for example. That might be a way to rationalize that process and avoid some of the problems that we were just discussing.

Senator LANKFORD. For Senator Heitkamp and me, one of the things that we have proposed is for major rules, as they go out the door, that there is a scheduled time for retrospective review and no longer than 10 years, and so that everyone knows when the rule is finalized, we also know exactly what year it will be reviewed, and every 10 years it is reviewed. And it could be 5, it could be 10, it could be 7. The agency sets that time period—it is a predictable time period—to be able to have some review, and so, again, they can budget for it, they can schedule it, and they know when it is coming.

We have talked a lot about the impacts on State and local governments and, for the Unfunded Mandates Reform Act when it was passed, the loopholes that are in it, areas where it did not trigger this type of disclosure, which, as you have all mentioned, is informational basically to Congress, so that Congress, when they are making a decision, they can have good information. Those loopholes that are out there, can anyone identify any particular bills or conversations that have happened where one of these unfunded mandates got through and it did not trigger some of the review? Senator Bramble?

Mr. BRAMBLE. Yes, I have a couple of them. One general problem is that the UMRA criteria starts from the basis that if it is already an unfunded mandate, then it is only the incremental change that would be subject to the criteria of fitting whether there is additional review. But two specific examples:

One is the Individuals with Disabilities Education Act. The Federal Government did not maintain its commitment to fund 40 percent average per pupil expenditure. The mandate continued. It did not trigger UMRA because it was in place already, and the fact is

that the Federal Government is not adequately funding it but the requirements are still there, and States still have to comply with the act.

For the REAL ID Act, we have the same kind of situation, and I think that it provides an example of one of the loopholes where, if it is a mandate that is a funded mandate, when the funding dries up, there is no triggering UMRA in those cases.

Senator LANKFORD. OK. Let me ask the where and who question. Dr. Posner, you had mentioned before about trying to do this intergovernmental process. That begs the question of where does that land best that it is most effective. You had mentioned outside groups that had done that here in this town and tried to raise that information to all bodies. The White House, the Congress, different groups have been out there. Where is the place that it would be most effective to make sure if we are going to have intergovernmental conversations it actually has impact? Is that in OMB's area? Is that here in Congress? Where is that?

Mr. POSNER. Well, the one that was eliminated in 1995 was an independent commission appointed by the President and approved by the Congress, which included 30 Cabinet Secretaries, State legislators, county board supervisors, mayors, and Governors. And I think that had a formative role on certain areas—general revenue sharing formation, the Reagan federalism program, and several others. I think that may be a good place for it.

I think they also need to be populated in the various policymaking circles. So Congress had a Subcommittee on Intergovernmental Relations in both the House and the Senate that worked with the ACIR on issues, so that is the way things get done. As we know, it is not just one hand clapping.

And so I think that is what we are missing, is that population of the intergovernmental perspective, in both the Congress and the executive at the very least.

Senator LANKFORD. OK. Senator Bramble.

Mr. BRAMBLE. Mr. Chairman, this is a document, Congressional Budget Office cost estimate, on H.R. 3821 dated February 11, 2016. Let me read from it: "For large entitlement programs like Medicaid, UMRA defines an increase in the stringency of conditions or a cap on Federal funding as an intergovernmental mandate if the affected governments lack authority to offset those costs while continuing to provide required services."

And then it goes on to say, "Because States have flexibility within the Medicaid program to offset their financial and programmatic responsibilities in order to reduce costs, CBO concludes that the new conditions or resulting costs would not constitute an intergovernmental mandate."

Medicaid is the second largest expenditure in the State of Utah, second only to education, and most States find that. And yet Medicaid itself does not trigger UMRA, and changes to Medicaid do not trigger UMRA. Under the Affordable Care Act, the Medicaid expansion, the 90/10 split—our State is one of 16 or 17 that have not expanded Medicaid. But that major Federal mandate in health care does not even trigger the UMRA criteria.

Senator LANKFORD. Mr. Desloge.

Mr. DESLOGE. And I will take it a step further, because what happens is at the State level, when they are dealing with the Medicaid issues, in Florida at least, they offset and the county level picks up a percentage of that. And it is debated all the time in the courts as far as how they get to the percentage, and it has been a battle between the State government and us on an ongoing basis. We ran up a half a billion dollar backlog of disputed bills. You have people moving in and out of the State. And so, we are not a Medicaid provider, yet the State had figured out that they were going to ask us to shoulder part of it.

So I hate to say it, but it flows downhill, and we are kind of where the buck stops in local government. And we want a seat at the table, and I commend you for this. I think this is a great tune-up of existing legislation. And we would just like the opportunity to be there early and be there throughout the process, and we do not think we will add any regulatory or additional burden. But I think you are spot on with where you are heading with this.

Senator LANKFORD. OK. Dr. Posner, can you talk about your Trojan horse conversation earlier about grant conditions and such? You said some of those are coming much later. You take the grant money, and then suddenly you find out after the fact here is what that means.

Mr. POSNER. Yes, on Medicaid requirements that are imposed after the fact. There is actually a Pennhurst decision that Justice Rehnquist authored that was about the Vocational Rehabilitation Act, which at the time was a billion-dollar-a-year program. Long after the States had become partners in managing this program, the Federal Government imposed additional requirements. And the Court ruled that was unconstitutional. It was a retroactive rule that burdened the States.

Increasingly, it seems that major Federal grant programs like highways or education are vulnerable to having new Federal conditions imposed. For example, when Congress decides to slap on the 21-year-old drinking age and a 55-mile-an-hour speed limit and drunk driving tolerance levels, you wonder whether the purpose of Congress is to fund the substantive activity or to use it as a vehicle for delivery of regulatory mandates. And, increasingly, it seems more like the latter.

So those are the kinds of things we are talking about where, since 1956, we have had a cooperative relationship financially where the Federal Government collects the gas tax and redistributes it, but with now this overlay of regulatory mandates that have largely maybe overtaken the point of the program.

Senator LANKFORD. OK. Let me read a quote to you. This comes from—and this has been an ongoing, long-term conversation about this bill and about any other changes to unfunded mandates reform. When I was serving in the House, Susan Dudley came and testified early on before this piece of legislation was even written, and we were talking about just the problems of the Unfunded Mandates Reform Act. In 2011, to one of my questions, she answered this—or she made this statement: "To broaden the coverage, Congress could consider aligning UMRA language with that of Executive Order 12866" your comment before—"and/or extending it to include independent regulatory agencies, which are not currently

bound by the Executive Order either. To make the Executive Branch more accountable for the goals of UMRA, Congress could provide OMB oversight authority beyond certifying and reporting on agencies' actions. Congress might also want to expand judicial review under UMRA so that, for example, an agency's failure to justify not selecting the most cost-effective or least burdensome alternatives could be grounds for staying or invalidating the rule."

Mr. Pierce, you had made a comment about that earlier, that you had some concerns in that area of, again, ossification and making this much more difficult, as you had mentioned before. It is extremely helpful in many areas if you know that there is a way to be able to restrain an agency to say if you do not follow the rules, as with the Clean Air Act and Clean Water Act, outside entities can step in and say, no, you have to actually follow the rule itself and the guidelines.

What is the barrier if, when the Federal Government is promulgating a rule, they do not consult, they do not engage as they are asked to do, States and counties can step in and say at least you have to consult us, slow down the process? The judicial review being the stick, I guess, that the States could use to be able to say you did not consult us.

Mr. PIERCE. Yes, let me try that one. Let me start by saying that Susan is a colleague and a good friend, and I agree with her on most everything, including the desirability of trying to make 12866 and whatever you folks do with UMRA fit together nicely.

Senator LANKFORD. And that is a lot of the conversation of codifying this. We have done it now for two decades. Let us go ahead and make it the standard, because each administration says that is the Executive Order. But they also know, "OK, if we are busy, we are not going to follow it because it is not really statute. We will generally follow it, but at times we will not."

Mr. PIERCE. Once you get the courts involved, you are really unleashing something over which neither you nor the Executive Branch have any control at all. And I have no idea what they would do with that, and in many circumstances it has unintended adverse effects far worse than the intended beneficial effects. And that comes back to why I am concerned about efforts to codify provisions of 12866, for instance, where, sure, a new President could change it, but we have had a string of Presidents of both parties who have said, "We like it," and have kept it the way it is and kept the courts out of it, which to me is one of the strengths they implemented. And that allows them to sit down and talk with agencies and have a dialogue with Federal agencies and tell a Federal agency, "I want you to go talk to the folks in Utah," or the folks wherever.

Senator LANKFORD. Right.

Mr. PIERCE. Courts cannot do that. Courts are blunderbusses that come in 5 years after the fact and say, "It was all wrong. Start all over." I do not like that.

Senator LANKFORD. No, and I would agree. But when you can get some clarification, once the courts have gone through the painful process of multiple years and you get a clarification and everyone agrees on this is really the process, or Congress comes back and says, "That is not what we intended. We are going to fix it and pro-

vide some clarity to it." The key aspect is right now with 12866 there may be consultation, but it may not be in a way that people felt like they were consulted. I have had several agencies that a rule would come out, and I would say, "Did you consult anyone on this?" And they would say, "Yes." And I would say, "Who?" They would say, "Well, we have a group that we work with and consult." "Well, how was the process done?" "We do consultation." "With who?" "This group that we consult." "Who is on the list?" "Well, we do not really put their names out."

OK. Well, the people that were affected by it never felt like they had a voice to really say, so suddenly a guideline or a rule comes out, it is fairly significant, that changes either their staffing, their budgeting, or materials, and they never got a voice. Someone did, but no one who is the someone. So allowing the agencies to define the someone at times gets a little too loose.

Mr. PIERCE. I agree, and I agree with Professor Posner's point very early on in the hearing that you cannot really solve that with legislation. It is too complicated, too variable. I have been working on the Clean Power Plan coordination process. There are about eight agencies in every State that have some role in the process of implementation, assuming that that rule is ultimately upheld and implemented, trying to figure out which agencies—they are all—they differ. They differ in their powers; they differ in their perspectives on what should be done. Trying to find them and say, OK, EPA usually works with the natural resource agencies. Well, in the case of this particular rule, the most important agencies are the public utility commissions. Well, seven of them are elected. The Governor has no power over them. The people are the only ones who have power over them. Others report to this—they each have—trying to figure out who to consult with in a very complicated 50-State system and within each State, seven, eight agencies with overlapping or conflicting power, it is a very difficult process. I do not think you are going to be able to solve it with legislation, and I am not sure how else to solve it.

One suggestion is you could bring in, at least for informal consultation—my former colleague at Columbia who runs the American Law Institute that was responsible for getting the uniform code, Lance Liebman has been working on this for decades. His experience is it has gotten much harder. The things they were able to do in getting States to agree 20, 30 years ago, they cannot get that level of agreement. They cannot even get States to agree on who within the State is——

Senator LANKFORD. What about something just as basic for major rules like an Advanced Notice of Proposed Rulemaking? So it is Federal Register, publicly announced, everyone knows, now you are not having a matter of chasing down who is the right person within the State; it is a public announcement. But we get it in before the rulemaking actually begins. We give greater consultation early on in the process. So before there is text written and everyone is fighting about that word has this thing, it gives the ability for States, counties, affected parties—whether that be independent businesses, whatever it may be—they can actually rush in and say, "Have you considered the tribal impacts of this? Before you write the rule, think about this."

Mr. PIERCE. Advanced Notices of Proposed Rulemaking certainly can be beneficial, and agencies sometimes use them with good benefit. They definitely add to the time required to make a decision. They add to the complexity. And, also, what you are suggesting assumes that there is not a draft until the agency issues—that is not true.

Senator LANKFORD. Correct.

Mr. PIERCE. And because of the way the courts have defined the requirements of a Notice of Proposed Rulemaking—the courts have defined that, not the way Congress defined it 70 years ago. They have redefined it in such a way that, as a practical matter, the first notice has to be the final, because if you make any change, you have to justify it to the satisfaction of the court. So the easy way to minimize the burden and risk of judicial review is by making all of the decisions before you ever put anything in writing, and most agencies—EPA is a good example. They have hundreds of meetings through which they come up with the initial draft. All you would be doing is backing that process up and saying all those meetings have to take place before the issuance of the Advanced Notice of Proposed Rulemaking because the courts would just come in and say if you have made a change, you have to justify it.

The easy way around that is do not make changes, which means as a bottom line make all your decisions before you ever issue the notice.

Senator LANKFORD. Which we are back to the same issue then.

Mr. PIERCE. Yes.

Senator LANKFORD. You do not get public consultation. The county never gets an opportunity to be able to speak to it because they have a group of folks that they normally work with and a group of attorneys that hash the issues, and they say, "We think this is the tightest language that we can make it work."

Mr. PIERCE. In the informal process, that I think is exactly right, and it is a big problem. In the formal process, they certainly have the right to come in with comments, and there has been a lot of empirical studies that show that they simply do not. They choose in most cases, for whatever reason—and I am sure a lot of this is resource problems at the State and local level. They choose, they say, "Oh, somebody just told me some Federal agency is proposing to do something we care about, and we have a right to comment on it." We do not have the personnel, we do not have the time, we do not have the resources. And often just trying to figure out, is this the Governor or the Attorney General? In many cases, they dislike each other intensely and have completely conflicting views. And so if we say something on behalf of the Governor, well, the Attorney General is just going to come in and say, "That is all wrong." Can we clear it with—this is a horrendously difficult practical problem that I know you appreciate it.

Senator LANKFORD. I do.

Mr. PIERCE. It needs to be solved, and I think we all appreciate it, but I do not have a good solution.

Senator LANKFORD. Right. It is also why federalism is so important that the majority of these rules and issues should be handled on a State level, State to State rather than the Federal. But the things that are Federal, that is a whole different issue.

Mr. PIERCE. Thirty-eight types of gasoline in the United States today is a problem.

Senator LANKFORD. We can talk about—now that some other folks here that are strong advocates for it are gone, we can also talk about ethanol requirements as well. But that is a whole different—— [Laughter.]

Dr. Posner.

Mr. POSNER. Just a quick footnote on this. I think the Earth and the Moon and the stars on consultation were aligned 6 years ago with the Recovery Act. It was tremendously urgent to get the money out the door, and I think GAO did a lot of studies on this. That was a peak where Governors, mayors, the President, the Vice President, the agency heads, all were focused on that one program. And the administration did a remarkable job in working with both the program people within the agencies as well as at the top, the Vice President and the Budget Director. They did weekly phone calls with States, State representatives and Governors, and I think everybody felt good about what happened. And there was also tremendous visibility to that spending, so, you had that reinforcement that everybody was kind of under the gun and the glare of publicity and transparency, a lot of information was being floated. And the system worked. So that was under a lot of stress.

I think what we are talking about here is much more complicated when you are talking about rules and the like. But, there have been extraordinary periods where this has come together, and it might be worth studying that to see what lessons we can learn.

Senator LANKFORD. The accountability on the back side of that was also very important.

Senator Bramble, if there are any final comments, I will allow you to make them. But votes have just been called. You know exactly what that means as far as timing. So we will wrap up here in just a moment. Senator Bramble.

Mr. BRAMBLE. Thank you. I just want to comment very quickly on the consultation. It is also a matter of timing. Some agencies, in talking with staff at NCSL and colleagues across the country, the timing can be critical. If an agency calls 12 hours before the rule is effective and then claims that, "Well, we reached out to the State," that really does not count. They may check the box and say, "We consulted immediately before it became effective," but that is not the kind of consultation that works.

Senator LANKFORD. Right. And that is the reason we have the courts to say, "Clearly the law was not followed as it was intended to be followed," and now what happens? And I get the dynamic of it. But with no stick in the process and no voice that comes back, you struggle with how do you actually maintain enforcement consistency on this.

Before we adjourn, I would like to announce to folks that on March 17, the Subcommittee will hold a hearing examining the degree of deference, another issue we can talk about at length at some point, the Federal courts and their granting of deference to regulatory agencies and examining that agency deference and what happens in the days ahead and the trends that we are facing on that.

This concludes our hearing today. I would like to thank our witnesses very much for your testimony. Your written testimony is obviously a part of the full long-term record. The hearing record itself will remain open for 15 days until the close of business on March the 10 for the submission of additional statements or questions for the record.

With that, this hearing is adjourned.

[Whereupon, at 12:10 p.m., the Committee was adjourned.]

APPENDIX

SENATOR JAMES LANKFORD, CHAIRMAN SENATOR HEIDI HEITKAMP, RANKING MEMBER

February 24, 2016

Opening Statement of Senator James Lankford

Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management Hearing titled:

"The Unfunded Mandates Reform Act: Opportunities for Improvement to Support State and Local Governments"

Good Morning. We meet today to discuss the burden federal laws and regulations have on state and local governments, and how the Unfunded Mandates Reform Act of 1995 intended to relieve state and local governments of these burdens. We will also discuss how we can build upon UMRA's successes so that we can best address the burdens we place on state and local governments.

The Unfunded Mandates Reform Act, or UMRA, was the result of bipartisan recognition that many decisions made by the federal government have significant costs, particularly to state and local governments.

UMRA has provided better quality information to Congress and agencies as we contemplate new requirements that will add cost burdens to local governments. But the benefits of UMRA on state and local governments have fallen short of their intended goals.

UMRA is complex and contains many exceptions, and as a result, federal actions that affect state and local governments do not benefit from the consultation and analyses otherwise required by UMRA.

The Government Accountability Office has found that issued regulations seldom trigger UMRA's reporting and consultation requirements. There are many reasons for this. It could be because the rule was promulgated by an independent agency or the regulation was issued without a notice of proposed rulemaking or perhaps the requirements in the regulation were considered voluntary as a condition of federal aid, or the regulation did not meet the dollar threshold for UMRA.

Implementation of UMRA could be improved- various experts also told GAO that the process used to consult with state and local officials needed to be more consistent and that more could be done to involve state and local governments early in the rulemaking process.

I have heard these same sentiments from several officials in state and local governments. The very public servants that will later implement a regulation are not consulted early enough to

improve the regulation or are not given enough time to make the changes required to be in compliance.

The provisions of UMRA require us to ask hard questions about the balance between our federal government and those governments closer to the people- we cannot simply pass the burden to them in times of scarce resources without due consideration.

During my tenure in the House, we held three hearings on the effects of UMRA and potential improvements to the statute. I look forward to hearing more insights today.

It is time to revisit UMRA. HR 50, The Unfunded Mandates Improvement and Transparency Act (UMITA) proposed by Representative Virginia Foxx, and its Senate companion S. 189, introduced by Senator Fischer, was conceived to strengthen the original 1995 UMRA legislation. Representative Foxx, who is here today- I want to acknowledge your leadership on this issue and your tenacity on behalf of state and local governments and I have been honored to work with you over the years on this important issue.

UMITA improves upon UMRA by reflecting much of what we have learned since UMRA's passage. It updates the legislation to reflect current CBO practices, addresses current exceptions to UMRA analysis and consultation, allows for analysis of mandates to states and locals as conditions of grant aid, and codifies OMB directives to agencies on how to consult with state and local governments in an effort to enhance consistency of these efforts.

H.R. 50 passed the House in February 2015. UMITA is supported by all the major stakeholders representing state and local governments. I am optimistic about its prospects here in the Senate- this is a good governance bill on behalf of state and local governments that should have bipartisan backing.

I look forward to hearing from our panel today about the real costs of federal decisions on state and local governments, how UMRA has worked, and actions Congress could take to ensure more thoughtful decisions about the balance between federal and local governments.

With that, I recognize Senator Heitkamp for her opening remarks.

February 24, 2016

Opening Statement of Senator Heidi Heitkamp

Ranking Member, Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management

"The Unfunded Mandates Reform Act: Opportunities for Improvement to Support State and Local Governments"

As I have said before, regulations are a critical part of how our federal government keeps our products and food safe, and ensures a level playing field for our businesses. To get good regulations, we need a strong regulatory process.

Part of a strong regulatory process is engaging stakeholders early in the process. Regulators need to talk to industry, labor groups and other stakeholders when developing a rule. Consultation with State, local and tribal governments is also critical to the regulatory process.

Congress should always consider the compliance costs of legislation and how states, local and tribal governments will be impacted. Appropriate consideration must always be given to how decisions made in Washington affect the bottom lines back home. This robust analysis and consultation means we can create a safer and more equitable nation. Out of this need, the Unfunded Mandates Reform Act was born, in 1995.

This law has worked to keep us, and the executive agencies accountable to our home states and towns. It helps ensure that those of us, on the Hill, understand how our actions affect budgets beyond our own. It requires agencies to consult with those individuals who have boots on the ground and know how the rules could be followed and what works and what doesn't.

It is important then, as we approach the 21st anniversary of President Clinton signing this bill, that we take a step back and review this important legislation, a retrospective review, if you will. That we check in with our state and local partners and ensure that we are still moving forward.

With that I look forward to hearing from our witnesses and speaking with them about their thoughts on the Unfunded Mandates Reform Act.

Rep. Foxx testimony
Senate Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management
February 24, 2016

Chairman Lankford, Ranking Member Heitkamp, and distinguished Members of the Subcommittee: thank you for the opportunity to appear before you today to discuss the unfunded mandates imposed on state and local governments by the federal government through the legislative and regulatory processes.

Like some of you, I served as a state senator and can testify to the difficulty of balancing the state's budget when there are dozens of complicated, unfunded federal mandates that must be taken into account. Those experiences convinced me of the need to bring accountability to federal regulatory structures that so often tie the hands of state and local governments.

In 1995 in a model of bipartisanship, Congress passed the Unfunded Mandates Reform Act (UMRA). It passed the House with close to 400 votes and the Senate with more than 90 votes and was signed by President Clinton.

UMRA focused on Washington's abuse of unfunded federal mandates and passed on the principle that the American people would be better served by a government that regulates only with the best information.

UMRA was designed to force the Federal Government to estimate how much its mandates would cost local and

state governments, which was previously not the case. UMRA was NOT intended to prevent the government from regulating, but rather to ensure that decision makers have the *best information possible* when regulating.

I have always admired the purpose and spirit of UMRA, but weaknesses in the law have been exploited in the intervening decades and need to be addressed.

My bill, the Unfunded Mandates Information and Transparency Act or UMITA, seeks to address these shortcomings and will help UMRA meet its unfulfilled potential.

There are five main components to UMITA:

1) First, UMITA ends the exemption that most independent regulatory agencies have from UMRA's transparency requirements. These agencies include the Securities and Exchange Commission, the National Labor Relations Board and the Federal Communications Commission.

2) Second, UMITA treats "changes to conditions of grant aid" as mandates for cost disclosure purposes.

- If federal legislation or regulations force states, localities, or the private sector to make costly changes in order to qualify for federal grant aid, those costs will be included in UMRA's cost analysis.
- For example: if Congress ever passes another law such as No Child Left Behind that changes the rules that states must follow to continue receiving federal funds, then those changes and the resulting costs will be disclosed and considered.

3) Third, UMITA guarantees the public always has the opportunity to weigh in on regulations.

- Currently, UMRA cost analyses are required only for regulations that were publicly announced through a formal "notice of proposed rulemaking."
- UMITA requires agencies to complete cost analyses for ALL regulations, whether or not such a notice was issued, while providing an accommodation for emergency regulations.

4) Fourth, UMITA equips Congress, regulators, and the public with better tools to determine the true cost of regulations.

- Analyses required by UMITA will factor in real-world consequences, such as costs passed onto taxpayers and opportunity costs when considering the bottom-line impact of federal mandates.

5) And finally, UMITA ensures the federal government is held accountable for following these rules.

- UMRA contained little in the way of enforcement, so UMITA provides that if the transparency requirements are not met, states and local governments will have access to a judicial remedy.

It is in these ways that UMITA will ensure public and bureaucratic awareness about the cost – in dollars and in jobs – that Federal regulations impose on the economy and local governments.

Let me be clear: UMITA is **not** an anti-regulation bill. It is intended neither to stall nor to prevent the regulatory process from working as it should. UMITA is a bill to make our regulatory apparatus more efficient, effective and

transparent.

UMITA has bipartisan DNA and is purely about good government: openness and honesty about the cost of regulations. These principles do not belong to either party. This is why my Democrat colleagues Loretta Sanchez and Collin Peterson joined me as cosponsors and is why the bill passed the House with votes from both parties.

Republicans and Democrats can agree that every unfunded mandate the Federal Government imposes should be both deliberative and economically defensible.

It is my hope that this hearing will be a first step toward an improved and more transparent regulatory process that eases the burdens passed on to state and local governments.

Thank you for your time and consideration.

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TESTIMONY OF

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PRESIDENT PRO-TEMPORE
UTAH SENATE
PRESIDENT, NATIONAL CONFERENCE OF STATE LEGISLATURES

ON BEHALF OF THE

NATIONAL CONFERENCE OF STATE LEGISLATURES

REGARDING

THE UNFUNDED MANDATES REFORM ACT: OPPORTUNITIES FOR IMPROVEMENT TO SUPPORT STATE AND LOCAL GOVERNMENTS

BEFORE THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT

UNITED STATES SENATE

February 24, 2016

Testimony of Senator Curt Bramble
February 24, 2016

Chairman Lankford, Ranking Member Heitkamp and distinguished members of the Subcommittee on Regulatory Affairs and Federal Management, I am Curt Bramble, President of the National Conference of State Legislatures (NCSL) and President Pro Tempore of the Utah Senate. I appear before you today on behalf of NCSL, a bipartisan organization representing the legislatures of our nation's states, commonwealths, territories, possessions and the District of Columbia.

Thank you for the opportunity to discuss the Unfunded Mandates Reform Act of 1995 (UMRA) and the opportunities for improvement to support state and local governments. NCSL applauds the leadership of the committee for bringing the discussion of unfunded and underfunded mandates before the committee, as the financial impact of federal actions on state and local governments is often overlooked.

Mr. Chairman, I would also like to thank you for your continued leadership in seeking to strengthen UMRA, both through introducing the Unfunded Mandates Information and Transparency Act of 2015 (UMITA; S. 189) and shepherding similar legislation through the House Committee on Oversight and Government Reform during your time in the U.S. House of Representatives. I also want to thank Senator Deb Fischer, a former state legislator and NCSL executive committee member, for her leadership on this issue.

My testimony today will highlight the effectiveness and limitations of UMRA and the impact of these limitations on state budgets. I will also discuss NCSL's support for

provisions in S. 189 that provide additional safeguards for states with respect to federal unfunded mandates.

UMRA was adopted over 20 years ago in an effort "...to curb the practice of imposing unfunded federal mandates on state and local governments."[1] While at that time it renewed the commitment to cooperative federalism and brought attention to the growing reliance of mandates as a policy instrument, its shortcomings have caused unfunded and underfunded federal mandates to continue to pose an undue burden on state and local governments.

NCSL remains supportive of UMRA and is appreciative of its role in providing the fiscal impact, though limited, of federal legislation on state and local governments. As a result of UMRA, the Congressional Budget Office (CBO) analyzes the intergovernmental fiscal ramifications of pending legislation. UMRA has a procedural hammer to call further attention to potential unfunded or underfunded mandates and the mere procedural threat has changed some, but not all, discussions and negotiations leading up to the advancement of legislation. CBO's annual reports to Congress have consistently shown that few pieces of legislation cross UMRA's threshold. Some of this can be attributed to the procedural threat UMRA imposes, some to the threshold itself, but in most cases the narrow definition of a federal intergovernmental mandate in the underlying law. As a result, the limited scope of UMRA has allowed federal statutes and regulations, with significant fiscal implications for state and local governments, to be enacted or issued, respectively, without being identified as containing intergovernmental mandates, and more importantly, without a truly reflective cost estimate.

[1] Unfunded Mandates Reform Act of 1995.

Mr. Chairman, state legislators view mandates more expansively than UMRA's definition. We believe there are mandates on states when the federal government:

- establishes a new condition of grant-in-aid for a long-standing program;
- reduces current funds available, including a reduction in the federal match rate or a reduction in available administrative or programmatic funds, to state and local governments for existing programs without a similar reduction in requirements;
- extends or expands existing or expiring mandates;
- establishes goals to comply with federal statutes or regulations with the caveat that if a state fails to comply they face a loss of federal funds;
- compels coverage of a certain group of individuals under a current program without providing full or adequate funding for this coverage;
- establishes overly prescriptive regulatory procedures; and
- intrudes on state sovereignty.

The experience of state and local governments, coupled with our view of what constitutes a mandate, supports the need for UMRA to be changed. NCSL has longstanding policy that urges Congress to consider reforms that include:

- Expansion of the definition of a federal intergovernmental mandate to include:
    - new conditions of federal funding for existing federal grants and programs, including costs not previously identified;
    - changes to all open-ended entitlements, such as Medicaid, child support and Title 4E (foster care and adoption assistance);

- proposals that would place a cap or enforce a ceiling on the cost of federal participation in any entitlement or mandatory spending program;
- proposals that would reduce state revenues, especially when changes to the federal tax code are retroactive or otherwise provide states with little or no opportunity to prospectively address the impact of a change in federal law on state revenues; and
- proposals that fail to exceed the statutory threshold only because they do not affect all states.

- Improvements to Title II, including enhanced requirements for federal agencies to consult with state and local governments and the creation of an office within the Office of Management and Budget that is analogous to the State and Local Government Cost Estimates Unit at CBO.

The Unfunded Mandates Information and Transparency Act of 2015 addresses several of these recommendations. In particular, NCSL is pleased that S. 189 expands the scope of reporting requirements to include new conditions of federal funding for existing federal grants and programs. In UMRA, the term "federal intergovernmental mandate" does not include conditions of federal assistance or an enforceable duty arising from participation in a voluntary program. Changes to grant requirements for established state-federal programs often results in new prescriptive requirements that shift costs to state governments. While statutorily these programs are deemed "voluntary," in some cases these are state-federal partnerships that have existed for decades. UMITA seeks to rectify this problem by allowing any chairman or ranking member of a committee in the Senate

or House of Representatives to request CBO to compare the authorized level of funding with the prospective costs of carrying out a condition of federal assistance imposed on state, local or tribal governments.

We also support provisions in UMITA that modify the definition of direct cost in the case of federal intergovernmental mandates, expand UMRA's reporting requirements to independent regulatory agencies, and create a mechanism for congressional requests for a regulatory "look-back" analysis of mandates in existing federal regulations.

In addition, NCSL is appreciative of UMITA's inclusion of provisions to enhance agency consultation with state and local governments. This process is often haphazard and inconsistent with approaches and commitments varying throughout federal agencies. State and local governments welcome a uniform and predictable process for consultation.

Mr. Chairman, NCSL recognizes the need for the federal government to reduce its annual deficits, curb growth in the national debt and achieve a sustainable fiscal path. Provisions in UMITA are critical to ensuring that these efforts be made with a full understanding of the fiscal impact on state and local governments. This is not about blocking legislative or regulatory action, this is about transparency and government responsibility by ensuring the full potential impacts of intergovernmental mandates in legislation and regulations is known. Mr. Chairman, I thank you for this opportunity to testify before the subcommittee, and look forward to answering any questions the committee may have.

STATEMENT OF

THE HONORABLE BRYAN DESLOGE
COMMISSIONER, LEON COUNTY, FLA.
AND
FIRST VICE PRESIDENT, NATIONAL ASSOCIATION OF COUNTIES

ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES

THE UNFUNDED MANDATES REFORM ACT: OPPORTUNITIES FOR IMPROVEMENT TO SUPPORT STATE AND LOCAL GOVERNMENTS

BEFORE THE
SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT

UNITED STATES SENATE
FEBRUARY 24, 2016

Chairman Lankford, Ranking Member Heitkamp and distinguished members of the Committee, thank you for holding today's hearing on opportunities to improve the Unfunded Mandates Reform Act to support state and local governments. I am honored to provide testimony on behalf of the National Association of Counties (NACo) to share with you the impact that unfunded mandates are having on counties and the importance of strengthening the review and analysis of potential mandates in federal legislation and regulation.

My name is Bryan Desloge and I serve as the First Vice President of NACo. I am an elected county commissioner from Leon County, Florida. With over 280,000 residents in the panhandle of northern Florida, Leon County is known as Florida's Capital County because our county seat is Tallahassee.

About NACo and Counties

NACo is the only national organization that represents county governments in the United States, including Alaska's boroughs and Louisiana's parishes. Founded in 1935, NACo assists America's 3,069 counties in pursuing excellence in public service to produce healthy, vibrant, safe and resilient counties.

Counties are highly diverse, not only in my state of Florida, but across the nation and vary immensely in natural resources, social and political systems, cultural, economic and structural circumstances. Despite this diversity, all counties fulfill many responsibilities at the local level. Counties are responsible for supporting and maintaining public infrastructure, transportation and economic development assets, providing justice, law enforcement and public safety services, and protecting the public's health and well-being.

These responsibilities are shared among the federal, state and local levels as they are the fundamental components of a broader national interest in serving our citizens. While the policies and programs established by the federal government are intended to guide and coordinate efforts, counties are ultimately the implementers at the local level. That is why **federal policies matter to counties and counties matter to federal policies.**

Over two decades ago, state and local governments experienced a dramatic shift in how the federal government sought to implement policies. Rather than through cooperation, state and local governments increasingly found themselves subject to legislation and regulations that imposed obligations without funding to assist implementation. In response, state and local government officials advocated for a way to reduce, and potentially eliminate, the ever increasing number of unfunded federal mandates. This effort resulted in the passage of the Unfunded Mandates Reform Act (UMRA) of 1995.

I am here to testify that unfunded federal mandates continue to challenge counties today. While UMRA resulted in progress in the 20 years since enactment, further improvements are needed.

Today, I would like to share three key points that should be weighed as Congress considers legislation to update and improve UMRA:

1) **Although UMRA established a framework for the consultation process between federal agencies and state and local governments, this new legislation presents us with an opportunity to improve the process even more**

2) **Counties will continue to face mounting fiscal stress from mandates if the process is not improved**

3) **Our system of federalism requires a strong federal, state and local partnership to achieve our shared goals**

First, although UMRA established a framework for the consultation process between federal agencies and state and local governments, this new legislation presents us with an opportunity to improve the process even more

UMRA Title I

Under UMRA, Congress defined federal mandates as any provision in legislation, statute, or regulation that "would impose an enforceable duty upon State, local, or tribal governments" or "reduce or eliminate the amount" of federal funding authorized to cover the costs of an existing mandate.

Over the last few decades, UMRA's Title I has helped to identify and reduce the number of mandates in the legislative process. Specifically, it established a procedural framework to shape how Congress considers proposed legislation that could place unfunded mandates on state and local governments.

Under UMRA, the Congressional Budget Office (CBO) is required to prepare mandate cost estimates for the Legislative Branch. These estimates can be requested by either congressional committees or committee leadership. Estimates are also required when an authorizing committee reports a bill or joint resolution containing a federal mandate. If a CBO cost estimate identifies intergovernmental mandates that exceed UMRA's threshold ($77 million), the law establishes a procedure through which members of Congress can take actions to slow or stop consideration of the legislation.

According to the Congressional Research Service (CRS), since UMRA's enactment, unfunded mandates in proposed legislation were found in only one percent of over ten thousand cost estimates prepared by the CBO. This evidence seems to indicate that Title I has been successful in reducing the number of bills that would impose unfunded mandates. We believe the very prospect of a point of order being raised against legislation serves as a deterrent to including unfunded mandates in legislative proposals.

Further, CBO's consultation approach when analyzing legislative mandates is worth replicating. CBO proactively brings together NACo and other state and local government organizations to discuss and seek input on mandates in proposed legislation. This collaborative process allows CBO to learn about the direct impact of intergovernmental mandates from those most affected – state and local governments. Although it is not a perfect process, at least local government partners are able to weigh in with CBO.

UMRA Title II

However, UMRA's Title II consultation process with federal agencies has not been as effective as Title I.

UMRA's Title II established a framework for federal agencies to consult with state and local governments to help assess the effects of federal regulatory actions containing intergovernmental mandates. UMRA leaves the responsibility to each agency to develop its own consultation process. However, the framework has been applied inconsistently across federal agencies and each agency's process is different.

Meaningful consultation with counties and local government early in the rulemaking process will not only reduce the risk of unfunded mandates but will also result in more pragmatic and successful strategies for implementing federal policies. But in order for intergovernmental consultation to be truly meaningful, Congress should direct federal agencies to engage state and local governments as partners, actively participating in the planning, development and implementation of rules. Counties are more often than not the level of government closest to the people and directly accountable to them.

Further, counties are often responsible to implement and help fund policies and programs established by the states and federal government. In many instances, we even function as co-regulators with the states and federal agencies. Given these important intergovernmental roles and responsibilities, counties are more than mere stakeholders, or members of the interested public – counties are intergovernmental partners. Unfortunately, all too often, our opportunity to engage in the rulemaking process has been limited to the comment period offered to the general public.

To give you a sense of the consequences of less than ideal consultation, I will highlight a few examples of recent regulations where agencies did not engage in what we consider an effective and meaningful intergovernmental consultation process.

U.S. Environmental Protection Agency's "Waters of the U.S." Rule

In May of 2015, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) issued the final rule on the definition of the "Waters of the United States" under the Clean Water Act (CWA). The rule sought to clarify the EPA's authority under the CWA. Throughout the development of the rule, the EPA did not, and in fact refused to, meaningfully consult counties prior to the proposed rule's publication, despite our having repeatedly requested to be at the table to work together towards a practical rule.

When the final rule was released, it immediately created more confusion than clarity and significantly expanded the EPA's CWA jurisdiction to potentially include county-owned and maintained roadside ditches, flood control channels, drainage conveyances and wastewater and storm water systems.

If Congress or the courts do not step in to block the rule as written, counties could be liable for massive increased costs for compliance. Throughout the process we have argued that the best remedy would be robust intergovernmental consultation to develop definitions and regulations that make sense on the ground.

U.S. Department of Labor's Overtime Pay Rule

In July of 2015, the U.S. Department of Labor (DOL) issued a proposed rule to update and revise the regulations issued under the Fair Labor Standards Act (FLSA) that would change the way employers determine minimum wage and overtime pay for executive, administrative and professional employees. The rule would double the current salary threshold for overtime pay eligibility and establish a mechanism to automatically update the threshold.

As employers, counties provide both wages and benefits to 3.3 million employees. The substantial threshold increase could negatively impact county employees' wages and benefits. Some counties have calculated that the overtime pay change could increase their payroll costs dramatically in the first year of implementation and beyond. For example, Berks County, Pa. estimated that 97 employees would be eligible for overtime pay under the rule. In the first year alone, this could cost an additional $1.5 million to the county. Most counties must operate on a balanced budget and would not have the financial resources for major pay increases without increasing taxes or finding reductions in areas like employee benefits or employee work hours.

Despite this substantial direct effect, DOL did not adequately consult state and local governments to assess the potential impact of the proposed rule. Because there was no meaningful consultation, NACo has requested an extension of the comment period to perform additional analysis on the administrative and fiscal impact on county governments. Earlier and more meaningful consultation with state and local governments could have resulted in a rule that would have been less challenging to implement at the local level.

U.S. Environmental Protection Agency's Ozone Rule

In October of 2015, the EPA released its final rule to tighten the National Ambient Air Quality Standards for Ozone by establishing a more stringent ozone standard of 70 parts per billion. Under the Clean Air Act (CAA), states and counties serve as both the regulator and regulated entity of clean air and we are responsible for ensuring that the CAA's goals are achieved.

Despite this high level of intergovernmental responsibility, EPA decided to move forward with a more stringent standard, without meaningfully consulting with state and local governments even though the earlier 2008 ozone standard had yet to be fully implemented. Imposing the more stringent standard will result in significant compliance cost to counties, impacting transportation programs and economic development.

These are just three of many examples we can provide. **We do not necessarily disagree with the underlying objectives of these or many other rules. We are concerned with how the agencies are conducting the rulemaking process without truly consulting their intergovernmental partners.** Although UMRA established some guidelines for the consultation process between federal agencies and state and local governments, the process itself needs to be strengthened and improved.

The consultation process should be consistent across the federal agencies and require that state and local governments, as intergovernmental partners, are meaningfully consulted throughout the rulemaking life cycle. Counties should be brought in early during policy development before a proposed rule is even published in the *Federal Register.* Seeking county input late in the rulemaking process is a missed opportunity to work together and develop practical rules.

Second, without congressional action to improve intergovernmental collaboration, counties will face steadily increasing fiscal pressure as a result of unfunded federal mandates

Without Congressional action to improve intergovernmental collaboration in the development and implementation of federal agency regulations, these mandates will add another layer of

fiscal strain on counties already operating under considerable pressure. In many instances, counties are mandated to provide a growing number of services while operating under greater state and federal restrictions on how we generate revenue.

In fact, more than 40 states have some type of limitation on the property taxes collected by counties. The challenge of fiscal constraints and tight budgets is shared by most counties, regardless of size. According to a report released by NACo last month, only 214 of the nation's 3,069 county economies have fully recovered to pre-recession levels, indicating that the vast majority of counties are operating under ongoing fiscal constraint.

In my state of Florida, the combined fiscal impact of federal and state mandates on counties is substantial. For example, Florida counties paid $281 million for the local share of Medicaid costs this year, $57 million last year for a portion of the costs for juvenile secure detention, $525 million last year for certain court related costs and are required to increase this spending by at least 1.5 percent per year, and $1.8 billion in FY 2013 and FY 2014 for county roads, bridges and tunnels.

But it's not just in Florida. In Montgomery County, New York, for example, federal and state mandates consume 86 percent of the total tax levy for the county. A majority of that figure consists of the county's local share of Medicaid, which consumes 44 percent of local property tax revenue. In 2015, the county's tax levy brought in over $27 million dollars. But after paying for mandates like the county's share of Medicaid, corrections, community colleges and social services, only slightly less than $4 million remained for all other services and functions of county government.

These examples highlight what is most damaging about **unfunded mandates;** they hide from policy makers the true impact of federal programs when the cost of implementing them is shifted onto local governments that are already stressed. In many instances, the shift creates budgetary imbalances that may require cuts to other critical local services like fire, law enforcement, emergency, education and infrastructure or increases in local taxes and fees to make up the difference.

This is why UMRA needs to be improved, especially as it relates to regulations. Federal policies and programs developed with only the impact on the federal treasury and not the impact on state and local governments in mind, puts the ability to fulfill our responsibilities at risk. And at the end of the day, it is our shared constituents that will have to deal with reduced public services or increased taxes at the local level.

Finally, our system of federalism requires a strong federal, state and local partnership to achieve common goals

The American federal system of government is rooted in cooperation with each level of government – federal, state and local – contributing to the public good. This requires balancing the need to establish national standards geared towards a shared goal; adequate funding to ensure no one level is left to shoulder the burden of policy implementation; and building in local flexibility while still accomplishing the policy's goal.

Unfortunately, the partnership is often out of balance because the federal agencies impose a one-size-fits-all approach, taking the decision-making away from local officials with experience and expertise in solving problems at the local level. As the closest form of government to the people, counties have the greatest ability to understand the diverse needs of our local communities. Our local experience and expertise helps us identify alternative, more cost-effective methods to address an issue, as opposed to a top down federal directive.

A recent example of good collaboration and meaningful consultation involving the Endangered Species Act (ESA) shows that when federal, state and local governments work together, we see results. Counties recognize the importance of protecting America's fish, wildlife and plants. ESA requirements, however, can have a considerable economic, financial and public safety impact on county governments.

With the threat of potentially listing the Bi-State Sage-grouse, a decision that would have impacted over 80 percent of the land in Mono County, California, the county led a collaborative approach to achieve species conservation as well as ensure that new regulatory burdens were not imposed on private land owners in the impacted area. The county and federal and state agencies worked collaboratively to assist in species population monitoring, provide technical support to local landowners to help mitigate the impacts of land use on Bi-State Sage-grouse habitat, make certain the best practices for conservation were being implemented on the landscape and secure necessary resources for conservation work in the region. The county also hosted outreach and education forums to ensure that the community members and land owners were informed on all aspects of the status under ESA, the impacts of a critical habitat designation on private and public land use and how individuals could contribute to species conservation.

This work was successful. In April of 2015, the Secretary of the U.S. Department of Interior, Sally Jewell, was able to determine that the Bi-State Sage-grouse would not need to be listed as threatened under the ESA.

In this case, the synergy between the biological expertise of state and federal agencies and the county's convening power and ability to bring the local perspective on land use activities and on the economic and environmental impacts of ESA decisions, demonstrated that when working in partnership, solutions can be found. This is only one example of many success stories of locally driven conservation efforts. **Congress should build on these successes by strengthening the mandate review process to ensure the perspective brought to the table by each partner is considered.**

Conclusion

Mr. Chairman, counties are encouraged by initiatives like the Unfunded Mandates Information Transparency Act (UMITA) that you cosponsored with Senator Fischer. Although UMRA established a framework that intergovernmental mandates in legislation or regulation should be considered, UMITA presents us with an opportunity to improve the process even more.

Provisions in the bill, such as requiring enhanced levels of consultation by federal agencies with state and local governments, establishing principles for federal agencies to follow when assessing the effects of regulations on state and local governments, and expanding the scope of reporting requirements to include regulations imposed by most independent regulatory agencies, are positive steps towards addressing concerns like those we are raising.

Taking steps like these will help bring our system of federalism back into balance. The steps should foster a true dialogue where the strengths of each partner as well as the challenges they face are understood by all parties involved. Counties stand ready with innovative approaches and solutions to work side-by-side with our federal and state partners to ensure the health, well-being and safety of our citizens.

Chairman Lankford, Ranking Member Heitkamp and distinguished members of the Committee, thank you for the opportunity to speak to you today. I will be happy to take any questions.

Attachments:

- Joint letter submitted to Congress from National Governors Association, National Conference of State Legislatures, The Council of State Governments, National Association of Counties, National League of Cities, U.S. Conference of Mayors and International City/County Management Association in support of the Unfunded Mandates Information and Transparency Act on November 17, 2015
- NACo's Compilation of Unfunded Mandates and Other Regulatory Impacts on Counties

- NACo letter submitted to EPA and the Corps on the "Waters of the U.S." proposed rule on November 14, 2014
- NACo letter submitted to DOL on "overtime pay" proposed rule on August 31, 2015
- Joint letter submitted to EPA from National Association of Counties, National League of Cities, U.S. Conference of Mayors and National Association of Regional Councils on proposed ozone rule on March 17, 2015

November 17, 2015

The Honorable James Lankford
U.S. Senate
B40C Dirksen Senate Office Building
Washington, DC 20510

The Honorable Deb Fischer
U.S. Senate
383 Russell Senate Office Building
Washington, DC 20510

The Honorable Virginia Foxx
U.S. House of Representatives
2350 Rayburn House Office Building
Washington, DC 20515

The Honorable Loretta Sanchez
U.S. House of Representatives
1211 Longworth House Office Building
Washington, DC 20510

RE: The Unfunded Mandates Information and Transparency Act (S. 189/H.R. 50)

Dear Senators Lankford and Fischer and Representatives Foxx and Sanchez:

On behalf of the Big 7, a coalition of national organizations that represent state and local officials, we applaud your efforts to make improvements to the Unfunded Mandates Reform Act (UMRA) of 1995. Monitoring federal regulations and planning for unfunded mandates continues to be one of the most pressing issues for state and local leaders. In particular, we support strengthening the required analysis of pending legislation and your call for a strong regulatory look back process. This additional information is critical for improving both the legislative and regulatory processes.

As you know, UMRA was designed to limit the imposition of unfunded federal mandates on state, local, and tribal governments by requiring the Congressional Budget Office and regulatory agencies to provide a qualitative and quantitative assessment of the anticipated costs of legislation and certain regulations, respectively. As UMRA begins its third decade, its goal to "…curb the practice of imposing unfunded Federal mandates on State and local governments," is even more important.

A report by the White House Office of Management and Budget stated that federal regulations and unfunded mandates cost states, cities and the general public between $44 and $62 billion each year. With many states and local governments continuing to face difficult economic conditions, the federal government should avoid imposing any new unfunded mandates. Moreover, federal regulatory agencies should work more closely with state and local governments and other stakeholders during the rule making process to gather input and identify practical solutions.

We commend you for your leadership in advocating the enactment of this legislation, and we look forward to working with you and your staff to ensure its passage.

Sincerely,

David Adkins
CEO and Executive Director
The Council of State Governments

Matthew D. Chase
Executive Director
National Association of Counties

Dan Crippen
Executive Director
National Governors Association

William T. Pound
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National Conference of State Legislatures

Clarence Anthony
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National League of Cities

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Robert J. O'Neill, Jr.
Executive Director
International City/County Management Association

CC: Members of the United States Senate and House of Representatives

NACo NATIONAL ASSOCIATION of COUNTIES

UNFUNDED MANDATES AND OTHER REGULATORY IMPACTS ON COUNTIES

ENVIRONMENTAL PROTECTION AGENCY	
Clean Air Act	Compliance with federal air pollution standards, including, but not limited to, monitoring air quality; retrofitting stationary and mobile sources of pollution and obtaining required permits; ozone and particulate matter (PM) standards for PM 10 and PM 2.5. While tighter standards for PM 10 have been temporary tabled, the reconsideration process for air standards resets every five years.
Particulate Matter Standards	Mentioned briefly above, lowering PM standards is problematic, especially for rural areas, where practices governing regular everyday events such as cars driving down dirt roads and agricultural practices that sustain local economies could be regulated, as could natural events such as wildfires, droughts or wind storms. Because of the high, naturally occurring, dust levels found in arid climates, many western counties have a difficult time meeting the current PM standard. This, in turn, affects their economic base, which will further restrain economic recovery. Based on previous experience, non- attainment areas have difficulty maintaining and attracting businesses to their regions, since these businesses would have to operate under the tighter standards. Most businesses chose to relocate or not even build in a non-attainment area.
Ozone Standards	The EPA is currently assessing whether to tighten the current National Ambient Air Quality Standards (NAAQS) for ozone. 358 to 558 additional counties would be considered in non-attainment under the standards. For counties designated as being in non-attainment, this impacts both economic development and transportation conformity projects.
Clean Water Act	Compliance with federal regulations and mandates related to: county owned water and wastewater treatment regulations; combined and sanitary sewer overflow consent decrees; "Waters of the U.S." definitional changes (refer below for more specific problems with the navigable "waters of the U.S." regulation program); regulation of point and non-point discharges (including those from forest roads), including standards for improving and maintaining water quality; stormwater regulations; and inconsistent blending and bypass rules.
Pesticides Regulation	The general permit for pesticides became effective the end of October, 2011. NACo has heard mixed reviews from our counties. Some counties, have changed spraying patterns, which may not be as effective as previous practices. The general permit has a heavier paperwork burden for spraying activities. This in turn has changed the way counties administer the program. Since county governments serve as primary service providers for their residents, this permit has significant effects on county programs, particularly mosquito abatement and noxious weed control efforts, creating unfunded mandates for both urban and rural counties through the tight reporting requirements. Additionally, the final "Waters of the U.S." rule may trigger expanded regulation for counties
Stormwater Regulations	CWA stormwater regulations, also known as municipal separate storm sewer systems (MS4s), apply to counties with populations of 100 thousand or more and certain counties in or near urban areas. MS4s are required to meet water criteria standards, generally through Best Management Practices (BMPs). However, in recent years MS4 permits are moving away from BMPs to stricter nutrient numerical limits which can make it both infeasible and very expensive to comply with permit requirements.

Blending and Bypass	In a March 2013 court case, *Iowa League of Cities v. EPA,* the U.S. Court of Appeals for the 8th Circuit struck down EPA's prohibitions against the practice of blending wastewater at Publically Owned Treatment Works (POTW) during wet weather events and against the use of mixing zones in permits for compliance with bacteriologic standards. Despite requests by NACo and other local government groups that this practice should not be prohibited nationwide, EPA stated that the use of blending and bypass is only applicable to areas within the 8th Circuit Court's jurisdiction and not applicable to other areas of the country. This court decision should be applied to all regions rather than just to the 8th Circuit Court region.
Drinking Water	Establishes maximum contaminant levels for contaminants in public water systems and specifies treatment techniques to be used. Upcoming regulations that will have a direct impact on local governments that own/operate drinking water facilities include the lead and copper rules and the cyanotoxin advisory requirements.
Resource Conservation and Recovery Act	Cleanup at landfills, superfund sites and underground storage tanks - Local governments who own landfills are subject to federal standards regarding location, operating criteria, groundwater monitoring, corrective actions, closure and post- closure care. For Superfund sites, the issues stem from institutional controls such as zoning around sites, setting and enforcing easements and covenants and overseeing building and/or excavation near sites.
Brownfields Redevelopment/Dioxin	Brownfields redevelopment has created some of the biggest success stories for local governments. However, the EPA is assessing whether to drop its dioxin levels to a point that would halt all brownfields development in the nation. While dioxin can be created as a byproduct through manufacturing, it is also naturally occurring. The levels the EPA proposed to lower dioxin are equal to many naturally occurring levels. NACo would urge the EPA the revisit the science used behind the health standards. Otherwise, this could be a huge loss for local governments.
ARMY CORPS OF ENGINEERS – SPECIFIC PROBLEMS DEALING WITH THE 404 PERMIT PROGRAM (EPA & USACE)	
Compensation Wetland Mitigation	Rule issued in conjunction with EPA. Local governments request added flexibility in meeting wetland mitigation requirements. Specific example includes variance between state and federal requirements. In this case, the state has an expanded set of options to meet the requirement that is not necessarily followed at the federal level. Therefore a local government may satisfy state requirements but not be able to meet federal requirements.
Ditch Drainage Requirements	The excessive amount of requirements necessary to provide information for USACE to review before a project is approved is both costly and time consuming for counties. For example, a county that wished to pursue and complete a drainage project was informed that the following was needed by USACE before work could be started: detailed plans showing existing condition, photos of areas where work will be done, details concerning existing water surface elevation, ordinary high water line, calculations of amount of material to be excavated, and a wetland delineation. Just to do this, the county would need to hire engineers to survey and perform calculations. All of this would significantly add to the cost of the project without necessarily ensuring clean water.
Post construction requirements – 404 Permit Related	The post construction monitoring process adds costs for channel rebuilds and other mitigation measures. For example, one county, after completion of a bridge replacement project, was required by NOAA Fisheries and FHWA to reinitiate formal consultation due to shifting boulders in the stream bed. State fish and wildlife officials supported the county in its objection and in its request to allow the channel to continue to stabilize. An updated BA and additional reporting would cost the county $50,000 in this instance. Should the reconstruction of the stream bed be required by the agencies, almost $1M in additional costs could be incurred.

NACo NATIONAL ASSOCIATION of COUNTIES

UNFUNDED MANDATES AND OTHER REGULATORY IMPACTS ON COUNTIES

Waters of the U.S.	Any changes to "Waters of the U.S." definition within the CWA will have an impact on county owned and maintained ditches such as roadside, flood control, stormwater, etc. Additionally, since there is only one "waters of the U.S." definition in the CWA, changes would impact more than the Section 404 permit program. What those changes are is not well understood nor has it been fully studied. This may have a significant impact on local governments.
TRANSPORTATION	
Grant Requirements	Requirements do not provide flexibility during implementation phase. For example, a county applies for funding to install electronic dynamic driver feedback speed limit signs. The county would like to purchase the signs using grant funding and then use county resources (e.g. staff) to install them. Requirements however, dictate that all stages of the process must be let out to private contractors, which further implies other requirements, e.g. Davis-Bacon, EEO, etc.
MAP-21	MAP-21 provides for some major reforms in regard to project delivery/environmental streamlining. It also proposes to modify the categorical exclusion process for NEPA review of certain projects. NACo continues to be engaged in rulemakings pertaining to these areas.
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION	
National Marine Fisheries Service	The Biological Assessment (BA) process through NMFS is extremely time consuming and raises costly barriers. For example, one county was working on a joint interchange project with the state to address urban growth. In an attempt to navigate the federal environmental permitting process, the project took two years alone to navigate the BA consultation with NMFS. A standard BA consultation generally takes9-12 months but the NMFS process added more than a year in time and approximately $1M in additional engineering costs with no added value to the project.
MISCELLANEOUS/MULTIPLE AGENCIES	
Inmate Healthcare	The Supreme Court required counties to provide health care for jail inmates in Estelle v. Gamble, 429 U.S. 97 (1976), while the federal government refuses to contribute to the provision of Medicaid, Medicare, CHIP or veterans' health benefits or services for otherwise eligible inmates.
Funding assistance-applications	When applying for funding assistance from separate sources/agencies for one project, multiple applications are required. The duplicity and lack of interchangeability of the forms and the agencies is very time consuming for local governments.
Use of ".gov" Domain for County Websites	The U.S. General Services Administration regulates the use of this extension. Arguably, this would make county sites easier to recall for constituents. Rules for use, however, restrict counties from enacting local ordinances/laws to assist in offsetting technology costs associated with website operation and maintenance via approved and regulated advertising.
Website Accessibility	The Department of Justice is currently considering a rule that would establish requirements to make websites for state and local governments accessible to individuals with disabilities. An advanced notice of the proposed rule was issued in 2010; however the Department has yet to issue the proposed rule. While counties support ensuring individuals with disabilities are able to access public information, the resources and additional funding needed for county websites to meet whatever standard is required by the rule will vary on a county by county basis and must be taken into consideration when determining the implementation period of the rule.

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Overtime Pay	In July 2015, the U.S. Department of Labor (DOL) released a proposed rule to amend regulations under the Fair Labor Standards Act governing the "white collar" exemption from overtime pay for executive, administrative and professional employees. In the proposed rule, DOL would change (more than double) the threshold for employees who are eligible to receive overtime pay, from $23,660 to $50,440. This level would also be adjusted annually. NACo submitted comments requesting DOL to extent the 60 day comment period to allow counties to calculate the financial and administrative burden this would impose on counties. NACo counties to collect information from counties regarding the financial and administrative impact of the overtime pay change.
Assessment of Fair Housing	The U.S. Department of Housing (HUD) released a final rule on updating Affirmatively Furthering Fair Housing practices and a proposed rule on the Assessment of Fair Housing Tool. HUD grantees are supposed to use the Assessment of Fair Housing (AFH) tool to analyze their fair housing goals to more effectively carryout their obligation to affirmatively further fair housing. AFH replaces the current Analysis of Impediments (AI) process which required HUD grantees that receive CDBG, HOME and Emergency Shelter Grants funding to identify local barriers to fair housing choice. The AFH is a much more comprehensive planning process, requiring jurisdictions to look at patterns of segregation and integration; racially and ethnically concentrated areas of poverty, and disparities in access to opportunity, as well as the contributing factors of those issues. The Tool is expansive and will take staff time and likely financial resources to implement. NACo submitted comments expressing concerns about the AFH Tool due to the lack of data provided by HUD for the new planning process and because HUD is not providing any funding to grantees to implement the new planning process and because HUD is not providing any funding to grantees to implement the new planning process. NACo continues to engage the Administration and Congress about county concerns with the AFH rulemaking.

NACo National Association of Counties

November 14, 2014

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Water Docket, Room 2822T
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Re: Definition of "Waters of the United States" Under the Clean Water Act, Docket ID No. EPA-HQ-OW-2011-0880

Dear Ms. Downing and Ms. Jensen:

On behalf of the National Association of Counties (NACo) and the 3,069 counties we represent, we respectfully submit comments on the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers (Corps) jointly proposed rule on *Definition of "Waters of the United States" Under the Clean Water Act*.[1] We thank the agencies for their ongoing efforts to communicate with NACo and our members throughout this process. **We remain very concerned about the potential impacts of the proposed rule and urge the agencies to withdraw it until further analysis has been completed.**

Founded in 1935, NACo is the only national organization that represents county governments in the United States and assists them in pursuing excellence in public service to produce healthy, vibrant, safe and resilient counties.

The Importance of Clean Water and Public Safety

Clean water is essential to all of our nation's counties who are on the front lines of protecting the citizens we serve through both preserving local resources and maintaining public safety. The availability of an adequate supply of clean water is vital to our nation and integrated and cooperative programs at all levels of government are necessary for protecting water quality.

Counties are not just another stakeholder group in this discussion—they are a valuable partner with federal and state governments on Clean Water Act implementation. To that end, it is important that the federal, state and local governments work together to craft practical and workable rules and regulations.

Counties are also responsible to protect the public. Across the country, counties own and maintain public safety ditches including road and roadside ditches, flood control channels, stormwater culverts and pipes, and other infrastructure that is used to funnel water away from low-lying roads, properties and businesses to prevent accidents and flooding incidents. **Defining what waters and their conveyances fall under federal jurisdiction has a direct impact on counties who are legally responsible for maintaining their public safety ditches and infrastructure.**

[1] Definition of Waters of the U.S. Under the Clean Water Act, 79 Fed. Reg. 22188 (April 21, 2014).

NACo shares the EPA's and Corps goal for a clear, concise and workable definition for "waters of the U.S." to reduce confusion—not to mention costs—within the federal permitting process. Unfortunately, we believe that this proposed rule falls short of that goal.

EPA asserts that they are not trying to regulate any waters not historically or previously regulated. But this is misleading. Prior to a 2001 Supreme Court decision,[2] virtually all water was jurisdictional. The EPA's and the Corps economic analysis agrees. It states that "Just over 10 years ago, almost all waters were considered "waters of the U.S."[3] This is why we believe the proposed rule is an expansion of jurisdiction over current regulatory practices.

Hundreds of counties, including their respective state associations of counties, have submitted public comments on the proposed rule over concerns about how it will impact daily operations and local budgets. We respectfully urge the agencies to examine and consider these comments carefully.

This letter will highlight a number of areas important to counties as they relate to the proposed rule:

- **Counties Have a Vested Interest in the Proposed Rule**
- **The Consultation Process with State and Local Governments was Flawed**
- **Incomplete Data was Used in the Agencies' Economic Analysis**
- **A Final Connectivity Report is Necessary to Justify the Proposed Rule**
- **The Clean Water Act and Supreme Court Rulings on "Waters of the U.S."**
- **Potential Negative Effects on All CWA programs**
- **Key Definitions are Undefined**
- **The Section 404 Permit Program is Time-Consuming and Expensive for Counties**
- **County Experiences with the Section 404 Permit Process**
- **Based on Current Practices—How the Exemption Provisions May Impact Counties**
- **Counties Need Clarity on Stormwater Management and Green Infrastructure Programs**
- **States Responsibilities Under CWA Will Increase**
- **County Infrastructure on Tribal Land May Be Jurisdictional**
- **Endangered Species Act as it Relates to the Proposed Rule**
- **Ensuring that Local Governments Are Able to Quickly Recover from Disasters**

Counties Have a Vested Interest in the Proposed Rule

In the U.S., there are 3,069 counties nationally which vary in size and population. They range in area from 26 square miles (Arlington County, Virginia) to 87,860 square miles (North Slope Borough, Alaska). The population of counties varies from Loving County, Texas, with just under 100 residents to Los Angeles County, California, which is home to close to ten million people. Forty-eight of the 50 states have operational county governments (except Connecticut and Rhode Island). Alaska calls its counties boroughs and Louisiana calls them parishes.

Since counties are an extension of state government, many of their duties are mandated by the state. Although county responsibilities differ widely between states, most states give their counties significant authorities. These authorities include construction and maintenance of roads, bridges and other infrastructure, assessment of property taxes, record keeping, running elections, overseeing jails and court

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[2] *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'r (SWANCC)*, 531 U.S. 159, 174 (2001).

[3] U.S. Envtl. Prot. Agency (EPA) & U.S. Army Corps of Eng'r (Corps), *Econ. Analysis of Proposed Revised Definition of Waters of the United States*, (March 2014) at 11.

systems and county hospitals. Counties are also responsible for child welfare, consumer protection, economic development, employment/training, and land use planning/zoning and water quality.

Counties own and maintain a wide variety of public safety infrastructure that would be impacted by the proposed rule including roads and roadside ditches, stormwater municipal separate storm sewer systems (MS4), green infrastructure construction and maintenance projects, drinking water facilities and infrastructure (not designed to meet CWA requirements) and water reuse and infrastructure.

On roads and roadside ditches, counties are responsible for building and maintaining 45 percent of public roads in 43 states (Delaware, North Carolina, New Hampshire, Vermont and West Virginia counties do not have road responsibilities). These responsibilities can range from intermittent maintenance, such as snow plowing, debris cleanup, short term paving and surface repairs to maintenance of traffic safety and road signage and major long-term construction projects.

Many of these road systems are in very rural areas. Of the nation's 3,069 counties, approximately 70 percent of our counties are considered "rural" with populations less than 50,000 and 50 percent of these are counties have populations below 25,000 residents. Any additional cost burdens are challenging to these smaller governments, especially since more rural counties have the most road miles and corresponding ditches. Since state constitutions and statutes dictate and limit the revenue sources counties may use, balancing increased federal and state regulations with the limited financial resources available to local governments poses significant implementation challenges.

Changes to the scope of the "waters of the U.S." definition, without a true understanding of the direct and indirect impact and costs to state and local governments, puts our local governments in a precarious position, choosing between environmental protection and public safety. Counties do not believe this needs to be an either/or decision if local governments are involved in policy formations from the start.

Regardless of size, counties nationwide are coping with fiscally tight budgets. County revenues have declined and ways to effectively increase county treasuries are limited. In 2007, our counties were impacted by the national financial crisis, which pushed the nation into a recession. The recession affected the capacity of county governments to deliver services to their communities. While a number of our counties are experiencing moderate growth, in some parts of the country, economic recovery is still fragile.[4] This is why we are concerned about the proposed rule.

The Consultation Process with State and Local Governments was Flawed

Throughout the entire rule-making process, state and local governments were not adequately consulted through the Regulatory Flexibility Act (RFA) and Executive Order 13132: Federalism. Since 2011, NACo has repeatedly requested a transparent process, as directed under the Administrative Procedures Act (APA), which includes meaningful consultation with impacted state and local governments.

The Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), requires federal agencies to consider potential impacts of proposed rules on small entities. This process was not followed for the proposed "waters of the U.S." rule.

Under RFA, small entities are defined as small businesses and organizations, cities, counties, school districts and special districts with a population below 50,000. RFA requires agencies to analyze the impact any proposed rule

[4] Nat'l Ass'n of Counties, *County Tracker 2013: On the Path to Recovery*, NACo Trends Analysis Paper Series, (2014).

could have on small entities and provide less costly options for implementation. The Small Business Administration's (SBA) Office of Advocacy (Advocacy) oversees federal agency compliance with RFA.

As part of the rulemaking process, the agencies must "certify" the proposed rule does not have a Significant Economic Impact on a Substantial Number of Small Entities (SISNOSE). To certify a proposed rule, federal agencies must provide a "factual basis" to certify that a rule does not impact small entities. This means "at minimum...a description of the number of affected entities and the size of the economic impacts and why either the number of entities or the size of the impacts justifies the certification."[5]

The RFA SISNOSE process allows federal agencies to identify areas where the proposed rule may economically impact a significant number of small entities and consider regulatory alternatives that will lessen the burden on these entities. If the agencies are unable to certify that a proposed rule does not impact small entities, the agencies are required to convene a small business advocacy review (SBAR) panel. **The agencies determined, incorrectly, there was "no SISNOSE"—and therefore did not provide a necessary review.**

In a letter sent to EPA Administrator Gina McCarthy and Corps Deputy Commanding General for Civil and Emergency Operations Major General John Peabody, SBA Advocacy expressed significant concerns that the proposed "waters of the U.S." rule was "improperly certified...used an incorrect baseline for determining...obligations under the RFA...imposes costs directly on small businesses" and "will have a significant economic impact..." Advocacy requested that the agencies "withdraw the rule" and that the EPA "conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking."[6] **Since over 2,000 of our nation's counties are considered rural and covered under SBA's responsibility, NACo supports the SBA Office of Advocacy conclusions.**

President Clinton issued Executive Order No. 13132, "Federalism," on August 4, 1999. **Under Executive Order 13132—Federalism, federal agencies are required to work with state and local governments on proposed regulations that will have a substantial direct impact on state and local governments.** We believe the proposed "waters of the U.S." rule triggers Executive Order 13132. Under Federalism, agencies must consult with state and local officials early in the process and must include in the final draft regulation a federalism summary impact statement, which must include a detailed overview of state and local government concerns and describe the extent the agencies were able to address the concerns.[7] **A federalism impact statement was not included with the proposed rule.**

EPA's own internal guidance summarizes when a Federalism consultation should be initiated.[8] Federalism may be triggered if a proposed rule has an annual implementation cost of $25 million for state and local governments.[9] Additionally, if a proposal triggers Federalism, EPA is required to work with state and local governments in a "meaningful and timely" manner which means "consultation should begin as early as possible and continue as you develop the proposed rule."[10] Even if the rule is determined not to impact state

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[5] Small Bus. Admin. (SBA), Office of Advocacy (Advocacy), *A Guide for Gov't Agencies: How to Comply with the Regulatory Flexibility Act,* (May 2012), at 12-13.

[6] Letter from Winslow Sargeant, Chief Counsel for Advocacy, to Gina McCarthy, Adm'r, EPA and Gen. John Peabody, Deputy Commanding Gen., Corps of Eng'r, on Definition of "Waters of the United States" Under the Clean Water Act (October 1, 2014).

[7] Exec. Order No. 13132, 79 Fed. Reg. 43,255 (August 20, 1999).

[8] U.S. Envtl. Prot. Agency, *EPA's Action Development Process: Guidance on Exec. Order 13132: Federalism*, (November 2008).

[9] *Id.* at 6.

[10] *Id.* at 9.

and local governments, the EPA still subject to its consultation requirements if the proposal has "any adverse impact above a minimum level."[11]

Within the proposed rule, the agencies have indicated they "voluntarily undertook federalism consultation."[12] While we are heartened by the agencies' acknowledgement of our concerns, we are disturbed that EPA prematurely truncated the state and local government Federalism consultation process. **EPA initiated a formal Federalism consultation process in 2011. In the 17 months between the consultation and the proposed rule's publication, EPA failed to avail itself of the opportunity to continue substantial discussions during this intervening period with its intergovernmental partners, thereby failing to fulfill the intent of Executive Order 13132, and the agency's internal process for implementing it.**

Recommendations:

1. **Pursuant to the rationale provided herein, as well as that put forth by the SBA Chief Counsel for Advocacy, formally acknowledge that this regulation does not merit a "no SISNOSE" determination and, thereby, must initiate the full small entity stakeholder involvement process as described by RFA SBREFA**

2. **Convene a SBAR panel which provides an opportunity for small entities to provide advice and recommendations to ensure the agencies carefully considers small entity concerns**

3. **Complete a multiphase, rather than one-time, Federalism consultation process**

4. **Charter an ad hoc, subject-specific advisory committee under the authority of the Federal Advisory Committee Act (FACA), as EPA has done on numerous occasions for less impactful regulations, to underpin the development of this comprehensive regulation**

5. **Accept an ADR Negotiated Rulemaking process for the proposed rule**: Because of the intrinsic problems with the development of the proposed rule, we would also ask the agencies to consider an Alternative Dispute Resolution (ADR) negotiated rulemaking with all stakeholders. An ADR negotiated rulemaking process would allow stakeholders of various groups to "negotiate" the text of a proposed rule, to allow problems to be addressed and consensus to be reached.

Incomplete Data was Used in the Agencies' Economic Analysis

As part of the proposed rule, the agencies released their cost-benefit analysis on *Economic Analysis of Proposed Revised Definition of Waters of the U.S.* (March 2014). We are concerned about the limited scope of this analysis since it bases its assumptions on a narrow set of CWA data not applicable to other CWA programs. Since EPA has held its 2011 Federalism briefing on "waters of the U.S.," **we have repeatedly raised concerns about the potential costs and the data points used in the cost-benefit analysis—these concerns have yet to be addressed.**[13] [14] [15]

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[11] *Id.* at 11.

[12] 79 Fed.Reg. 22220.

[13] Letter from Larry Naake, Exec. Dir., Nat'l Ass'n of Counties to Lisa Jackson, Adm'r, EPA & Jo Ellen Darcy, Assistant Sec'y for Civil Works, U.S. Dep't of the Army, "Waters of the U.S." Guidance (July 29, 2011) *available at* http://www.naco.org/legislation/policies/Documents/Energy,Environment,Land%20Use/Waters%20US%20Draft%20guidance%20NACo%20Comments%20Final.pdf.

[14] Letter from Larry Naake, Exec. Dir., Nat'l Ass'n of Counties to Lisa Jackson, Adm'r, EPA, Federalism Consultation Exec..Order 13132: "Waters of the U.S." Definitional Change (Dec. 15, 2011) *available at* http://www.naco.org/legislation/policies/Documents/Energy,Environment,Land%20Use/Waters%20US%20Draft%20guidance%20NACo%20Comments%20Dec%2015%202011_final.pdf.

The economic analysis uses CWA Section 404 permit applications from 2009-2010 as its baseline data to estimate the costs to all CWA programs. There are several problems with this approach. Based on this data, the agencies expect an increase of approximately three percent of new waters to be jurisdictional within the Section 404 permit program. The CWA Section 404 program administers permits for the "discharge of dredge and fill material" into "waters of the U.S." and is managed by the Corps.

First, we are puzzled why the agencies chose the span of 2009-2010 as a benchmark year for the data set as more current up-to-date data was available. In 2008, the nation entered a significant financial recession, sparked by the housing subprime mortgage crisis. Housing and public infrastructure construction projects were at an all-time low. According to the National Bureau of Economic Research, the recession ended in June 2009,[16] however, the nation is only starting to show signs of recovery.[17] By using 2009-2010 data, the agencies have underestimated the number of new waters that may be jurisdictional under the proposed rule.

Second, the economic analysis uses the 2009-2010 Corps Section 404 data as a baseline to determine costs for other CWA programs run by the EPA. Since there is only one "waters of the U.S." definition used within the CWA, the proposed rule is applicable to all CWA programs. The Congressional Research Service (CRS), a public policy research arm of the U.S. Congress, released a report on the proposed rule that stated "costs to regulated entities and governments (federal, state, and local) are likely to increase as a result of the proposal." The report reiterates there would be "additional permit application expenses (for CWA Section 404 permitting, stormwater permitting for construction and development activities, and permitting of pesticide discharges...for discharges to waters that would now be determined jurisdictional)."[18]

We are concerned the economic analysis focuses primarily on the potential impacts to CWA's Section 404 permit program and does not fully address the cost implications for other CWA programs. The EPA's and the Corps economic analysis agrees, "...the resulting cost and benefit estimates are incomplete...Readers should be cautious in examining these results in light of the many data and methodological limitations, as well as the inherent assumptions in each component of the analysis."[19]

Recommendation:

- **NACo urges the agencies to undertake a more detailed and comprehensive analysis on how the definitional changes will directly and indirectly impact all Clean Water Act programs, beyond Section 404, for federal, state and local governments**

- **Work with national, state and local stakeholder groups to compile up-to-date cost and benefit data for all CWA programs**

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[15] Letter from Tom Cochran, CEO and Exec. Dir., U.S. Conf. of Mayors, Clarence E. Anthony, Exec. Dir., Nat'l League of Cities, & Matthew D. Chase, Exec. Dir., Nat'l Ass'n of Counties to Howard Shelanski, Adm'r, Office of Info. & Regulatory Affairs, Office of Mgmt. and Budget, EPA's Definition of "Waters of the U.S." Under the Clean Water Act Proposed Rule & Connectivity Report (November 8, 2013) *available at* http://www.naco.org/legislation/policies/Documents/Energy,Environment,Land%20Use/NACo%20NLC%20USCM%20Waters%20of%20the%20US%20Connectivity%20Response%20letter.pdf.

[16] Nat'l Bureau of Econ. Research, Bus. Cycle Dating Comm. (September 20, 2010), *available at* www.nber.org/cycles/sept2010.pdf.

[17] Cong. Budget Office, *The Budget & Economic Outlook: 2014 to 2024* (February 2014).

[18] U.S. Cong. Research Serv., EPA & the Army Corps' Proposed Rule to Define "Waters of the U.S.," (Report No. R43455; 10/20/14), Copeland, Claudia, at 7.

[19] Econ. Analysis of Proposed Revised Definition of Waters of the U. S., U.S. Envtl. Prot. Agency & U.S. Army Corps of Eng'r, 11 (March 2014), at 2.

A Final Connectivity Report is Necessary to Justify the Proposed Rule

In addition to the aforementioned issues, we are also concerned that the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, used as a scientific basis of the proposed rule, is still in draft form.

In 2013, EPA asked its' Science Advisory Board (SAB), which is comprised of 52 scientific advisors, to review the science behind the report. The report focused on more than 1,000 scientific studies and reports on the interconnectivity of water. In mid-October, 2014, the SAB completed its review of the draft report and sent its recommendations to the EPA.[20]

The SAB recommendations have yet to be incorporated into the draft connectivity report. Releasing the proposed rule before the connectivity report is finalized is premature—the agencies missed a valuable opportunity to review comments or concerns raised in the final connectivity report that would inform development of the proposed "waters of the U.S." rule.

Recommendations:

- **Reopen the public comment period on the proposed "waters of the U.S." rule when the *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* report is finalized**

The Clean Water Act and Supreme Court Rulings on "Waters of the U.S."

Clean water is essential for public health and state and local governments play a large role in ensuring local water resources are protected. It is important state and local governments are involved as a significant partner in the CWA rule development process.

The Clean Water Act charges the federal government with setting national standards for water quality. Under a federal agreement for CWA enforcement, the EPA and the Corps share clean water responsibilities. The Corps is the lead on the CWA Section 404 Dredge and Fill permit program and the EPA is the lead on other CWA programs.[21] 46 states have undertaken authority for EPA's Section 402 NPDES permit program—EPA manages NPDES permits for Idaho, Massachusetts, New Hampshire and New Mexico.[22] Additionally, all states are responsible for setting water quality standards to protect "waters of the U.S."[23]

"Waters of the U.S." is a term used in CWA—it is the glue that holds the Clean Water Act together. The term is derived from a law that was passed in 1899, the Rivers and Harbors Act, that had to do with interstate commerce—any ship involved in interstate commerce on a "navigable water," which, at the time, was a lake, river, ocean—was required to have a license for trading.

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[20] Letter from Dr. David T. Allen, Chair, Science Advisory Bdd & Amanda D. Rodewald, Chair, Science Advisory Bd. Panel for the Review of the EPA Water Body Connectivity Report to Gina McCarthy, Adm'r, EPA, SAB Review of the Draft EPA Report Connectivity of Streams & Wetlands to Downstream Waters: A Review and Synthesis of the Sci. Evidence (October 17, 2014).

[21] Memorandum of Agreement Between the Dep't of the Army & the Envtl. Prot. Agency Concerning the Determination of the Section 404 Program & the Applications of Exemptions Under Section(F) of the Clean Water Act, 1989.

[22] Cong. Research Service, Clean Water Act: A Summary of the Law (Report RL 30030, October 30, 2014), Copeland, Claudia, at 4.

[23] *Id.*

The 1972 Clean Water Act first linked the term "navigable waters" with "waters of the U.S." in order to define the scope of the CWA. The premise of the 1972 CWA was that all pollutants discharged to a navigable water of the U.S. were prohibited, unless authorized by permit.

In the realm of the CWA's Section 404 permit program, the courts have generally said that "navigable waters" goes beyond traditionally navigable-in-fact waters. However, the courts also acknowledge there is a limit to jurisdiction. What that limit is within Section 404 has yet to be determined and is constantly being litigated.

In 2001, in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers,* the Corps had used the "Migratory Bird Rule"—wherever a migratory bird could land—to claim federal jurisdiction over an isolated wetland. [24] In SWANCC, Court ruled that the Corps exceeded their authority and infringed on states' water and land rights.[25]

In 2006, in *Rapanos v. United States*, the Corps were challenged over their intent to regulate isolated wetlands under the CWA Section 404 permit program.[26] In a 4-1-4 split decision, the Court ruled that the Corps exceeded their authority to regulate these isolated wetlands. The plurality opinion states that only waters with a relatively permanent flow should be federally regulated. The concurrent opinion stated that waters should be jurisdictional if the water has a "significant nexus" with a navigable water, either alone or with other similarly situated sites.[27] Since neither opinion was a majority opinion, it is unclear which opinion should be used in the field to assert jurisdiction, leading to further confusion over what waters are federally regulated under CWA.

Potential Negative Effects on All CWA Programs

There is only one definition of "waters of the U.S." within the CWA which must be applied consistently for all CWA programs that use the term "waters of the U.S." While Congress defined "navigable waters" in CWA section 502(7) to mean "the waters of the United States, including the territorial seas," the Courts have generally assumed that "navigable waters of the U.S." go beyond traditional navigable-in-fact waters such as rivers. However, the Courts also acknowledge there is a limit to federal jurisdiction.

Previous Corps guidance documents on "waters of the U.S." clarifications have been strictly limited to the Section 404 permit program. A change to the "waters of the U.S." definition though, has implications for ALL CWA programs. This modification goes well beyond solely addressing the problems within the Section 404 permit program. These effects have not been fully studied nor analyzed.

Changes to the "waters of the U.S." definition within the CWA will have far-reaching effects and unintended consequences to a number of state and local CWA programs. As stated before, the proposed economic analysis needs to be further fleshed out to recognize all waters that will be jurisdictional, beyond the current data of Section 404 permit applications. CWA programs, such as the National Pollutant Discharge Elimination System (NPDES), total maximum daily load (TMDL) and other water quality standards programs, state water quality certification process, or Spill Prevention, Control and Countermeasure (SPCC) programs, will be impacted.

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[24] 531 U.S. 159, 174 (2001).

[25] *Id.*

[26] 547 U.S. 715, 729 (2006).

[27] *Id.*

Key Definitions are Undefined

The proposed rule extends the "waters of the U.S." definition by utilizing new terms—"tributary," "uplands," "significant nexus," "adjacency," "riparian areas," "floodplains" and "neighboring"—that will be used to claim jurisdiction more broadly. All of these terms will broaden the types of public infrastructure that is considered jurisdictional under the CWA.

"Tributary"—The proposed rule states that a tributary is defined as a water feature with a bed, bank, ordinary high water mark (OHWM), which contributes flow, directly or indirectly, to a "water of the U.S." A tributary does not lose its status if there are man-made breaks (bridges, culverts, pipes or dams) or natural breaks upstream of the break. The proposed rule goes on to state that **"A tributary...includes rivers, streams, lakes, ponds, impoundments, canals, and ditches..."**[28]

For counties that own and manage public safety infrastructure, the potential implication is that roadside ditches will be treated the same as rivers and streams, while the functions and purposes of both are significantly different. Public safety ditches should not be classified as tributaries. Further fleshing out the exemptions for certain types of ditches, which is discussed later in the letter, would be beneficial.

"Uplands"—The proposed rule recommends that "Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" are exempt, however, the term "uplands" is undefined.[29] This is problematic. County public safety ditch systems—roadside, flood, drainage, stormwater—can be complex. While they are generally dug in dry areas, they run through a transitional area before eventually connecting to "waters of the U.S." It is important to define the term "uplands" to ensure the exemption is workable.

"Significant Nexus"—The proposed rule states that "a particular category of waters either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable or interstate waters."[30]

This definition uses the watershed approach to determine jurisdiction—a watershed is an area of land where all of the rivers, streams, and other water features drain to the same place. According to the EPA, "Watersheds come in all shapes and sizes. They cross county, state, and national boundaries. In the continental U.S., there are 2,110 watersheds, including Hawaii, Alaska, and Puerto Rico, there are 2,267 watersheds."[31]

There are very few parts of the country that are not in a watershed. This definition would create burdens on local governments who maintain public safety ditches and infrastructure near natural waterbodies; this infrastructure could be considered jurisdictional under the "significant nexus" definition.

"Adjacent Waters"— Under current regulation, only those wetlands that are adjacent to a "waters of the U.S." are considered jurisdictional. However, the proposed regulate broadens the regulatory reach to "adjacent waters," rather than just to "adjacent wetlands." This would extend jurisdiction to "all waters," not just "adjacent wetlands." The proposed rule defines "adjacent as "bordering, contiguous or neighboring."[32]

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[28] 79 Fed. Reg. 22199.

[29] *Id.*

[30] *Id.*

[31] U.S. Envtl. Prot. Agency, "What is a Watershed?,"*available at* http://water.epa.gov/type/watersheds/whatis.cfm.

[32] 79 Fed. Reg. 22199.

Under the rule, adjacent waters include those located in riparian or floodplain areas.[33]

Expanding the definition of "adjacency," will have unintended consequences for many local governments. Stormwater and floodwater infrastructure and facilities are often located in low-lying areas, which may be considered jurisdictional under the new definition. Since communities are highly dependent on these structures for public safety, we would encourage the agencies to assess the unintended consequences.

"Riparian Areas"—The proposed rule defines "riparian area" as "an area bordering a water where the surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." Riparian areas are transitional areas between dry and wet areas.[34] Concerns have been raised that there are very few areas within the U.S. that would not meet this definition, especially if a riparian area boundary remains undefined.

"Floodplains"—The proposed definition states that floodplains are defined as areas with "moderate to high water flows."[35] These areas would be considered "water of the U.S." even without a significant nexus. Under the proposed rule, does this mean that any area, that has the capacity to flood, would be considered to be in a "floodplain?"

Further, it is major problem for counties that the term "floodplain" is not tied to, or consistent with, the generally accepted and understood definition used by the Federal Emergency Management Agency (FEMA). Notwithstanding potential conflicts with other Federal agencies, the multiple federal definitions could create challenges in local land use planning, especially if floodplain designations are classified differently by various agencies.

Aside from potential conflicts between Federal agencies, this would be very confusing to landowners and complicated to integrate at the local level. These definitions could create conflict within local floodplain ordinances, which were crafted to be consistent with FEMA National Flood Insurance Program (NFIP) rules. It is essential that floodplain definitions be consistent between and among all Federal agencies.

"Neighboring"—"Neighboring" is a term used to identify those adjacent waters with a significant nexus. The term "neighboring" is used with the terms riparian areas and floodplains to define the lateral reach of the term neighboring. [36] Using the term "neighboring," without limiting qualifiers, has the potential to broaden the reach of the CWA. No one county is alike, nor are the hydrologic and geological conditions across the U.S. Due to these unique challenges, it is often difficult to craft a one-size-fits-all regulatory approach without considering regional or local differences. Moreover, there could be a wide range of these types of differences within one state or region.

Recommendations:

- **Redraft definitions to ensure they are clear, concise and easy to understand**
- **Where appropriate, the terms used within the proposed rule should be defined consistently and uniformly across all federal agencies**

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[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*

- **Create a national map that clearly shows which waters and their tributaries are considered jurisdictional**

The Section 404 Permit Program is Time-Consuming and Expensive for Counties

Ditches are pervasive in counties across the nation and, until recently, were never considered to be jurisdictional by the Corps. Over the years, numerous local governments and public agencies have expressed concerns that regional Corps offices sometimes require Section 404 permits for maintenance activities on public safety infrastructure conveyances. While a maintenance exemption for ditches exists on paper, in practice it is narrowly crafted. Whether or not a ditch is regulated under Section 404 has significant financial implications for local governments and public agencies.

In recent years, certain Corps districts have inconsistently found public safety ditches jurisdictional, both for construction and maintenance activities. Once a ditch falls under federal jurisdiction, the Section 404 permit process can be extremely cumbersome, time-consuming and expensive, leaving counties vulnerable to citizen suits if the federal permit process is not streamlined.

Based on our counties' experiences, while the jurisdictional determination process may create delays, lengthy and resource intensive delays also occur AFTER federal jurisdiction is claimed. Once jurisdictional, the project triggers application of other federal laws like environmental impact statements, National Environment Policy Act (NEPA) and the Endangered Species Act (ESA). These impacts involve studies and public comment periods, all of which can cost both time and money. And often, as part of the approval process, the permit requires the applicant to "mitigate" the environmental impacts of the proposed project, sometimes at considerable expense. There also may be special conditions attached to the permit for maintenance activities. These specific required conditions result in a lengthy negotiation process with counties. A number of California counties have communicated this process can easily take easily three or more years, with costs in the millions for one project.

One Midwest county studied five road projects that were delayed over the period of two years. Conservatively, the cost to the county for the delays was $500,000. Some counties have missed building seasons waiting for federal permits. These are real world examples, going on now, for many our counties. They are not hypothetical, "what if" situations. These are actual experiences from actual counties. The concern is, if more public safety ditches are considered jurisdictional, more counties will face similar problems.

Counties are liable for ensuring their public safety ditches are maintained and there have been cases where counties have been sued for not maintaining their ditches. In 2002, in *Arreola v Monterey* (99 Cal. App. 4th 722), the Fourth District Court of Appeals held the County of Monterey (Calif.) liable for not maintaining a flood control channel that failed due to overgrowth of vegetation. Counties are legally responsible for public safety infrastructure, regardless of whether or not the federal agencies approve permits in a timely manner.

It is imperative that the Section 404 permitting process be streamlined. Delays in the permitting process have resulted in flooding of constituent and business properties. This puts our nation's counties in a precarious position—especially those who are balancing small budgets against public health and environmental protection needs.

The bottom line is, county ditch systems can be complex. They can run for hundreds of miles continuously. By their very nature, they drain directly (or indirectly) into rivers, lakes, streams and eventually the ocean. At a time when local governments throughout the nation are only starting to experience the beginnings of economic recovery,

proposing far reaching changes to CWA's "waters of the U.S." definition seems to be a very precarious endeavor and one which should be weighed carefully knowing the potential implications.

County Experiences with the Section 404 Permit Process

During discussions on the proposed "waters of the U.S." definition change, the EPA asked NACo to provide several known examples of problems that have occurred in Section 404 jurisdictional determinations, resulting in time delays and additional expenses. These examples have been provided to the agencies.

One Midwest county received Federal Highway Authority funding to replace two old county bridge structures. The Corps determined that because the project would impact 300 feet of a roadside ditch, the county would have to go through the individual permit process. The county disagreed with the determination but decided to acquiesce to the Corps rather than risk further delay and the withdrawal of federal funding. The cost associated with going through the Corps process required the county to significantly scale back its intended project in order to stay on time and budget. Ultimately, the project's completion was still delayed by several months.

The delay that can result from regulating local drainage features is evidenced by another Midwestern county that wanted to conduct a storm water improvement project to address local flooding concerns. The project entailed adding a second structure to a concrete box culvert and replacing a corrugated metal culvert. These structures were deemed jurisdictional by the Corps because they had a "bank on each side" and had an "ordinary high water mark. Thus, the county was forced to go through the individual permit process.

The delay associated with going through the federal permit process nearly caused the county to miss deadlines that would have resulted in the forfeiture of its grant funds. Moreover, because the project was intended to address flooding concerns, the delay in its completion resulted in the flooding of several homes during heavy rains. The county was also required to pay tens of thousands in mitigation costs associated with the impacts to the concrete and metal structures. Ultimately, no changes were recommended by the Corps to the project, and thus, no additional environmental protection was provided by going through the federal process.

Based on Current Practices—How the Exemption Provisions May Impact Counties

While the proposed rule offers several exemptions to the "waters of the U.S." definition, the exclusions are vague and imprecise, and may broaden jurisdiction in a number of areas. Specifically, we are concerned about the exemptions on ditches and wastewater treatment systems.

"Ditches"— The proposed rule contains language to exempt certain types of ditches: 1) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow and 2) Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or a jurisdictional impoundment.[37]

For a ditch to be exempt, it must be excavated and drain only to a dry area and be wet less than 365 days a year. This is immediately problematic for counties. County ditches are not dug solely in dry areas, because they are designed to drain overflow waters to "waters of the U.S."

Counties own and manage different types of public safety ditches—roadside, drainage, flood control, stormwater—that protect the public from flooding. They can run continuously for hundreds, if not thousands, of miles throughout

[37] *Id.*

the county. Very few county ditches just abruptly end in a field or a pond. Public safety ditches are generally dug in dry areas, run through a transition area, before connecting directly or indirectly to a "water of the U.S."

Under the proposed rule, if dry ditches eventually connect, directly or indirectly, to a "water of the U.S.," will the length of the ditch be considered jurisdictional waters? Or will portions of a dry ditch be considered exempt, even though the ditch's physical structure interconnects with a jurisdictional river or stream?

The exclusion also states that ditches that do not "contribute to flow," directly or indirectly to "waters of the U.S.," will be exempt. The definition is problematic because to take advantage of the exemption, ditches must demonstrate "no flow" to a river, stream, lake or ocean. Most ditches, by their nature, have some sort of flow in rain events, even if those ditches are dry most of the year. **Since the proposed rule indicates that perennial, intermittent or ephemeral flows could be jurisdictional, the agencies need to further explain this exclusion.[38] Otherwise, there will be no difference between a stream and a publicly-owned ditch that protects public safety.**

The agencies have reiterated that the proposed rule leaves in place the current exemption on ditch maintenance activities.[39] EPA has indicated this exemption is automatic and that counties do not have to apply for the exemption if they are performing maintenance activities on ditches. **However, in practice, our counties have reported the exemption is inconsistently applied by Corps districts across the nation. Over the past decade, a number of counties have been required to obtain special Section 404 permits for ditch maintenance activities.**

These permits often come with tight special conditions that dictate when and how the county is permitted to clean out the relevant ditch. For example, one California county has a maintenance permit for an earthen stormwater ditch. They are only permitted to clear grass and debris from the ditch six months out of the year due to ESA impacts. This, in turn, has led to multiple floodings of private property and upset citizens. In the past several years, we've heard from a number of non-California counties who tell us they must get Section 404 permits for ditch maintenance activities.

Some Corps districts give a blanket exemption for maintenance activities. In other districts, the ditch maintenance exemption is very difficult to obtain, with narrow conditions governing the types maintenance activities that are considered exempt. Additionally, a number of Corps districts are using the "recapture provision" to override the exemption.[40] Under the "recapture clause," previously exempt ditches are "recaptured," and must comply for the Section 404 permitting process for maintenance activities.[41] Additionally, Corps districts may require documentation to original specifications of the ditch showing original scope, measurements, etc.[42] Many of these ditches were hand-dug decades ago and historical documentation of this type does not exist.

Other districts require entities to include additional data as part of their request for an exemption. One Florida county applied for 18 exemptions at a cost of $600,000 (as part of the exemption request process, the entity must provide data and surveying materials), three months later, only two exemptions were granted and the

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[38] 79 Fed. Reg. 22202.

[39] See, 33 CFR 232.4(a)(3) & 40 CFR 202.3(c)(3).

[40] U.S. Army Corps of Eng'r, Regulatory Guidance Letter: Exemption for Construction or Maintenance of Irrigation Ditches & Maint. of Drainage Ditches Under Section 404 of the Clean Water Act (July 4, 2007).

[41] *Id.*

[42] *Id.* at 4.

county was still waiting for the other 16 to be granted. At that point, the county was moving into its seasonal rainy season and fielding calls from residents who were concerned about flooding from the ditches.

This is what is happening to counties now. If the approval process for ditch maintenance exemptions is not clarified and streamlined, more counties will experience delays in safeguarding and caring for these public safety ditches.

It is the responsibility of local governments to ensure the long-term operation and protection of public safety infrastructure. **The federal government must address problems within the current CWA Section 404 regulatory framework, to ensure that maintenance activities on public safety infrastructure do not require federal approval. Without significantly addressing these problems, the federal agencies will hinder the ability of local governments to protect their citizens.**

Recommendations:

- **Exclude ditches and infrastructure intended for public safety**
- **Streamline the current Section 404 permitting process to address the delays and inconsistencies that exist within the existing decision-making process**
- **Provide a clear-cut, national exemption for routine ditch maintenance activities**

"Waste Treatment Systems"—Water treatment refers to the process of taking waste water and making it suitable to discharge back to the environment. The term "waste treatment" can be confusing because it is often linked to wastewater or sewage treatment. However, this can also include water runoff from landscape irrigation, flushing hydrants, stormwater runoff from roads, parking lots and rooftops.

The proposal states that "waste treatment systems,"—including treatment ponds or lagoons, designed to meet the requirements of the CWA—are exempt.[43] In recent years, local governments and other entities have moved toward a holistic approach in treating stormwater by using ponds, swales and wetlands. Traditionally, such systems have been exempt from CWA, but due to the broad nature of the proposed rule, we believe the agencies should also exempt other constructed wetland and treatment facilities which may be included under the proposed rule. This would include, but not be limited to, water and water reuse, recycling, treatment lagoons, setting basins, ponds, artificially constructed wetlands (i.e. green infrastructure) and artificially constructed groundwater recharge basins.

It is important that all constructed features built for the purpose of water quality treatment or runoff control be exempt, whether or not it was built for CWA compliance. Otherwise, this sets off a chain reaction and discourages further investment which will ultimately hurt the goals of the CWA.

Recommendations:

- **The proposed rule should expand the exemption for waste treatment systems if they are designed to meet *any* water quality requirements, not just the requirements of the CWA**

[43] 79 Fed. Reg. 22199.

Counties Need Clarity on Stormwater Management and Green Infrastructure Programs

Under the CWA Section 402 National Pollution Discharge Elimination System (NPDES) permit program, all facilities which discharge pollutants from any point source into "waters of the U.S." are required to obtain a permit; this includes localities with a Municipal Separate Storm Sewer System (MS4). An MS4 is defined as a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)" owned by a state, tribal, local or other public body, which discharge into "waters of the U.S."[44] They are designed to collect and treat stormwater runoff.

Since stormwater management activities are not explicitly exempt under the proposed rule, NACo is concerned that man-made conveyances and facilities for stormwater management could now be classified as a "water of the U.S."

In various conference calls and meetings over the past several months, the agencies have stressed that municipal MS4s will not be regulated as "waters of the U.S." However, EPA has indicated that there could be "waters of the U.S." designations within a MS4 system, especially if a natural stream is channelized within a MS4. This means an MS4 could potential have a "water of the U.S." within its borders, which would be difficult for local governments to regulate.

MS4s are subject to the CWA and are regulated under Section 402 for the treatment of water. However, treatment of water is not allowed in "waters of the U.S." This automatically sets up a conflict if an MS4 contains "waters of the U.S." Would water treatment be allowed in the "waters of the U.S." portion of the MS4, even though it's disallowed under current law? Additionally, if MS4s contained jurisdictional waters, they would be subject to a different level of regulation, requiring all discharges into the stormwater system to be regulated along with regulating discharges from a NPDES system.

The definitional changes could easily be interpreted to include the whole MS4 system or portions thereof which would be a significant change over current practices. It would also potentially change the discharge point of the MS4, and therefore the point of regulation. Not only would MS4 permit holders be regulated when the water leaves the MS4, but also when a pollutant enters the MS4. Since states are responsible for water quality standards of "waters of the U.S." within the state, this may trigger a state's oversight of water quality designations within an MS4. **Counties and other MS4 permittees would face expanded regulation and costs as they will now have to ensure that discharges from outfalls to these new "waters of the U.S." meet designated water quality standards.**

This would be problematic and extremely expensive for local governments to comply with these requirements. Stormwater management is often not funded as a water utility, but rather through a county or city general fund. If stormwater costs significantly increase due to the proposed rule, not only will it potentially impact our ability to focus available resources on real, priority water quality issues, but it may also require that funds be diverted from other government services such as education, police, fire, health, etc. Our county members cannot assume additional unnecessary or unintended costs.

Further, by shifting the point of compliance for MS4 systems further upstream, the proposed rule could reduce opportunities for establishment of cost effective regional stormwater management systems. Many counties and stormwater management agencies are attempting to stretch resources by looking for regional and integrated approaches for managing stormwater quality. The rule would potentially inhibit those efforts. Even if the agencies do not initially plan to treat an MS4 as a "water of the U.S.," they may be forced to do so as a result of CWA citizen suits that attempt to address lack of clarity in the proposed rule.

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[44] 40 CFR 122.26(b)(8).

EPA has indicated these problems could be resolved if localities and other entities create "well-crafted" MS4 permits. In our experience, writing a well-crafted permit is not enough—localities are experiencing high levels of litigation from outside groups on approved permits that have been signed off by both the state and the EPA. A number of Maryland counties have been sued over the scope and sufficiency of their approved MS4 permits.

In addition, green infrastructure, which includes existing regional stormwater treatment systems and low impact development stormwater treatment systems, is not explicitly exempt under the proposed rule. A number of local governments, as well as private developers, are using green infrastructure as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes to treat stormwater runoff. The proposed rule could inadvertently impact a number of these facilities by requiring Section 404 permits for green infrastructure construction projects that are jurisdictional under the new definitions in the proposed rule. Additionally, it is unclear under the proposed rule whether a Section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established.

While jurisdictional oversight of these "waters" would occur at the federal level, actual water quality regulation would occur at the state and local levels, becoming an additional unfunded mandate on our counties and agencies.

Recommendations:

- **Explicitly exempt MS4s and green infrastructure from "waters of the U.S." jurisdiction**

States Responsibilities Under CWA Will Increase

While the EPA and the Corps have primary responsibility for water quality programs, everyday CWA implementation is shared with the states and local governments.[45] Under the CWA, states are required to identify polluted waters (also known as impaired waters) and set Water Quality Standards (WQS) for them. State WQS are intended to protect jurisdictional "waters of the U.S.," such as rivers, lakes and streams, within a state. As part of the WQS process, states must set designated uses for the waterbody (e.g. recreation, drinkable, fishable) and institute Total Maximum Daily Loads (TMDL) for impaired waters.

Currently, WQS regulation focuses on waters regulated under federal law, however, NACo is concerned the proposed rule may broaden the types of waters considered jurisdictional. This means the states will have to regulate more waters under their WQS and TMDL standards. This would be extremely costly for both the states and localities to implement.

In EPA's and the Corps economic analysis, it states the proposed rule "may increase the coverage where a state would...apply its monitoring resources...It is not clear that additional cost burdens for TMDL development would result from this action."[46] The data used to come to this conclusion is inconclusive. As discussed earlier, the agencies used data from 2009-2010 field practices for the Section 404 program as a basis for the economic analysis. This data is only partially relevant for the CWA Section 404 permit program, it is not easily interchangeable for other CWA programs.

Because of vague definitions used in the proposed rule, it is likely that more waters within a state will be designated as "waters of the U.S." As the list of "waters of the U.S." expand, so do state responsibilities for

[45] Cong. Research Serv., Clean Water Act: A Summary of the Law (Report RL 30030, October 30, 2014), Copeland, Claudia.

[46] Econ. Analysis of Proposed Revised Definition of Waters of the United States, U.S. Envtl. Prot. Agency (EPA) & U.S. Army Corps of Eng'r (Corps), (March 2014) at 6-7.

WQS and TMDLS. The effects on state nonpoint-source control programs are difficult to determine, but they could be equally dramatic, without a significant funding source to pay for the proposed changes.

Recommendation:

- **NACo recommends that the federal agencies consult with the states to determine more accurate costs and implications for the WQS and TMDL programs**

County Infrastructure on Tribal Lands May Be Jurisdictional

The proposed rule reiterates long-standing policy which says that any water that that crosses over interstate lines—for example if a ditch crosses the boundary line between two states—falls under federal jurisdiction. But, this raises a larger question. If a ditch runs across Native American land, which is considered sovereign land, is the ditch then considered an "interstate" ditch?

Many of our counties own and maintain public safety infrastructure that runs on and through Native American tribal lands. Since these tribes are sovereign nations with self-determining governments, questions have been raised on whether county infrastructure on tribal land triggers federal oversight.

As of May 2013, 566 Native American tribes are legal recognized by the Bureau of Indian Affairs (BIA).[47] Approximately 56.2 million acres of land is held in trust for the tribes[48] and it is often separate plots of land rather than a solidly held parcel. While Native American tribes may oversee tribal roads and infrastructure on tribal lands, counties may also own and manage roads on tribal lands.

A number of Native American tribes are in rural counties—this creates a patchwork of Native American tribal, private and public lands. Classifying these ditches and infrastructure as interstate will require counties to go through the Section 404 permit process for any construction and maintenance projects, which could be expensive and time-consuming.

NACo has asked the federal agencies to clarify their position on whether local government ditches and infrastructure on tribal lands are currently regulated under CWA programs, including how they will be regulated under the final rule.

Recommendation:

- **We request clarification from the federal agencies on whether ditches and other infrastructure that cross tribal lands are jurisdictional under the "interstate" definition**

Endangered Species Act as it Relates to the Proposed Rule

NACo is concerned that provisions of the proposed rule may interact with provisions of the Endangered Species Act (ESA) and its implementing regulations in ways that may produce unintended negative outcomes.

For instance, when a species is proposed for listing as endangered or threatened under ESA, large swaths of land may be designated as critical habitat, that is essential to the species' protection and recovery. Critical

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[47] U.S. Dept. of the Interior, Indian Affairs, *What We Do, available at http://www.bia.gov/WhatWeDo/index.htm* .

[48] *Id.*

habitat requires special management and conservation, which can have enormous economic impacts on county governments and private landowners.

This effect is intensified when the Section 404 permit program is triggered. Section 7 consultation under the ESA could be required, which can be time-consuming and expensive, especially for public safety projects. Some counties are already reporting strict ESA requirements on maintenance of public safety ditches.

To further compound the issue, the vague terms used in the proposed rule such as "floodplains," may also trigger ESA compliance. In recent years, the Federal Emergency Management Agency (FEMA) has been sued for not considering the habitat needs of threatened and endangered species in National Flood Insurance Program (NFIP) floodplain designations. Local governments in certain states, who participate in the NFIP, must now certify they will address ESA critical habitat issues in floodplain areas. **This litigation-driven approach circumvents local land use planning authority and creates an atmosphere of mistrust rather than providing incentives to counties and private landowners to actively engage in endangered species conservation.**

If the agencies plan to use broad definitions within the proposed rule, regulation by litigation would seem to be an increasingly likely outcome. These issues need to be carefully considered by the agencies.

Ensuring that Local Governments Are Able to Quickly Recover from Disasters

In our nation's history, our citizens have experienced both manmade and natural disasters. Counties are the initial line of defense, the first responders in protection of its residents and businesses. Since local governments are responsible for much of what constitutes a community—roads and bridges, water and sewer systems, courts and jails, healthcare, parks, and more—it is important that local governments quickly recover after disasters. This includes removing wreckage and trash from ditches and other infrastructure that are considered jurisdictional.[49]

Counties in the Gulf Coast states and the mid-west have reported challenges in receiving emergency waivers for debris in ditches designated as "waters of the U.S." after natural and manmade disasters. This, in turn, damages habitat and endangers public health. NACo would urge the EPA and the Corps to revisit that policy, especially if more waters are classified as "waters of the U.S."

Conclusion

We appreciate the opportunity to be a part of this process. NACo acknowledges the efforts taken by both EPA and the Corps to conduct outreach on the proposed rule. This is a priority issue for our nation's counties who are responsible for environmental protection and public safety.

As stated earlier, we believe that more roadside ditches, flood control channels and stormwater management conveyances and treatment approaches will be federally regulated under this proposal. This is problematic because counties are ultimately liable for maintaining the integrity of these ditches, channels, conveyances and treatment approaches. Furthermore, the unknown impacts on other CWA programs are equally problematic, the degree and cost of regulation will increase dramatically if these features are redefined as "waters of the U.S." **We urge you to withdraw the rule until further study on the potential impacts are addressed.**

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[49] Disaster Mitigation: Reducing Costs & Saving Lives: Hearing before the Subcomm. on Econ. Dev., Pub. Bldgs. & Emergency Mgmt., H. Comm. on Transp. & Infrastructure, 113th Cong. (2014) (statement of Linda Langston, President, Nat'l Ass'n of Counties).

We look forward to working together with our federal partners, as our founding fathers intended, to protect our nation's water resources for generations to come. If you have any questions, please feel free to contact Julie Ufner, NACo's Associate Legislative Director at Jufner@naco.org or 202.942.4269.

Sincerely,

Matthew D. Chase
Executive Director
National Association of Counties

August 31, 2015

Mary Zeigler
Director of the Division of Regulations, Legislation, and
Interpretation, Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

Re: Defining and Delimiting the Exemptions for Executive, Administrative, and Professional Employees; Proposed Rule; Regulatory Information Number (RIN) 1235-AA11

Dear Director Zeigler:

On behalf of the nation's 3,069 counties, the National Association of Counties (NACo) respectfully submits the following comments on the proposed rule to amend regulations under the Fair Labor Standards Act governing the "white collar" exemption from overtime pay for executive, administrative and professional employees. In the proposed rule, the U.S. Department of Labor (DOL) would change the salary threshold for employees who are eligible for overtime pay from $23,660 to $50,440. This salary threshold would also be updated annually in the Federal Register.

Founded in 1935, NACo is the only national organization that represents county governments in the United States and assists them in pursuing excellence in public service to produce healthy, vibrant, safe and resilient communities and provide their residents with essential services such as education, law enforcement, search and rescue, road maintenance and public health.

County governments are a major employer and economic engine for workers across the U.S. Today, America's 3,069 county governments employ more than 3.3 million people, providing service to over 305 million county residents. Counties provide health benefits to nearly 2.5 million employees and nearly 2.4 million of their dependents. For health insurance premiums alone, counties spend an estimated $20 to $24 billion annually.

Because counties are responsible for everything from transportation and infrastructure, to justice and public safety, to public health, to search and emergency rescue, 911 operations, fire prevention, and much more, this proposed rule could have a major impact on county operations—and the ability of county governments to provide these critical services to the people we serve—especially during crisis events or even disasters.

NACo's comments reflect our concerns about the proposed rule to increase the threshold amount for "white collar" employee exemption from overtime pay—and the potential impact that the proposed rule could have on county government budgets and administration. The proposed rule could also potentially have a substantial impact on the nation's rural counties (almost 70 percent of counties are considered rural

and have less than 50,000 residents).

Because counties need additional time to examine and calculate the potential economic or administrative impact on their county, NACo respectfully urges DOL to extend the comment period provided in the proposed rule. We also urge DOL to perform further analysis on the potential impact of the proposed rule on county and local governments prior to its finalization.

Concerns with Changing the Overtime Pay Exemption Threshold

Under the proposed rule, DOL would require employers to more than double the minimum salary level for an employee to qualify as "exempt" from overtime pay. DOL would change the salary threshold for "white collar" employees who are eligible for overtime pay, from $23,660 to $50,440. This is a substantial increase over a one-year period.

This increase could have harmful consequences on county governments—and ultimately on county employees—particularly when many are still recovering from the U.S. recession. According to NACo's 2014 County Economic Tracker report, only 65 county economies had recovered (based on four indicators—job growth, unemployment rates, economic input (GDP) and median home prices) to their pre-recession levels.[1] As employers, county governments provide both wages and benefits to their employees. The proposed overtime pay exemption threshold increase could negatively impact county employees' wages and benefits at a time when county economies are still in a fragile state.

Some counties have calculated that the overtime pay change could increase their payroll costs dramatically in the first year of implementation and beyond. For example, according to Berks County, Pennsylvania, 97 of the current 419 exempt employees would be eligible for overtime pay. Under the proposed rule, Berks County has estimated that the additional financial burden could cost the county as much as $1.5 million in the first year alone. ***Most counties must operate on a balanced budget and many do not have the financial resources to make major pay increases without increasing taxes, reducing employee fringe benefits and/or reducing their county employee work hours or staff.***

In fact, 43 states have some type of limitation on the property taxes collected by counties, including 38 states that impose statutory limitations on property tax rate, property tax assessments or both. Only 12 states authorize counties to collect their own local gas taxes, which are limited to a maximum rate in most cases and often involve additional approvals for implementation.

In many counties, the overtime salary change could reduce the number of exempt employees and change their classifications. The change from exempt to non-exempt status could reduce these county employees' fringe benefits and incentive compensation. For instance, in Columbia County, Pennsylvania the proposed overtime pay guidelines would make an additional 43 currently exempt employees eligible for overtime pay. For this rural county, the proposed rule would have a major financial impact.

NACo urges DOL to allow for an extended comment period and to perform additional analysis on the impact of the proposed rule on county government. The proposed changes are substantial, and thus would result in the need of county governments to increase both administrative time and expenses to ensure that they are in compliance.

[1] Istrate, Emilia, Nicholas Lyell. County Economic Tracker 2014: Progress through Adversity, Washington D.C.: National Association of Counties. Available at http://www.naco.org/sites/default/files/documents/County_Economic_Tracker2014-FINAL.pdf

Concerns with Automatic Annual Adjustments/Increases

The proposed rule would also annually adjust the overtime pay threshold—potentially increasing the exempt threshold each year. **This change would create uncertainty for county governments and would place an undue administrative and monetary burden on county governments, as it would become difficult to plan for and implement salary increases due to these annual undefined overtime pay changes.** ***NACo urges DOL to provide additional clarity into the potential annual increase and to strongly consider the increased administrative and financial burdens it could place on county governments on an annual basis.***

Requesting Separate Comment Period for Changes to Duties Test

In the proposed rule, DOL is considering whether there should be changes made to the "duties" test under this proposed rule. A duties test examines employees' functions to determine whether they are exempt or non-exempt. The Department modernized the duties test in 2004. ***NACo urges DOL to not make any changes to the "duties" test at this time, but instead publish a separate proposed rule and give adequate time for comments on potential changes to the "duties" test.***

Additional Time Needed for Public Comment

Many counties have expressed concerns about the length of the comment period provided in the proposed rule. The 60 day timeframe has not been sufficient for many counties to calculate the economic or administrative impact on their county and provide comments. ***NACo urges DOL to consider extending the public comment period for at least an additional 90 days.***

We thank you for the opportunity to comment. If you have any questions, please feel free to contact Daria Daniel, NACo's Associate Legislative Director at ddaniel@naco.org or 202.942.4212.

Sincerely,

Matthew D. Chase
Executive Director
National Association of Counties

March 17, 2015

Air and Radiation Docket and Information Center
U.S. Environmental Protection Agency
Mail Code 28221T
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Docket No. EPA-HQ-OAR-2008-0699, National Ambient Air Quality Standards for Ozone

Dear Administrator McCarthy:

On behalf of the nation's mayors, counties, cities and regions, we respectfully submit our comments on the U.S. Environmental Protection Agency's (EPA) "Draft Documents Related to the Review of the National Ambient Air Quality Standards (NAAQS) for Ozone."

Our organizations, which collectively represent the nation's 19,000 cities and mayors, 3,069 counties and more than 500 regional councils, support the goals of the Clean Air Act (CAA) and the National Ambient Air Quality Standards (NAAQS) that protect public health and welfare from hazardous air pollutants. Local governments across the country are actively working toward meeting these goals of improving air quality.

The NAAQS applies to counties and cities within a metropolitan region and plays a critical role in shaping regional transportation plans and can influence regional economic vitality. The proposed rule would revise the current NAAQS for ozone of 75 parts per billion (ppb), which was set in 2008, proposing to reduce both the primary and secondary standard to within a range of 65-70 ppb over an 8-hour average. EPA is also accepting comments on setting the standard at a level as low as 60 ppb.

Because of the financial and administrative burden that would come with a more stringent NAAQS for ozone, we ask EPA to delay implementation of a new standard until the 2008 standard is fully implemented. The current 2008 standard of 75 ppb has yet to be implemented due to litigation opposing the standard. The 1997 standard of 80 ppb is still generally used by regions and it will take several additional years to fully implement the more stringent 2008 standard.

A more stringent NAAQS for ozone will dramatically increase the number of regions classified as non-attainment. By EPA's own estimates, under a 70 ppb standard, 358 counties and their cities would be in violation; under a 65 ppb standard, an additional 558 counties and their cities would be in violation. Unfortunately, there is very little federal funding available to assist local governments in meeting CAA requirements. According to EPA, under this proposed rule a 70 ppb standard would cost approximately $3.9 billion per year; a 65 ppb standard would cost approximately $15.2 billion annually to implement.[1]

Moreover, these figures do not take into account the impact that the proposed rule will have on the nation's transportation system. Transportation conformity is required under the CAA[2] to ensure that federally-supported transportation activities (including transportation plans, transportation improvement programs, and highway and transit projects) are consistent with state air quality implementation plans. Transportation conformity applies to all areas that are designated non-attainment or "maintenance areas" for transportation-related criteria pollutants, including ozone.[3] Transportation conformity determinations are required before federal approval or funding is given to transportation planning and highway and transit projects.

For non-attainment areas, the federal government can withhold federal highway funds for projects and plans. Withholding these funds can negatively affect job creation and critical economic development projects for impacted regions, even when these projects and plans could have a measurable positive effect on congestion relief.

Additionally, these proposed new ozone regulations will add to an already confusing transportation conformity compliance process due to a recent decision by the United States Court of Appeals for the District of Columbia Circuit. In 2012, after the 2008 NAAQS for ozone was finalized, EPA issued a common-sense proposal to revoke the 1997 NAAQS for ozone in transportation conformity requirements to ensure that regulated entities were not required to simultaneously meet two sets of standards—the 1997 and 2008 NAAQS for ozone. However, the court disagreed, and on December 23, 2014 ruled, in *Natural Resources Defense Council vs. Environmental Protection Agency and Gina McCarthy,* that EPA lacked the authority to revoke conformity requirements. This ruling has left state and local governments with a conformity process that is now even more confusing and administratively burdensome, and a new NAAQS for ozone will add to the complexity.

Given these financial and administrative burdens on local governments, we urge EPA to delay issuing a new NAAQS for ozone until the 2008 ozone standard is fully implemented.

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[1] The cost to California is not included in these calculations, since a number of California counties would be given until 2032–2037 to meet the standards.
[2] Section 176(c) (42 U.S.C. 7506(c))
[3] See 40 CFR Part 93, subpart A

If you have any questions, please contact us: Judy Sheahan (USCM) at 202-861-6775 or jsheahan@usmayors.org; Julie Ufner (NACo) at 202-942-4269 or jufner@naco.org; Carolyn Berndt (NLC) at 202-626-3101 or Berndt@nlc.org; Joanna Turner (NARC) at 202-618-5689 or Joanna@narc.org.

Sincerely,

Tom Cochran
CEO and Executive Director
The U.S. Conference of Mayors

Matthew D. Chase
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National Association of Counties

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National League of Cities

Joanna L. Turner
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National Association of Regional Councils

Unfunded Mandates: Promoting Accountability for National Policy Actions

Paul Posner

George Mason University

Statement provided for Hearing of the Senate Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management, February 24, 2016

Unfunded Mandates: Promoting Accountability for National Policy Actions

Paul Posner

George Mason University

Chairman Lankford, Ranking Member Heitkamp and other members of the Subcommittee,

I am pleased to be here to share my thoughts on unfunded federal mandates. This hearing provides much-needed attention to this important issue. While lurking at the foundation of much legislation and regulation, it is healthy to periodically take stock of the nature of these federal requirements and their implications for our federal system of government.

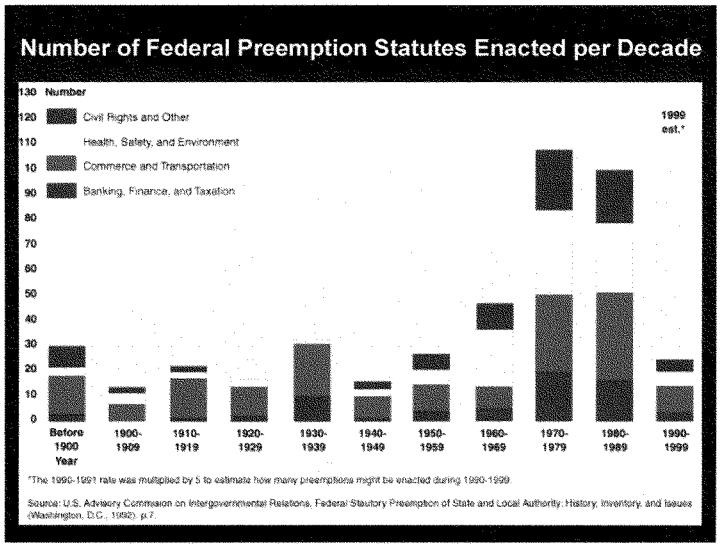
My testimony today will discuss how intergovernmental mandates have emerged as a significant tool of government at the federal level and whether and how various reforms have altered national legislative and regulatory strategies. I will conclude by offering observations on the potential utility of additional reforms in both the rules applying to unfunded intergovernmental mandates as well as broader institutional changes I believe are necessary to reinvigorate our federal system here in Washington.

The Rise of Federal Mandates

Over the past forty years, mandates and preemptions have become primary tools relied on by Congress and the President to project national priorities and objectives throughout the intergovernmental system. Generally, mandates can refer to a wide range of federal actions, from affirmative obligations for state and local governments to take action on a policy issue to a constraint preventing or preempting state or local actions.

The secular trends toward more a more coercive and centralized federalism have survived the passage of both Republican and Democratic Administrations, as well as Democratic and Republican Congresses. These trends continued through the 1990's and are reflected in following chart developed by the now-defunct Advisory Commission on Intergovernmental Relations (ACIR), which shows the growth of federal preemptions over the decades.[1]

[1] The chart ends in mid-1990's due to the demise of its institutional sponsor, the ACIR, but the trends through the end of 1990's were estimated by the Commission staff.



What forces are responsible for these trends? On one level, national leaders under growing fiscal pressure are tempted to shift costs to other levels of government and private business. The shifting of costs and imposition of new mandates and rules takes advantage of two fundamental accounting principles:

- The costs of programs to subnational governments and business are free at the national level

- Taxpayers will suffer from the fiscal illusion and fail to hold national leaders accountable for the additional costs their actions impose throughout the system

Yet, despite these perennial temptations, federal officials displayed remarkable restraint on intergovernmental mandates as late as 1960. The expansions of the federal role largely relied on grants and the tradition of cooperative federalism. The New Deal and Great Society programs populated domestic policy with numerous grant programs that sought to engage state and local governments through the carrot rather than the stick. When national regulations were imposed on the economy through such statutes as the *Fair Labor Standards Act*, the *Social Security Act* and Title VII of the *Civil Rights Act of 1964*, state and local governments were exempted. Indeed, federalism was accepted as one of the primary "rules of the game."

The shift toward the reliance on more coercive forms of national action began in the 1960's, accelerating through the next several decades. The era of chronic deficits that began in the late 1960's was at least partly responsible for the turn away from cooperative federalism. But underlying shifts in the party system, interest groups and the economy itself also were forcing greater centralization in the federal system.

The position of state and local governments in the federal system was protected by a decentralized party system where candidates for national owed their nominations and political allegiances to state and local party leaders, embedding a sensitivity to the prerogatives of state and local officials in fundamental political incentives. In recent decades, candidates have been on their own to assemble independent coalitions to support and finance campaigns, as state and local parties have lost their prominent place in electoral politics. National elected officials now have to balance their natural allegiance

to state and local governments with the need to establish their own visible policy profiles to appeal to a diverse coalition of voters, interest groups, and media outlets.

Strong forces have promoted the nationalization of problems that have been deposited on the federal doorstep. The growth of national media institutions focused on Washington created a powerful resource for those groups wishing to nationalize problems and issues, and reporting increasingly sought to find national dimensions or applications for state and local problems or solutions. The growing integration of business throughout the nation and the world has converted the business community from advocates of state authority to promoters of national preemption. As corporations increasingly operate in a global environment, coping with separate state regulatory regimes is seen as a hindrance to economic efficiency and competitiveness.

With strong national forces at work, the position of groups representing state and local governments became pivotal to their prospects in Washington. While they have at times succeeded in modifying mandates to reduce costs, in many cases states and local leaders are neutralized and even champion particular mandates and preemptions.[2] Facing strong groups pressing for national mandates or preemptions, state and local groups are often disarmed by their lack of political cohesion on key policy issues; lacking agreement they often unable to articulate positions in national debates. The compelling appeal of major federal mandates and preemptions, whether they be elections reform, education

[2] Paul L. Posner, *The Politics of Unfunded Mandates* (Washington, D.C., Georgetown University Press, 1998)

standards or homeland security requirements, indeed puts many elected officials on the defensive.

The recent trend toward party polarization has mixed effects on federal mandates. On the one hand, polarization has deepened the conflicts among states and localities in taking positions on mandates. Indeed, the National Governors Association was unable to take positions on such vital legislation as welfare reform of 1996 and the 2010 health reform legislation. However, polarization has stiffened the resolve of some states to resist federal mandates in recent years. The states' resisted the Real ID Act passed in 2005 by refusing to issue new hardened drivers licenses or conform to other provisions of this national legislation. Restive leaders in some states have pushed back against Medicaid expansion under health reform, even though this costs states much needed federal reimbursement for health care costs.

Reforms to curb the use of unfunded mandates

As the foregoing suggests, the imposition of mandates and other forms of cost shifting is a complex process with deep, and at times conflicting, fiscal, political and economic roots. Those seeking to reverse these trends must find ways to change incentives and institutions that are responsible for current trends in the intergovernmental allocation of power and responsibilities.

UMRA of 1995: A Modest Reform With Modest Results

Information alone had proven to be ineffectual to thwart these trends. In 1981 legislation, Congress required CBO to provide cost estimates on all proposed legislation approved by committees.. Paralleling the "fiscal note" processes used by state legislatures, these estimates provided some public notification of the cost impacts of legislative proposals before they are voted on by the House or the Senate. However, GAO and CBO studies have shown that the cost estimates had little traction in the Congress, as witnessed by the explosion of mandates following its enactment.

Congress went beyond pure information strategies when it passed the Unfunded Mandates Reform Act of 1995.. It strengthened requirements for CBO to estimate the costs of all major legislation reported by committees affecting both state and local governments and the private sector. It also required executive agencies to review the costs of mandates before they issue regulations, a process that was already largely in place due to Presidential orders. Most importantly, it provided a point of order that can be raised by any member against a bill reported out of committee that CBO estimates is an unfunded mandate with major costs.

Title 1 affecting the Congressional enactment of mandates has achieved some modest results in deterring or modifying proposed mandates thanks to the point of order

provision. Taking a cue from federal budget points of order, it enabled mandate opponents to raise a point of order against proposed unfunded intergovernmental mandates in pending legislation under consideration by the Congress. The point of order does not prevent mandates from being enacted since it can be overridden in each chamber, but it does promote accountability by prompting a separate vote on the issue of mandating itself. As such, it was not an impenetrable barrier, but more of a "speed bump" that could potentially embarrass mandate proponents and rally opponents.

In the 20 years since the advent of the Act, numerous cost estimates were prepared by CBO for both private sector and intergovernmental mandates as shown in Table 1. The table shows that mandates covered under the Act appeared in 12 to 15 percent of major legislation reported by committees. Relatively few bills had fiscally significant mandates, but the most important ones had significant fiscal effects.

Table 1, Cost estimates prepared under UMRA, 1996-2016

	Total cost estimates	Total with mandates	Total major mandates
Intergovernmental	10.932	1357	107
Private Sector	10,810	1714	394

Source: Robert J. Dilger and Richard S. Beth, *Unfunded Mandates Reform Act: History, Impact and Issues* (Washington, D.C.: Congressional Research Service, 2016)

The actual effect of points of order on congressional behavior can be achieved through several pathways. The first involves the actual raising of points of order by members to stop mandates in their legislative tracks.. This pathway has not been particularly productive from the state and local standpoint – a CRS report found that as of January,

2016, 60 points of order had been raised in the House and 3 in the Senate since the passage of UMRA. The point of order was sustained only one time in the House and twice in the Senate – both on bills raising the minimum wage votes.

The second pathway is where the CBO cost estimate and the potential for a point of order work as a deterrent to prompt mandate advocates to temper or withdraw their proposals. This certainly has worked in recent years in several notable occasions. For instance, legislation reported out of the House Ways and Means Committee would have narrowed the authority of states to impose taxes on businesses that lacked physical nexus in their states. (HR 1956, Business Activity Tax Simplification Act) When CBO estimated annual revenue costs exceeding $3 billion over time, the leadership of the House was persuaded to pull the bill from the calendar.[3] However, this "worked" only as part of an effective state and local lobbying campaign that adroitly used the CBO estimate to sidetrack the proposed tax preemption. More broadly, of 59 mandates above the point of order threshold proposed in late 1990's, 9 were amended before enactment to reduce their costs below the threshold.[4] Thus, the efficacy of the point of order stems at least in part from the shame that can still be mustered when legislation can be labeled as violating the state and local fiscal commons.

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Having said this, we must also acknowledge one major weakness - the limited coverage of UMRA, exempting many of the mandates passed in the past years. Specifically,

[3] Congressional Budget Office, Cost estimate, July 11, 2006.

[4] U.S. Government Accountability Office, *Unfunded Mandates: Analysis of Reform Act Coverage* GAO-04-637, May, 2004.

UMRA primarily covers only statutory direct orders, excluding most grant conditions as well as preemptions whose fiscal effects fall below the threshold; and statutory direct orders dealing with constitutional rights, prohibition of discrimination, national security, and social security are among those excluded from coverage. Moreover, the CBO cost estimate requirements do not generally apply to appropriations bills or floor amendments which have become increasingly prevalent ways to pass legislation in recent years. Prominent mandates of recent years were not considered to be unfunded mandates under the Act including the No Child Left Act, the Help America Vote Act, and a portion of the Real ID Act requiring states to impose a new national ID as part of their drivers licenses.

Title II dealing with administrative rule making has had little additional impact on agency behavior. In addition to the exclusions from UMRA coverage cited above, additional activities are exempt from Title II coverage including rules issued by independent regulatory agencies, rules issued without a notice of proposed rulemaking and rules such as the Clean Air Act whose underlying statute prohibits the consideration of costs. Moreover, revenue preemptions are not considered mandates for purposes of Title II.

GAO found that these exemptions excluded 80 of 110 economically significant rules from UMRA cost estimates during the first several years of UMRA's implementation. The exclusion for federal grant conditions constituted nearly 40 percent of these exemptions. Moreover, for those rules where UMRA applied, agencies typically were already providing cost estimates under Executive Order 12866 or other executive orders.

Reforming UMRA

Mr. Chairman, the foregoing suggests that UMRA has worked better than naysayers might have predicted, but it nonetheless fails to provide sufficient accountability and incentives to address unfunded mandates within both legislative and executive branch deliberations. The Unfunded Mandates Information and Transparency Act (HR 50) passed by the House in 2015 and its Senate companion (S189) contain many useful changes that promise to enhance coverage and promote consultation. In the intergovernmental area, the bills expand coverage to include mandates issued by independent regulatory agencies, regulations issued without advanced notice of proposed rulemaking, and the costs of conditions of federal assistance requested by the chair or ranking member of a committee.

The coverage of conditions of grants is an important change for intergovernmental mandates. The UMRA adopted a view of grants similar to that of the courts – grants are technically voluntary and thus do not constitute the imposition of federal rules and requirements on recipients. In recent years, the Court has placed limits on the use of direct federal power to directly order or "commandeer: the states in achieving national goals, but, until recently, it has been reluctant to limit grant conditions and the spending power in general. The argument is that states are grants are voluntary agreements freely entered into by the state government that vitiates their coercive nature.

Thus, it is not surprising that most federal mandates are carried out not by direct order but by conditions of aid. With federal assistance approaching nearly $700 billion, the federal government uses the Trojan Horse of grants to project a wide range of requirements on the states and localities. When one looks at recent controversies between federal and states governments, it is the grant conditions that states protest most vehemently - No Child Left Behind, Medicaid mandates predating health reform, and emergency management requirements are examples.

The Supreme Court's historic decision upholding the President's health reform rebuffed the new Medicaid health reform mandates to expand coverage to additional populations, arguing that these grant conditions have become equivalent to direct commandeering of states by federal officials in the service of national goals. [5] In writing for the Court, Justice Roberts opined that the sheer amount of funds at risk and the potential loss of not only the new Medicaid matching funds but, possibly, existing Medicaid funding ratchets up the stakes and makes it virtually impossible for states to resist the federal carrot. The Court's decision failed to provide bright lines to distinguish which kinds of grant conditions fall into the prohibited category but it appears that the imposition of new requirements that put long standing funding streams at risk are particularly suspect under this new doctrine. The Congress should follow the Court's new doctrine by placing grant conditions under greater scrutiny.

[5] National Federation of Independent Business v. Sebelius, Secretary of Health and Human Services 648 F 3d 1235

Another important intergovernmental issue covered by the legislation involves enhancements to consultation by federal agencies with affected parties before issuing rules. OMB has guidelines for federal agency consultation with state and local governments under UMRA, including requirements for early consultation before the issuance of proposed rules and seeking out state and local views on costs, benefits, risks and alternative approaches to compliance. [6] However, most observers including several OMB directors themselves, would characterize consultation as inconsistent or haphazard. This was true both for the initial development of regulations as well as the retrospective reviews of existing regulations, as reported by GAO. [7] The previous history of intergovernmental consultations reveals that federal agencies were highly inconsistent, but also that state and local groups often did not respond to the opportunity to provide their views on regulatory proposals. [8]

One way to strengthen intergovernmental consultation would be to centralize consultation in an Office of Intergovernmental Advocacy. Patterned after the Office of Advocacy in the Small Business Administration, this organization could provide more systematic intervention at earlier stages in agency rulemaking than is the case today. As with the SBA Office, the intergovernmental advocate could undertake the following functions

--Provide more systematic data on intergovernmental finance and costs for agencies to utilize in regulatory cost analysis

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[6] OMB, *2015 Draft Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local and Tribal Entities,* October, 2015, p. 62.
[7] GAO, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-791, July, 2007
[8] Advisory Commission on Intergovernmental Relations, *Improving Federal Grants Management*, A-53, February, 1977.

--Deliver training to agencies in measuring state and local regulatory costs and benefits

--Intervene and engage with federal agencies at pre-proposal stages

--Engage with state and local governments to ascertain positions and find agreement on proposals

Conclusions: The Need for Stronger Intergovernmental Institutions

The Unfunded Mandates Reform Act illustrates the potential, and limitations of institutional reform. It had a modest impact by raising the federalism dimension in policy deliberations that still attracts residual support from members of Congress. However, let me be quick to add that while a federalism dimension may be still alive, it is nonetheless weak and easily trumped by other national values and interests.

Strengthening UMRA should be high on the congressional agenda. Yet, even a stronger set of procedures needs the backing of institutions that reinforce information and incentives to focus on intergovernmental consequences of national policy. However, it is sobering to report that the institutions that grew up with the evolution of cooperative federalism have largely been eliminated.

The most important and preeminent institution was the Advisory Commission on Intergovernmental Relations (ACIR), created in the late 1950s during the Administration of President Eisenhower. With members from all levels of government appointed by the

President and the Congress, its research and policy recommendations found their way into path-breaking federal grants legislation including the Intergovernmental Cooperation Act of 1968, the Intergovernmental Personnel Act of 1970, the General Revenue Sharing program enacted in 1972, and the unfunded mandates reform legislation passed in 1995. The ACIR was also instrumental in Presidential federalism initiatives, with major involvement in Nixon Administration's block grant proposals and in the Reagan Administration's New Federalism program turn-back and sorting out proposals.

The ACIR was joined by other institutions that enabled the emergence of an intergovernmental issue network in Washington. These included a separate grants division in the President's budget office, the Office of Management and Budget (OMB), as well as specific subcommittees on federalism and intergovernmental relations on both House and Senate sides of the Congress, chaired by powerful senior members of Congress such as Senator Edmund Muskie. The GAO also created a unit dedicated to assessing the intergovernmental system for the Congress in the mid-1970's. During the 1980s, state and local groups invested in the creation of an Academy for State and Local Government, which was intended to perform neutral studies on the intergovernmental system that each group could not perform on its own.

This entire edifice crumbled during the 1980s and 1990s. The ACIR was abolished by a Congress seeking short-term budget savings by eliminating smaller agencies and commissions. The OMB eliminated its grants office in the early 1980s, ironically at the time when federalism received high level attention from President

Ronald Reagan as part of his broad scale reform intended to reallocate and devolve powers from federal government to the states. The Congress abolished its federalism subcommittees. The state and local groups abandoned their Academy, as internal disagreements on priorities and interests among them caused an independent neutral group to lose support.. The GAO and CBO retain their independent analytic units devoted to unfunded mandates and intergovernmental grants, however.

What are the common denominators behind the collapse of the intergovernmental institutional edifice in Washington? Certainly, the shifting landscape of the policy process played a role. The rise of polarized parties, confrontational politics, and interest group advocacy served to erode support for institutions that sought out the vital center and promoted improvements in relationships among governments.. Yet I fear that these developments also reflect the eclipse of federalism as a fundamental rule of the game in Washington, DC. Real progress on unfunded mandates reform is critically dependent on the reinvigoration of intergovernmental institutions within both the Congress and the Executive Branch to rekindle the priority placed on our federal system in the inner councils of government. This is a heavy lift indeed and one that will require a major initiative by those in the Adminstration, the Congress and the state and local community. Hearings like the one today are a vital first step in this project.

TESTIMONY OF RICHARD J. PIERCE, JR.

LYLE T. ALVERSON PROFESSOR OF LAW

GEORGE WASHINGTON UNIVERSITY

IN A HEARING ON THE UNFUNDED MANDATES REFORM ACT: OPPORTUNITIES FOR IMPROVEMENT TO SUPPORT STATE AND LOCAL GOVERNMENTS

BEFORE THE

SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT

OF THE

SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

Thank you, Chairman Lankford, Ranking Member Heitkamp, and distinguished members of the Subcommittee on Regulatory Affairs, for the opportunity to testify today on the proposed Unfunded Mandates Information and Transparency Act of 2015.

My name is Richard J. Pierce, Jr. I am Lyle T. Alverson Professor of Law at the George Washington University School of Law and a member of the Administrative Conference of the United States. For 38 years my teaching, research, and scholarly writing has focused on administrative law and government

regulation. I have written 125 articles and 20 books on those subjects. My books and articles have been cited in scores of judicial opinions, including over a dozen opinions of the United States Supreme Court.

I strongly support the Unfunded Mandates Reform Act (UMRA) with respect to its application to state, local, and tribal governments. It is not needed and is duplicative of other requirements in its application to private parties. Every President since President Reagan has issued Executive Orders that direct the Office of information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) to review all major rules issued by executive branch agencies to determine whether the benefits of the rule exceed its costs. Major rules are defined as rules that are expected to impose annual costs of $100,000,000 or more. The costs of major rules are usually borne primarily by private parties. I cannot imagine a rule that would fall within the scope of UMRA that would not also fall within the definition of a major rule for purposes of OIRA review. I also have been unable to identify any requirement of UMRA *in its application to private parties* that is not also required by those Executive Orders. In addition, each of the last three Presidents has issued Executive Orders that require agencies to review their existing rules and to rescind or amend any rule that imposes undue burdens on private parties.

Private parties do not need any special or additional means of protecting themselves from mandates imposed on them by major rules. Studies of the notice and comment rulemaking process have consistently found that private parties and their representatives dominate that process both with respect to the comments they submit and the influence of those comments. By contrast, beneficiaries of rules, state governments, local governments and tribal governments file very few meaningful comments and the comments they file have little effect on the final rule the agency adopts.

With one notable exception, I oppose enactment of the proposed Unfunded Mandates Information and Transparency Act because I believe that it is unnecessary and that it would have adverse effects of several types.

I will begin by expressing my strong support for Section 5, "Expanding the Scope of Reporting Requirements to Include Regulations Imposed by Independent Regulatory Agencies." I have long supported OIRA's use of cost-benefit analysis (cba) to review major rules issued by executive branch agencies and I have long urged expansion of the scope of OIRA review to include independent regulatory agencies. I have testified in support of, and sent letters in support of, Senator Portman's Bill, Senate 1607, which would have that effect.

Many studies have found that the most important beneficial effect of OIRA use of cba to review major rules has been to improve significantly the quality of the economic analysis executive branch agencies use in the rule making process. Many studies have also found that the economic analysis used by Independent regulatory agencies is systematically and significantly inferior to the economic analysis used by executive branch agencies. It follows that extension of OIRA use of cba to review major rules to independent agencies would induce them to improve the quality of their economic analysis. Similarly, extension of the Unfunded Mandates Act to independent agencies would have the beneficial effect of increasing their sensitivity to the need to refrain from imposing federal mandates on state, local, and tribal governments without providing them the resources needed to comply with those mandates.

The other provisions of the proposed Act are unnecessary for two reasons. First, the Unfunded Mandates Reform Act is fulfilling its laudable purpose in its present form. It is highly effective in sensitizing both Congress and executive branch agencies with respect to the need to refrain from

imposing federal mandates on state, local, and tribal governments without providing those governments with the resources they require to implement those mandates. Second, many of the provisions of the proposed Act paraphrase existing agency practices and/or requirements that other statutes and Executive Orders have long imposed on agencies. I would include in this category most of the requirements that would be imposed by sections 6, 8 "201 (a)", 9 "(a)(1-5)", and 11"(208)."

Most of the provisions of the proposed Act would have adverse effects for two reasons. First, every new regulatory statute that Congress enacts, including this proposed statute, raises hundreds of questions that cannot be definitively answered until one or more courts have provided answers to those questions. Every word and phrase in a statute must be definitively defined by the courts. That process takes many decades. During that lengthy period, every firm, individual, and agency that is potentially affected by the statute must live in a legal environment that is plagued by pervasive uncertainty. Uncertainty has many bad effects, including discouragement of the productive investments that are essential to allow the economy to function well.

That lengthy process of judicial interpretation also inevitably yields judicial answers that come as unpleasant surprises to many firms, individuals and institutions, including the Congress that enacted the statute. These adverse effects apply to all of the provisions, including those that paraphrase pre-existing practices or requirements. It is impossible to know the meaning of those provisions until a court interprets each. In some cases, a provision that seems merely to paraphrase a pre-existing requirement will be interpreted by courts to require some practice that differs substantially from the pre-existing practice or requirement that the provision seems to restate with new words and phrases.

The second adverse effect of the proposed Act would be to add mandatory procedures that are unnecessary and burdensome. Many of those new mandatory procedures would have the effect of making the rulemaking process longer and more resource-intensive. There is a large body of scholarly research that documents, and describes the adverse effects of, a phenomenon that is referred to as "ossification" of the rulemaking process. The process of issuing, amending, or repealing a rule has become so long and resource intensive that agencies are unable to issue, amend, or repeal rules in a timely manner. The Supreme Court has held that agencies must use the same burdensome and time-consuming procedures that they are required to use when they issue a rule when they amend or repeal a rule. Many, indeed most, agencies have burdensome rules that have long been obsolete but that the agencies have not been able to amend or repeal because of the "ossification" of the rulemaking process that has resulted from the constantly increasing procedural requirements that Congress and the courts have imposed on agencies. Many of the provisions of the proposed Act would impose new procedural requirements that would cause increases in the ossification of the process of issuing, amending, or repealing rules. Three provisions illustrate this adverse effect.

First, proposed section 8 "201 (b)" would apply the ten procedural requirements imposed by existing section 201(a) to minor and insignificant regulatory actions. The present version of section 202 limits the applicability of the required procedures to "significant regulatory actions," defined as actions that would impose annual costs of $100,000,000 or more. That limit makes sense. The costs of imposing demanding new procedural requirements on agencies when they take minor or insignificant actions is not justified by the costs of complying with the procedures. That is why President Reagan imposed the same limit on the actions that he subjected to OIRA review in Executive Order 11,291. Every President of both political parties has retained the limit that President Reagan announced.

Second, proposed section 9 "(a)" requires an agency to use elaborate procedures to prepare a written statement *before* it issues a notice of proposed rulemaking or a final rule. There is no justification for requiring an agency to commit the significant time and resources required to issue those statements when the agency already issues statements that comply with proposed section 9 "9(a)(1-5)" when it issues its notice of proposed rulemaking and when it issues its final rule.

Third, proposed section 9 "(a)(6)(B and C)"requires an agency to provide a "detailed summary" of the comments submitted to an agency in a significant rulemaking and a "detailed summary" of the agency's evaluation of those comments. That is literally impossible in many significant rulemakings. Thus, for instance, it is hard to imagine how EPA could have summarized in detail the 4.3 million comments it received in the rulemaking that produced the Clean Power Plan. The analogous requirement that courts apply is far more pragmatic: an agency must respond to all "well-supported" critical comments. The well-supported comments typically are a small subset of the total comments. The Administrative Procedure Act requires an agency to include a "concise, general" summary of the comments it received and its response to those comments. Even those "concise, general" statements are typically hundreds of pages long in a major rulemaking. I cannot imagine how long a "detailed summary" would be.

Thank you again for giving me the opportunity to testify on these important matters.

NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

Curtis Bramble
Senate President Pro Tempore
Utah
President, NCSL

Karl Aro
Director of Administration
Department of Legislative Services
Maryland
Staff Chair, NCSL

William T. Pound
Executive Director

March 10, 2016

The Honorable Howard Shelanski
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503

Dear Administrator Shelanski:

Over the past year, the National Conference of State Legislatures (NCSL) has welcomed the dialogue we have had with you and your office on smarter regulations and retrospective review. Key to improving the regulatory process, is early analysis and consultation with state and local leaders, as outlined in principles the Big 7 state and local groups shared with you in December. Last week, Katie Johnson from your office requested some examples of best practices regarding agency consultation with state and local governments. While the groups offered some examples, I have a time sensitive recommendation for your consideration.

Last week the U.S. Department of Education released the list of non-federal negotiators to the rulemaking committee to implement part A of Title I of the Elementary and Secondary Education Act (ESEA) of 1965, as amended by the Every Student Succeeds Act (ESSA). NCSL urges the administration to consider adding an additional negotiator to include a state legislator.

The rulemaking committee, as announced, lacks some extremely valuable expertise from state legislators who will be responsible for implementing the first major change in federal education policy since 2002. The topics of this negotiated rulemaking—student assessments and supplement not supplant requirements—are ones that state legislators will find themselves dealing with as they craft statutes and enact budgets. NCSL submitted the names of two state legislators (brief bios attached) who are not only education policy leaders in their state, but who also had direct experience as educators. To not include a state legislator as a negotiator is an opportunity missed.

Thank you in advance for your consideration of our request and I look forward to hearing from you.

Sincerely,

William T. Pound
Executive Director, NCSL

CC: Jerry Abramson, Deputy Assistant to the President and Director of Intergovernmental Affairs

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The Honorable Jacqueline Sly

- South Dakota state representative for eight years; current Chairwoman of House Education Committee, former Vice-Chair of same; Co-Chair of South Dakota Blue Ribbon Task Force on K-12 Education Funding; former teacher for 37 years before running for the legislature; has taught special education, general K-12 education, and alternative middle school education; last four years in the classroom spent as assistant director of STARBASE, a science and math program focused on aviation for students attending schools receiving Title I money; bachelor's degree in Elementary and Secondary Education (with endorsements to teach core areas of subjects at middle school level); master's degree in Curriculum and Development; as an educator, was involved in teacher leadership and professional development for her peers

The Honorable David P. Sokola

- Delaware state senator since 1990; Chairman of the Senate Education Committee; strong advocate for improving school standards and closing the achievement gap; teacher in Delaware Public Schools for three years; has served on the Southern Regional Education Board (SREB), Delaware Foundation for Science, Math & Technology Education; currently serves on SREB Legislative Advisory Council, advising state leaders on ways to improve education; serves as a Steering Committee Member and former Vice-Chair of the Education Commission of the States; recognized by Delaware State Education Association, University of Delaware's College of Education, and others for his work in education policy

Recommended Principles for Regulatory Reform

- Avoid pre-emption of state and local laws.
- Require early analysis and consultation with state and local leaders during the rulemaking process.
- Ensure federal agencies recognize the differences in geography and resources among state and local governments to make certain none are disproportionally affected.
- Communicate proposed rules and regulations clearly and consistently to state and local governments.
- Avoid unfunded mandates—federal programs must not impose unreimbursed costs on state and local governments.
- Provide state and local governments with sufficient time to implement new guidelines or regulations and take into consideration legislative calendars.
- Provide maximum flexibility in the administration and maintenance of federal programs, to ensure that programs do not impose new burdens on state and local budgets.
- Make certain federally mandated administrative requirements are uniform across federal agencies.
- Harmonize federal regulations with current actions at the state and local levels.

Post-Hearing Questions for the Record
Submitted to Senator Curt Bramble
President, National Conference of State Legislatures and
Senator, Utah State Senate
From Senator James Lankford

"The Unfunded Mandates Reform Act:
Opportunities for Improvement to Support State and Local Governments"
February 24, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

Defining a Mandate

Question: There are many exceptions to the Unfunded Mandate Reform Act's (UMRA) definition of a mandate. How would you define an intragovernmental mandate? What would that include if we thought about the real-world consequences of federal actions?

- NCSL views mandates more expansively than as defined in UMRA and would include the following in the definition of intergovernmental mandate:
    - a new condition of grant-in-aid for a long-standing program;
    - a reduction in current funds available, the federal match rate or available administrative or programmatic funds to state and local governments for existing programs without a similar reduction in requirements;
    - an extension or expansion of existing or expiring mandates;
    - a requirement that states establish goals to comply with federal statutes or regulations with the caveat that if a state fails to comply they face a loss of federal funds;
    - actions that compel coverage of a certain group of individuals under a current program without providing full or adequate funding for this coverage;
    - the establishment of overly prescriptive regulatory procedures; and
    - intrusion on state sovereignty.

  The real-world consequences of a broader definition would mean that legislation such as No Child Left Behind and the REAL ID Act; changes to the Medicaid program; reductions in funding to the Clean Water and Safe Drinking Water State Revolving Funds; and sanctions for not complying with federal requirements would have been considered intergovernmental mandates and in many cases exceeded the UMRA threshold.

Question: UMRA does not currently require analysis for requirements on state, local, and tribal governments that are part of participation in a voluntary federal program or a condition of federal financial assistance. What are some examples of conditions of federal assistance that state, local, and tribal governments have found burdensome?

- Individuals with Disabilities Education Act (IDEA): Under IDEA, states are partners with the federal government to achieve the national goal to assure that all children with disabilities have access to free appropriate public education and related services designed to meet their unique needs. When IDEA was last authorized in 2004, Congress established a glide path to fund 40 percent of the excess cost of educating a student with special education needs; Congress continues to underfund. Failure by the federal government to provide 40 percent of the funding places significant shortfalls on states. While seen as a "voluntary" program, states are really not in a position to refuse participation in IDEA.

  Medicaid: For large entitlement programs like Medicaid, UMRA defines an increase in the stringency of conditions or a cap on federal funding as an intergovernmental mandate if the affected governments lack authority to offset those costs while continuing to provide required services. However, this is almost never triggered because CBO finds that states have flexibility within the Medicaid program (because of optional services) to offset their financial and programmatic responsibilities to reduce costs. As a result, CBO concludes that the new conditions or resulting costs would not constitute an intergovernmental mandate. A recent example of this is seen in the CBO report on H.R. 3821: Medicaid Directory Caregivers Act. This bill would require state Medicaid agencies to publish, on public websites, a director of certain medical care providers who provided care to Medicaid enrollees in the prior 12 months.

Follow-up: How "voluntary" are some of these programs for state and local governments?

- IDEA and Medicaid are long-standing state-federal programs. This partnership, along with others, are viewed by many as mandatory.

Consultation Practices

Question: As reported in GAO-05-454, *Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement*, stakeholders from all sectors told GAO that the application of agency consultation practices with state and local governments were generally viewed as inconsistent. Stakeholders from state and local governments often point to the Congressional Budget Office (CBO) as the model in consultation. CBO only has a small staff conducting this work- what actions could executive agencies take to ensure meaningful consultation?

- Agencies need to take advantage of every opportunity to engage their state and local partners. Despite the fact that Executive Order 13132 requires a federal agency to ensure that it has an accountable process for meaningful and timely intergovernmental consultations in the development of regulatory policies that have federalism implications, opportunities are often missed.

An example is the recent negotiated rulemaking to implement parts of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (ESSA). The administration failed to include a state legislator in this process. Please see attached March 10, 2016 letter to Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget.

- NCSL recommends that executive agencies provide a uniform and predictable process to enhance their consultation with state and local governments. One way to do this would be for the agencies to conduct regular (monthly) meetings with the national organizations representing state and local governments. CBO hosts regular meetings with state and local groups. In addition, when allowed, it would be beneficial for the agencies to engage their state and local partners early and often in the regulatory process. We are not stakeholders but partners in implementing and administering these programs.

Question: Much of the discussion in the hearing was on the inadequacy of agency consultation with state and local governments. Other than promising practices implemented by CBO, what are some examples in which intergovernmental consultation has been well done?

- The best example is the outreach from federal agencies during the American Recovery and Reinvestment Act in 2008-2009. OMB and other executive agencies provided weekly/monthly calls to track, provide oversight, and distribute information relating to federal stimulus funds.

Follow up: Do some agencies do a better job than others? Please provide examples.

- NCSL typically has better consultation and communication with agencies where we have a positive relationship with the agencies intergovernmental staff. A recent example would be the outreach, feedback and open line of communication we've had with the Department of Homeland Security on the FEMA disaster deductible.

The Value of Consulting with State and Local Governments

Question: Consultation is often discussed as merely a required step for agencies as they regulate. Less discussed is the value state, local, and tribal governments provide to federal agency officials as they consider regulating or as they craft new regulations. Could you elaborate on the types of expertise and feedback state, local, and tribal governments can provide to federal agencies as they consider and draft regulations?

- The state legislatures' traditional role—lawmaking, program oversight, the appropriation of funds and information gathering—is critical to the successful implementation of any federal law or regulation. State legislative input will also bring insight to existing state laws and other important information that may prove extremely helpful in developing regulations that will effectively implement federal law, while at the same time avoiding administratively or financially burdensome requirements on states. It is also important for

federal policymakers to understand the potential impact of states' legislative calendars and federal fiscal years on implementation.

Follow up: What are some examples in which your organizations or those you represent have had meaningful input into a federal rule?

- NCSL worked closely with the Department of Homeland Security (DHS) when developing regulations to implement the REAL ID Act of 2005. When the Notice of Proposed Rulemaking was released, the estimated costs to the states was in the range of $11 billion. The final regulation reflected many of the recommendations made by the state groups, resulting in a reduced cost to states in the final rule—$3.9 billion. While this is still considered an unfunded mandate to states, DHS has continued to work with the states during implementation to provide improved flexibility, where authorized. However, this is not the norm. In most cases, our organization submits comments to the agencies, and the final regulatory action rarely reflects our concerns/recommendations.

OMB's Role in Consultation Practices

Question: UMRA's Title II requires agencies to "develop an effective process" for obtaining "meaningful and timely input" from State, local and tribal governments in developing rules that contain significant intergovernmental mandates. Each year, OMB, in an appendix to its annual report, provides descriptions of "selected consultation activities by agencies whose actions affect State, local, and tribal governments." In their *2014 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, OMB reported on examples of consultation activities provided by three agencies. Agencies often counter that they conduct many other types of informal consultation with regulated entities. What others ways have agencies reached out to you and how effective have those mechanisms been?

- The effectiveness of consultation varies by federal agency and in many cases depends on individual relationships between NCSL staff and agency staff. In most cases the notification NCSL receives is either a blast email from the agency announcing the release of a rule or there is the rare occasion where we receive an official letter requesting our input. In most cases the "consultation" feels like the agency is just "checking the box," and not effective as the final regulations/actions usually do not reflect the state concerns/recommendations.

Follow up: How could agency consultation practices be improved and made more transparent?

- We would recommend that consultation with state and local governments be as early as possible and that it be uniform across all federal agencies. The "Big 7" (the national organizations representing state and local governments) developed key principles aimed at improving the regulatory process. Please see attached.

Follow up: What could OMB do to ensure these improvements?

- Over the past 12 months, NCSL has welcomed a dialogue with OMB on smarter regulations and retrospective reviews. The attached principle have been shared with OMB.

Follow up: Does OMB currently have the authority to ensure compliance with its guidelines on consultation?

- Not familiar with all of OMB's authority.

Advanced Warning for New Regulations

Question: At a hearing held by the House Oversight and Government Reform Committee on February 15, 2011 to discuss potential improvements to UMRA, Mayor Patrice Douglas of Edmond, Oklahoma, stated: "Well, we budget out 5 years. Not all cities do that, but we try to look at a 5-year plan. I am not saying that we need 5 years, but we need adequate time to get that rolled into our budget. When these rules come down and you find out that you are going to have to spend $400,000 out of your general fund in the next year, that is a near impossibility for a city the size of mine to do. So I would say take into consideration the fact that we have a 1-year budget cycle, so rules need to accommodate that." How could we better align timelines for implementation of regulations that affect state, local, and tribal governments with the realities of the budget cycles in small governments?

- These timelines, and more specifically the potential costs, are likely to be different depending on the regulation, the geographic region and level of government. The federal agencies need to understand that most state legislatures are not in session all year, some are only in every other year and that in most cases the state fiscal year does not coincide with the federal fiscal year. Timelines could be better aligned if they recognized the state fiscal and legislative calendars. For example, a federal requirement would have to be implemented after at least two legislative session or not before the start of the next state fiscal year.

Measuring the Effects of Federal Funds and Federally-Mandated Requirements

Question: In your testimony, you mentioned that the State of Utah conducted a fiscal "stress test" to assess the effects of federal aid and requirements on the State. Please elaborate on the impetus for this stress test and the results of these efforts.

- Utah has been proactively managing volatility in its own revenue sources for almost a decade. It seems only logical to extend the same techniques to the 30 percent of Utah's operating and capital budget that comes from federal funds. The issue came to a head during the federal government shut-down of 2013 when the state opted to use state resources to operate the five National Parks located in Utah rather than see them shuttered by political inertia. One of the provisions included in Financial Ready Utah creates a Federal Funds Commission to assess the risk of a funding reduction from the federal government and examine how the state budget would react. The Federal Funds

Commission developed an online tool (federalrisk.le.utah.gov) that allows policymakers, citizens, and staff to view pre-determined risk scenarios—like a dollar crash—or build their own scenarios. They can then assess the adequacy of existing risk mitigation tools to address potential federal funds loss. The immediate result of this exercise was to strengthen Utah's federal funds contingency planning by enhancing public education participation (2016 H.B. 329, Fawson), and investing in a new statewide grants management module to integrate federal grants management into Utah's existing statewide accounting system. Utah also began to forecast sustainable versus temporary federal assistance and explicitly match the term of those resources to appropriations so as to maintain structural balance in federally-backed, state-run programs. Other efforts being discussed include establishing a separate rainy day fund into which state dollars would be deposited to address any sudden loss of federal funding.

Question: Could this method be replicated by other states?

- The tool developed by Utah to allow policymakers and constituents to anticipate and mitigate potential funding reductions is open source and can be modified for any state. However, this type of preemptive budgetary planning is not exclusive to Utah. With data on the amounts of federal money being expended in a state's operating and capital budget, and expertise in time series modeling, any state could manage federal assistance volatility that might result from a federal government shutdown or significant spending reform in Washington, D.C.

Post-Hearing Questions for the Record
Submitted to the Hon. Bryan Desloge
First Vice President, National Association of Counties and
Commissioner, Leon County, Florida
From Senator James Lankford

"The Unfunded Mandates Reform Act:
Opportunities for Improvement to Support State and Local Governments"
February 24, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

Defining a Mandate

Question: There are many exceptions to the Unfunded Mandate Reform Act's (UMRA) definition of a mandate. How would you define an intragovernmental mandate? What would that include if we thought about the real-world consequences of federal actions?

Answer: The National Association of Counties (NACo) believes that the current definition of an intragovernmental mandate is too narrow because of the number of exceptions that apply. NACo would support broadening the definition through a process that begins with a careful reexamination of the current exceptions under UMRA. We believe this evaluation is necessary to demonstrate what the exceptions' fiscal and operational impact is on state and local governments, which could lead to a more practical definition of intragovernmental mandate.

Question: UMRA does not currently require analysis for requirements on state, local, and tribal governments that are part of participation in a voluntary federal program or a condition of federal financial assistance. What are some examples of conditions of federal assistance that state, local, and tribal governments have found burdensome?

> **Follow-up:** How "voluntary" are some of these programs for state and local governments?

Answer: NACo agrees that some attention should be focused on the costs of conditions of federal assistance and how their impacts could be addressed. It would also be useful to gather and provide as much information as possible on the front end, on the costs of participation in federal programs. To that end, we would suggest requiring cost estimates on conditions of federal assistance, while maintaining their exemption from UMRA's enforcement provisions. With this more complete cost information, a state or local government could make more informed decisions about whether to participate in the federal program under consideration.

Proponents for excluding analysis of these programs under UMRA argue state or local governments could just choose not to participate. The sheer scale and significance of some local challenges are truly national in scope, and are essentially impossible to address with only local resources. Under these circumstances the cost of conditions of participation are essentially mandatory and should be calculated and reported for the benefit of policy makers and the public.

Consultation Practices

Question: As reported in GAO-05-454, *Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement*, stakeholders from all sectors told GAO that the application of agency consultation practices with state and local governments were generally viewed as inconsistent. Stakeholders from state and local governments often point to the Congressional Budget Office (CBO) as the model in consultation. CBO only has a small staff conducting this work- what actions could executive agencies take to ensure meaningful consultation?

Answer: NACo believes that meaningful consultation first requires that executive agencies recognize state and local governments as intergovernmental partners. As noted in our testimony, counties implement federal policies and regulations at the local level. In fact, in some cases we are co-regulators. However, all too often we are treated as mere stakeholders rather than as true intergovernmental partners. Meaningful consultation would mean that the federal agencies should engage their state and local government partners as early in the process as possible, ideally long before a rule is drafted. That engagement should continue throughout the entire rulemaking lifecycle.

But the engagement should not be limited to the rulemaking process. We would also urge executive agencies to establish regular meetings with state and local governments and their national associations throughout each year. We believe that regular communication is a fundamental way to establish and build the relationships that should serve as the foundation of a true intergovernmental partnership.

CBO is certainly a good example for consultation. CBO invites the representatives of state and local governments together on a regular basis to meet with CBO staff to discuss laws they are (or will be) analyzing under UMRA. This has kept the lines of communication open and laid the groundwork for constructive intergovernmental engagement over time, without unduly imposing on the agency's limited resources.

Question: Much of the discussion in the hearing was on the inadequacy of agency consultation with state and local governments. Other than promising practices implemented by CBO, what are some examples in which intergovernmental consultation has been well done?

Follow up: Do some agencies do a better job than others? Please provide examples.

Answer: NACo can point to a number of promising examples of good intergovernmental agency consultation. Recently, for example, after the Federal Emergency Management Agency (FEMA) released an Advanced Notice of Proposed Rule Making (ANPRM) on a "disaster deductible" on January 20, 2016, NACo and its partner state and local organizations were almost immediately engaged by FEMA to better understand the proposal. Between the release of the ANPRM and the comment deadline on March 21, NACo met with FEMA officials at length on two separate occasions to discuss the proposal. On each occasion, we were encouraged both by FEMA's willingness to discuss the potential impacts of a "disaster deductible" and by their understanding

of specific potential impacts on counties. In fact, on an occasion when NACo staff visited the FEMA offices to discuss matters unrelated to the proposal, FEMA staffers working on the proposal came by to provide friendly reminders about the comment deadline. In its official comments to FEMA, NACo commended the agency for its effective intergovernmental engagement throughout the comment period on the ANPRM.

Less recently, but still noteworthy as a good model of intergovernmental consultation, was the efforts of the Department of Energy (DOE) during the rollout of the Energy Efficiency and Conservation Block Grant (EECBG) Program. While the rollout was complicated, DOE's intergovernmental consultation was appropriate and meaningful, with the agency maintaining a level of constant communication with counties and NACo by hosting regular calls and meetings with program staff at the agency. NACo was able to ask questions when we felt information was lacking and if one of our counties was having an issue, we could raise it with DOE staff who were able to address it in real-time. DOE was able to acquire constant feedback in order to monitor how the program was being implemented on the ground and an early warning system for emerging implementation challenges.

Even when an agency conducts appropriate and meaningful intergovernmental consultation, it is often not institutionalized and consistent. For example the U.S. Department of Transportation (DOT) developed its legislative proposal to reauthorize the Moving Ahead for Progress in the 21st Century Act (MAP-21), without any effort to consult counties to seek input or ideas for reforms despite having common goals to address national transportation needs or the fact that counties own and maintain almost 45 percent of the nation's road miles. Counties were only approached after the reauthorization proposal was complete. However, with the recent passage of the Fixing America's Surface Transportation Act (FAST Act) DOT has already invited counties to participate in several dialogues on implementation of different provisions in the bill with the goal of seeking county feedback and identifying concerns.

Ultimately it is hard to identify a single executive agency which consistently models a high standard of meaningful intergovernmental consultation. There are, however, some very encouraging concepts that, if fully implemented, could help improve agency consultation. Specifically, the proposal offered in Section 10 of UMITA and Executive Order 13132 – Federalism. UMITA's Section 10 offers a framework to hold agencies accountable for their consultation and EO 13132 makes the case for enhanced consultation with state and local governments and emphasizes the need for a strong federal, state and local partnership to implement national policies.

The Value of Consulting with State and Local Governments

Question: Consultation is often discussed as merely a required step for agencies as they regulate. Less discussed is the value state, local, and tribal governments provide to federal agency officials as they consider regulating or as they craft new regulations. Could you elaborate on the types of expertise and feedback state, local, and tribal governments can provide to federal agencies as they consider and draft regulations?

Follow up: What are some examples in which your organizations or those you represent have had meaningful input into a federal rule?

Answer: NACo is well suited to offer technical advice about how county governments function, how proposed federal policies may affect the way county governments operate, as well as a wide range of data about county government and counties, in general.

A recent example and good illustration of feedback NACo provided was on the Department of Labor's proposal on overtime pay where they proposed to more than double the current salary threshold for employees who are eligible for overtime pay. While counties do not disagree with the rule's objective, we were able to explain that the draft rule failed to consider the fiscal constraints that exist at the local level if we were compelled to meet the new overtime pay requirements.

For example, county government is not a typical employer because we are also the local authority that provides services to constituents. These local services are generally funded by revenue generated by the assessment of property and sales taxes. State imposed limits on county revenue raising activities combined with limited funding from the federal government for various programs impose difficult budgetary decisions on county elected officials. Compounding the challenge is that our county budgets must be balanced on an annual basis. Any increase in one area, like payroll, will certainly require a decrease in another area, like infrastructure investment.

Furthermore, because our budget cycles are not synchronized with the federal government's or the calendar year, automatic updates to the salary threshold, as proposed in the rule, would be nearly impossible to prepare for since county budgets will have already been submitted and approved well in advance of the new thresholds being calculated and announced.

This information about the statutory and fiscal constraints counties operate under is the type of information that NACo and county governments can provide the agencies in any number of different rulemaking processes. This understanding of county government operations can help agency staff when drafting rules that counties will ultimately be responsible for implementing.

However, it is not just about county budgets. Counties also bring a level of expertise that is the result of being problem solvers at the local level. For example, in our testimony we discussed a county working proactively to bring local stakeholders with real-world local knowledge to the table to craft conservation plans to support the Bi-State Sage-grouse and ultimately prevent it needing to be listed under the Endangered Species Act. This is the type of expertise counties can bring that could assist agencies in writing regulations that are practical to implement on the ground level.

OMB's Role in Consultation Practices

Question: UMRA's Title II requires agencies to "develop an effective process" for obtaining "meaningful and timely input" from State, local and tribal governments in developing rules that contain significant intergovernmental mandates. Each year, OMB, in an appendix to its annual report, provides descriptions of "selected consultation activities by agencies whose actions affect

State, local, and tribal governments." In their *2014 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, OMB reported on examples of consultation activities provided by three agencies. Agencies often counter that they conduct many other types of informal consultation with regulated entities. What others ways have agencies reached out to you and how effective have those mechanisms been?

> **Follow up:** How could agency consultation practices be improved and made more transparent?
>
> **Follow up:** What could OMB do to ensure these improvements?
>
> **Follow up:** Does OMB currently have the authority to ensure compliance with its guidelines on consultation?

Answer: NACo welcomes any steps to improve the quality and timeliness of intergovernmental consultation – both formal and informal. Notably, informal consultation in the policy development phase of the regulatory process, possibly via phone or e-mail, would be very welcome. From our perspective, this level of informal contact rarely occurs. While the examples identified in the OMB report may be illustrative of how agencies have consulted regulated entities, they are far from the norm.

We would also welcome a more formal, public policy for the consultation process. The lack of a publicly available policy on intergovernmental consultation may partly explain why there appears to be so much inconsistency in how agencies consult local government. Not only does the process differ between agencies, even within an agency, the consultation level for one rule significantly differs from that for another rule.

An example of the approach we could recommend would be the publicly available intergovernmental policies for consultation with tribal governments which several federal agencies have published, including the U.S. Department of Housing and Urban Development, U.S. Department of Labor, U.S. Department of Health and Human Services, General Services Administration, and U.S. Department of Transportation. While counties do not assert the same kind of sovereign status accorded by the U.S. Constitution to Native American tribal governments, we would suggest that we are intergovernmental partners with the agencies and that a publicly available written policy for intergovernmental consultation would promote the kind of timely and meaningful consultation envisioned by UMRA.

Advanced Warning for New Regulations

Question: At a hearing held by the House Oversight and Government Reform Committee on February 15, 2011 to discuss potential improvements to UMRA, Mayor Patrice Douglas of Edmond, Oklahoma, stated: "Well, we budget out 5 years. Not all cities do that, but we try to look at a 5-year plan. I am not saying that we need 5 years, but we need adequate time to get that rolled into our budget. When these rules come down and you find out that you are going to have to spend $400,000 out of your general fund in the next year, that is a near impossibility for a city the size of mine to do. So I would say take into consideration the fact that we have a 1-year budget cycle, so rules need to accommodate that." How could we better align timelines for

implementation of regulations that affect state, local, and tribal governments with the realities of the budget cycles in small governments?

Answer: NACo would support changes to the federal regulatory process which would offer more generous lead time before final regulations become effective. This would allow counties, especially small ones, to have time to plan and budget for the costs associated with compliance. Further, utilizing a phased-in approach for the compliance schedule of any regulation would help ease any potential burdens and mitigate the impact of counties having to absorb the entire cost of compliance at once.

On UMITA and Slowing the Regulatory Process

Question: Many arguments against regulatory reform initiatives, including the Unfunded Mandates Information and Transparency Act (UMITA), are that additional analytical requirements might unnecessarily burden or elongate the rulemaking process or cause "ossification" of the regulatory state. Would you agree with that assessment?

Answer: NACo does not agree that a strong intergovernmental consultation process unnecessarily burdens, elongates or causes "ossification" of the regulatory state. On the contrary, as implementers and co-regulators of federal policies at the local level, counties must be involved before, during and after a rule is developed. We believe that this would not burden or elongate the rulemaking process. Rather, we believe this would enhance the rulemaking process by identifying and mitigating potential problems in the early policy development phase of the process.

As it currently stands, our opportunity for input on regulations is all too often limited to the public comment period and even if executive agencies reach out to seek input, more often than not, it is after a rule has been substantially developed. This results in having to revisit issues or raise new ones because agency officials did not adequately consider the perspective of local government, resulting in avoidable conflict. NACo believes that by working together as intergovernmental partners we will increase the likelihood of developing rules that enjoy broad support and can be successfully implemented rather than a rule that is opposed and contested.

Post-Hearing Questions for the Record
Submitted to Dr. Paul Posner
Director, Center for Public Service at George Mason University and
Former Director of Intergovernmental Affairs, U.S. Government Accountability Office
From Senator James Lankford

"The Unfunded Mandates Reform Act:
Opportunities for Improvement to Support State and Local Governments"
February 24, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

Defining a Mandate

Question: There are many exceptions to the Unfunded Mandate Reform Act's (UMRA) definition of a mandate. How would you define an intragovernmental mandate? What would that include if we thought about the real-world consequences of federal actions?

Answer: I would ensure that the definition was inclusive of all important federal cost impacts on state and local governments. This would include not only direct orders as UMRA does but also the following:

Preemptions of state and local authority that increase costs

Significant grant conditions for major programs that make state and local participation, in effect, not voluntary

Crossover sanctions where compliance with federal rules are imposed by sanctioning federal grant funds received by other large programs

Significant changes in the costs of major mandates over time due to changes in requirements, demands or federal funding.

Question: UMRA does not currently require analysis for requirements on state, local, and tribal governments that are part of participation in a voluntary federal program or a condition of federal financial assistance. What are some examples of conditions of federal assistance that state, local, and tribal governments have found burdensome?

Follow-up: How "voluntary" are some of these programs for state and local governments?

Answer: Many major federal grant programs impose significant cost burdens on state and local governments when federal funds fail to fully compensate for major costs. Examples include the IDEA program, education for disabled children. Premised on the promise of providing 40

percent of state and local costs for mandates from federal funds, actual levels of federal assistance now approximate 16 percent. The No Child Left Behind Act is another example. This program imposed major regulations on state and local schools while leaving these jurisdictions with major funding responsibilities that were not covered by federal funds. The Asbestos in Schools Act of 1985 was a case where federal mandates to clean up asbestos were imposed on local schools with federal funds that were perhaps only 10 percent of the total required.

The courts have generally ruled that grants are voluntary and therefore that states and local governments do not warrant additional protections from their impacts. However, state and local officials are under tremendous pressure to accept grants. In effect, grants represent a return on the federal taxes paid by local citizens and the failure to accept grants can be framed as a betrayal of local taxpayers by state or local officials. Often, the failure to accept major grants can become a campaign issue in the next election as a result. Recently, however, greater polarization across states has changed this equation – some conservative governors have gained political credit from their base by using the renunciation of grants like Medicaid expansion as a triumph for ideological purity and state rights.

The Court has occasionally found exceptions to its voluntary principle for rules imposed on grants retroactively some years after states have accepted the federal program. The Court ruled in Pennhurst State School and Hospital v. Halderman (No. 79-1404) that the Congress could not retroactively impose a new bill of rights for mentally retarded persons being treated in state institutions. The Roberts opinion overturning Medicaid expansion under Obamacare also suggested that the imposition of this new mandate was particularly objectionable since it was attached retroactively to states that had become willing partners under a program that was very different before the advent of this new requirement.

Consultation Practices

Question: As reported in GAO-05-454, *Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement*, stakeholders from all sectors told GAO that the application of agency consultation practices with state and local governments were generally viewed as inconsistent. Stakeholders from state and local governments often point to the Congressional Budget Office (CBO) as the model in consultation. CBO only has a small staff conducting this work- what actions could executive agencies take to ensure meaningful consultation?

Answer: CBO deserves much credit for becoming an honest broker of state and local interests when mandates are considered by the Congress. With a small staff, they have had influence on congressional staff and members that is disproportionate to their size. This occurs because of the threat of the point of order to the proposals of members for smooth passage of their proposals. As a result, CBO's views on intergovernmental costs are much feared by advocates and are solicited by members and staff on a bipartisan basis. CBO needs state and local officials to help them ferret out cost impacts and uses networks of state and local officials to develop their cost estimates.

Agencies have a different environment. They are often besieged by numerous interest groups in addition to those of the states and must pay attention to numerous administrative rules governing regulatory policy development that constrain their ability to enjoy the kind of informal

consultation used by CBO staff. The violation of consultation rules and due process rules by agencies constitutes a matter that can lead to the overturning of regulatory proposals by the courts.

Question: Much of the discussion in the hearing was on the inadequacy of agency consultation with state and local governments. Other than promising practices implemented by CBO, what are some examples in which intergovernmental consultation has been well done?

Follow up: Do some agencies do a better job than others? Please provide examples.

Answer: Federal agencies have an interest to work proactively with state and local governments due to their pivotal role in implementing federal programs in the field. Most domestic programs, in fact, are subject to joint administration by federal, state and local governments which can impart a rooting interest by federal officials on behalf of their state and local partners.

We saw this in the management of the $800 billion Recovery Act in 2009 by the Administration. The Vice President and OMB bent over backwards to engage states and local leaders in supporting the new stimulus, recognizing that state and local governments received the greatest share of the funding to stem the tide of the recession. New processes were created including weekly phone calls with state leaders, periodic White House sessions with governors and mayors and visits to state and local communities by the Vice President and other national officials. State and local officials sought to replicate this model with other federal policy engagements to no avail when federal interests were not well aligned with state and local concerns. For instance, when the prospect of a government shutdown reared its head, state officials sought to gain informal "heads up" from OMB about prospective funding cuts through the consultation channels established by the Recovery Act, only to be rebuffed.

However, this federal partnership interest is often offset by the weight of other interests and priorities within federal agencies. Specifically, federal agencies must pay attention to advocates and beneficiaries of regulatory programs who often take a suspicious and even adversarial view of the states. And they must also work with the White House and other central management overseers who may not share the enthusiasm for state flexibility and control.

Collective Action for State and Local Governments

Question: Your testimony suggested that organizations representing state and local governments often have divided interests- what are some examples in which they have successfully coordinated to have a larger impact?

Answer: Regrettably, I can point to only several examples over the past several decades. In recent years in particular, state organizations have increasingly been sidelined on major intergovernmental issues by the divisive polarization preventing state or local officials from reaching agreement on issues as important to states as health reform and welfare reform.

Nonetheless, victories for state and local collaboration do exist. The passage of UMRA itself must be considered a good case in point where state and local officials came together across party lines to lobby effectively for the new policy passed in 1995. The Recovery Act possibly could constitute another case where state and local governments achieved considerable funding and engagement from both the Congress and the Administration. The recent passage of the 2015 Every Student Succeeds Act constitutes another victory where state groups played a vital role to

reclaim state authority by replacing No Child Left Behind with a more flexible program. The National Governors Association staff said this was the first education program where NGA was able to take a position in 20 years.

On Retrospective Review

Question: In your testimony, you recommended prioritizing retrospective review by portfolio. Would you suggest this be conducted government-wide and if so, by whom?

> **Follow-up:** At the Department of Transportation (DOT), each DOT agency has divided its rules into 10 different groups and analyzes one group each year. Do you think this could be a viable model at the departmental-level across government?

Answer: I suggesting prioritizing retrospective reviews by policy portfolio as an alternative to an across the board requirement for sunset and review. I have testified twice before the Senate Budget Committee in recent weeks about the portfolio review as a way for national officials to periodically take on a policy goal oriented review of major areas in the budget. It seems more productive to encourage a baseline review of an entire policy area, such as low income housing or higher education subsidies, rather than a single tool used to achieve one of these goals. Thus, agencies and committees would be required to review the entire set of tools used to achieve the broad goals in these areas – spending programs, tax expenditures, loans, and regulations. This helps to anchor reviews in national priorities which have the greatest connection with leaders and the American public alike.

Although I am unfamiliar with the DOT process you have described, it appears that this would embody the spirit of what I have in mind in that it anchors regulatory reviews in a policy goal framework. In this way, it might not only encourage a review of the regulations but perhaps encourage a more robust comparison of using regulation vs other tools of government to accomplish federal purposes.

Post-Hearing Questions for the Record
Submitted to Richard J. Pierce, Jr.
Lyle T. Alverson Professor of Law
The George Washington University Law School
From Senator James Lankford

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Opportunities for Improvement to Support State and Local Governments"
February 24, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
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Defining a Mandate

Question: There are many exceptions to the Unfunded Mandate Reform Act's (UMRA) definition of a mandate. How would you define an intragovernmental mandate? What would that include if we thought about the real-world consequences of federal actions?

Question: UMRA does not currently require analysis for requirements on state, local, and tribal governments that are part of participation in a voluntary federal program or a condition of federal financial assistance. What are some examples of conditions of federal assistance that state, local, and tribal governments have found burdensome?

> **Follow-up:** How "voluntary" are some of these programs for state and local governments?

Answer: Congress might want to amend section 5(A)(i) of the Unfunded Mandates Reform Act. That section excepts from the definition of mandate "a condition of federal assistance; or, a duty arising from participation in a voluntary Federal program, ..." I agree with the witnesses who described circumstances in which duties or conditions of the type described in section 5(A)(i) have such a powerful coercive effect that they are functionally indistinguishable from mandates. The Supreme Court agreed with that general proposition when it held unconstitutional the Medicare expansion condition contained in the Affordable Care Act. It referred to that condition as an illustration of "when pressure becomes compulsion." NFIB v. Sibelius, 132 S. Ct. 2566, 2601-2606 (2012). I anticipate that Congress will experience difficulty, however, choosing the right language to use in such an amendment. It is challenging to describe the line between permissible conditions on grants or voluntary programs and impermissible compulsion or coercion of states and localities in a way that Congress, agencies, and courts can understand and apply.

Consultation Practices

Question: As reported in GAO-05-454, *Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement*, stakeholders from all sectors told GAO that the application of agency consultation practices with state and local governments were

generally viewed as inconsistent. Stakeholders from state and local governments often point to the Congressional Budget Office (CBO) as the model in consultation. CBO only has a small staff conducting this work- what actions could executive agencies take to ensure meaningful consultation?

Question: Much of the discussion in the hearing was on the inadequacy of agency consultation with state and local governments. Other than promising practices implemented by CBO, what are some examples in which intergovernmental consultation has been well done?

Follow up: Do some agencies do a better job than others? Please provide examples.

Answer: I am sure that some agencies do a better job of consultation than others but I do not know enough about the practices of various agencies to know which agencies perform this important function particularly well. You might want to ask CBO, GAO, and/or ACUS to study this question and to identify agencies that do a particularly good job of consulting and the practices they use for that purpose.

Consultation is more difficult for some federal agencies than for others because of the many ways in which state governments are organized. Some states assign some functions to a single agency while other states have multiple agencies with overlapping functions that relate to the functions of a federal agency. In some states, the agencies with overlapping functions are independent of each other and do not coordinate their policies. Thus, for instance, the Clean Power Plan (CPP) that EPA recently issued relates in complicated ways to functions performed by governors, state natural resource agencies, state attorney generals, and state public utility commissions. In some states those institutions differ significantly with respect to their perspectives on the CPP. In some states, one institution is adamantly opposed to the CPP while another institution is actively engaged in planning to implement the CPP.

On Missed Rulemaking Deadlines

Question: In your testimony, you mentioned missed rulemaking deadlines as one indication of the complexity and number of analytical requirements in our current rulemaking process. In fact, agencies often cite good cause due to judicial deadlines. In 2013, GAO's report *Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments* found that for 36 of the 123 rules without a NPRM it reviewed, the agency cited good cause "because a law imposed a deadline either requiring the agency to issue a rule or requiring a program to be implemented by a date that agencies claimed would provide insufficient time to provide prior notice and comment." Presently, a rule for which an agency cites good cause and thus does not issue an NPRM would not trigger UMRA's requirements. What argument could be made that regulations that receive the least scrutiny should also not benefit from enhanced consultation?

Answer: You note that some rules are both exempt from notice and comment rulemaking and from UMRA because a statute creates a deadline for issuance of the rule that is inconsistent with

compliance with the notice and comment procedure. That is not a surprise. If Congress considers issuance of a rule so urgent that it exempts the rule from notice and comment I would expect that same sense of urgency to excuse the agency from complying with UMRA.

In recent years, Congress has enacted many statutes that require agencies to issue rules so rapidly that the agency can not comply with either the requirements of notice and comment or the requirements of UMRA. Many scholars have criticized this congressional practice and have urged Congress to impose such short deadlines only in emergency situations. I am among the critics of the increasing tendency of Congress to require agencies to issue rules in unrealistically short periods of time in non-emergency situations.

On ANPRMs

Question: In your testimony, one of your major objections to a requirement for an Advance Notice of Proposed Rulemaking (ANPRM) for major rules was that the courts have typically required Notices of Proposed Rulemaking (NPRMs) to be very well defined when published. We feel that this is an argument for, rather than against, the use of ANPRMs. Because S. 1820 does not require logical outgrowth between the ANPRM and the NPRM, would the use of this mechanism not be beneficial to get early feedback from a wide swath of diverse stakeholders as the rule is being drafted?

Answer: Agencies often choose to issue ANPRMs. The agency that is deciding whether to issue a rule is in the best position to balance the additional time required to issue an ANPRM and to consider responses to the ANPRM against the potential value of adding that potentially long and resource-intensive step to a rulemaking process that is already long and resource-intensive.

I want to thank Chairman Lankford, Ranking Minority Member Heitkamp and the other members of the Subcommittee again for letting me share my views on these important and difficult issues.

Respectfully,

Richard J. Pierce, Jr.

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