was asserted by the fire department representatives that they have the authority and responsibility at the scene of an incident and are looked to by the local government and public to provide a response and see that the situation is brought under control. There was a need expressed to clarify the role of federal, state, local, and private groups.

A single strategy statement was adopted. The group concluded that there should be a lead federal agency to be responsible for coordinating current emergency response efforts in the areas of planning, training, role clarification, liability, research, funding, and resources at federal, state, and local levels (private and public).

The group did not feel that the lead-agency concept has been implemented at the federal level. However, this is a priority item if the emergency response problems are to be solved.

This group also adopted a second general issue statement:

> A sunset commission should be appointed to examine the transportation of hazardous materials and waste to determine the nature and extent of the problems of emergency response. This examination should be conducted in a coordinated effort of federal, state, and local government; producers; transportation; responders; and others.

This statement indicates their concern that a definition of the problem is required. This definition is needed in addition to the priority program outlined above.

Workshop on Legal Responsibilities and Implications

Stanley N. Wasser

This workshop addressed the subject of Legal Responsibilities and Implications as they pertain to the transportation of hazardous materials and hazardous wastes. The workshop sessions were led by H. Arvid Johnson. The discussions revolved around and evolved from the issues presented in three issue papers by J. Kevin Healy, H. Arvid Johnson, and Stanley Hoffman (see Appendix 2). Workshop participants included representatives of federal, state, and local governments; regional governmental associations; shippers; manufacturers; carriers; emergency responders; consultants; lawyers; and the press.

The topic of the workshop is indeed broad. No attempt was made in the sessions to clearly define what exactly was being addressed therein relative to the subject of the workshop, other than the issues presented in the three resource papers. Consequently, the workshop examined legal responsibilities and implications in the transportation of hazardous materials and hazardous wastes in a different context than it was treated in Transportation Research Board Circular 219.

Unlike some of the other workshop topics (e.g., training, emergency response, risk assessment, and technical innovation needs and limits), the nature of the issues discussed in this workshop does not and did not lend itself to the concreteness of definition and discussion as may have been the case with the other workshops. The issues are more philosophical; and their problems, strategies, and goals do not lend themselves to "laundry listing".

INTERJURISDICTIONAL CONFLICTS AND INCONSISTENT REGULATIONS

The workshop began by discussing the issue of interjurisdictional conflict, the topic of Healy's paper. It was generally agreed that of the three issues presented in the papers, this one was of the greatest immediate importance. The discussion of this issue was itself indicative of the uncertainty and chaos that will continue if the issue of interjurisdictional conflicts is not resolved. The problem is undoubtedly important and was described as "growing" and "festering" and one for which there is an "urgency" for a solution to prevent a proliferation of inconsistent regulations as well as duplicative programs. The objective, one participant stated, is to "stem the tide of conflict".

The problem of interjurisdictional conflicts was viewed both as a conflict between federal and nonfederal (state and local) laws and regulations, and also as one of "lateral" conflict between states, between local jurisdictions within a state, and perhaps even between the different regions of the country. Most of the discussion related, however, to the "vertical" conflict between federal and nonfederal (state and local) laws and regulations. The issue of international versus national conflict was not addressed.

It was generally agreed that the problem of interjurisdictional conflicts was really a problem that was prevalent in the safety regulation of the transportation of hazardous materials. The interjurisdictional conflicts did not seem to be as much of an issue in the environmental regulation of waste disposal or even in the pipeline area by reason of the site-specific nature of the regulations, the various roles that the different levels of government have played, and the mechanisms employed to establish the regulations (e.g., federally approved state program of substantial equivalency to the federal regulations).

The discussion of the problem of interjurisdictional conflicts made clear that its genesis or cause could be traced to various problems, real or perceived, depending on the various points of view of the different actors. The cause of interjurisdictional conflicts was seen to be political, and in part stimulated or generated by the media coverage. It was seen also to be the result of the perceived vacuum resulting from the lack of a strong leadership role at the federal level and the lack of a strong federal response to the problems presented by the transportation of hazardous materials. It was viewed at the local level, in particular, as a response to the fact that the actors at the local level--whether it be the local mayor, fire chief, or city counsel--are "on the firing line". They are the first to respond to incidents and the persons most directly accountable for enforcement. Since they find themselves lacking the necessary tools or money to adequately or satisfactorily respond or enforce, it is perceived as easier to pass a law that bans or prohibits even though enforcement may be left for another day. Finally, the genesis of interjurisdictional conflicts was viewed as traceable to frustration; a perceived lack of input into and feedback from the regulatory process (the Federal Register process is not sufficient); a lack of trust and confidence in those who are regulating; and a perceived lack of leadership.

The issue of interjurisdictional conflicts may have been best defined as a "conflict of concerns" with the underlying problem being the need to identify a mechanism to channel and address concerns.

With such a mechanism in place, it was felt that federal regulations would better reflect those concerns.

The apparent workshop consensus was that the problem of interjurisdictional conflicts would be characterized by four terms: (a) partnership--a partnership between the federal and non-federal actors qualified by a strong leadership role or primary role or key role by the federal government in that partnership; (b) partnership--the Federal Register process for various reasons is not sufficient, and state and local actors desire what they perceive as more participation in the regulatory process, although this lack of participation may be the result of a lack of time, resources, and expertise by the local actors; (c) coordination--the various roles of the federal and non-federal actors need to be better coordinated and defined; and (d) communication--not really defined by the discussions but reflecting a need to permit the exchange and consideration of each of the other points of view. These terms or concepts characterize the basis for the process of regulation and of how the actors can interact. It was suggested that once the process is developed, enforcement and training would fall into place.

The matter of uniqueness at the state, or more particularly the local, level was discussed as being a primary issue in the shaping of the regulatory relationships between the federal and non-federal actors. Although it was discussed whether the local uniqueness is merely a perceived rather than a real problem, there was more feeling that perhaps federally issued guidelines to assist state and local actors in addressing their particular problems would reduce some of the interjurisdictional conflicts.

One participant, following up on the issue of participation, characterized the matter as follows: If the problem is that the federal regulations are seen as inadequate to protect a given community and its perceived "local uniqueness", then the real issue is how to have better participation of the localities to produce an acceptable level of risk within their present resources. However, if no regulations could protect a given locality, the problem is not the regulations but how to best protect the people of the locality at any level of risk. The participant noted that localities are not necessarily proposing to "regulate" but to "prohibit". If this is so, the participant concluded that the solution is not regulatory but hardware--i.e., the people and money to meet the level of risk inherent in the regulations. The key question, suggested the participant, is what the partnership is going to do once it is formed.

Several examples of the partnership exist. EPA works closely with states and existing national organizations of local governments to work on national problems such as the manifest system. FEMA works with states on emergency-response matters. BCMS and DOT have cooperative enforcement agreements with states involving information exchanges, joint investigations, and cooperation in reporting and training.

The HM-164 rulemaking on routing of radioactive materials was a reference point for discussion of the various facets of the interjurisdictional conflict problem. Some participants seemed to view the process of that rulemaking as permitting extensive input and therefore reflecting local uniqueness, and as a "significant step" and a "useful pattern" for future regulations. Others viewed the process skeptically and as not one that truly reflected local or even national concerns. One participant viewed HM 164 as addressing the problem of special interests.

As the discussion evolved further, certain perceived needs or concerns of state and local actors became identifiable. It was generally agreed that if the federal government is to have the dominant or primary role in regulation--a proposition that received no real dissent--then the federal government would have to respond to state and local concerns with technical assistance and funding in the areas of knowledge, education, training, and enforcement. The unstated proposition, except by one participant, was that, if preemptive federal regulation, tempered by a responsiveness to state and local problems, is to be accepted, then the federal government must, as a sort of quid pro quo, assist the state and local actors who are, for all intents and purposes, left with the responsibility for enforcement and emergency response. This reality is, as the discussions indicated, an increasing one as the federal government returns more responsibility to the states and local governments and, as is now being done, urging states, even by legislation, to adopt and then enforce the federal regulatory schemes.

Certain goals were identified as necessary to any mechanism, strategy or solution that would be implemented to address the issue of interjurisdictional conflict. It was the consensus that there is a need to strive for uniform and consistent standards modified only when necessary by local concerns of true uniqueness. It was the consensus that an effective mechanism(s) is needed for state and local input, but that after this input is received there must be certainty of decision in the regulatory standard or policy or requirement to be imposed. It was the consensus that the solution or strategy to resolve the interjurisdictional conflict issue must provide a means to "take the presure off" the local government actors, such as a mechanism that permits the local government actor to deal with other local governments rather than the federal government. Finally, it was the consensus that the solution or strategy must resolve, or at least address, the issue on a partnership basis with shared participation, coordination, and communication.

Three recommended strategies or mechanisms evolved from the discussions. The first strategy is a "voluntary" one. It contemplates that a meeting would immediately be called, perhaps sponsored by DOT, of the interested state and local actors and by using existing state and local associational organizations to work out, or to establish a mechanism to work out, the interjurisdictional conflicts. The second strategy or mechanism calls for DOT to voluntarily set up an advisory council, perhaps through the Federal Advisory Committee Act, to assist DOT in establishing its regulatory guidelines and perhaps even adjudicating or assisting in adjudicating interjurisdictional disputes. The third strategy or mechanism contemplates a legislatively mandated advisory council, such as with the Federal Pipeline Safety Act, with a fixed charter and with the authority to issue binding rulings in case of proposed regulations on the federal, state, and local actors and the authority to use some form of an adjudicatory process to resolve conflicts. This mandatory council was viewed as a possible mechanism to take the heat off both the local as well as the federal actors.

Whatever the strategy or mechanism, the consensus appeared to be that the mechanism must address a long-term solution as well as a solution for the interim, present period. It was also considered that, even if the advisory council should maintain its high profile only on issues of national scope, it should not be a substitute for individual filings on each issue. Also, it was agreed that any advisory group that may be employed must be perceived from below as an effective forum of and for communication.

REGULATORY ENFORCEMENT AND PENALTIES TO SECURE COMPLIANCE

The resource papers on criminal liability and the regulation of corporate behavior by Johnson and on civil liability and social regulations by Hoffman were generally discussed by the workshop participants in the context of (a) the need for criminal and civil liability as enforcement tools and (b) the effectiveness of the various enforcement tools.

The consensus of the workshop appeared to be that existing enforcement mechanisms, both civil and criminal, are generally acceptable as means for securing compliance. However, it was agreed that the enforcement mechanisms need to be selectively, consistently, fairly, visibly, and aggressively used. Complaints were voiced, however, as to "nit-picking", the "time" burden of the process, and "disparities in penalties".

It was the apparent majority opinion that, although there are enough existing regulations, there is not enough enforcement.

It was generally agreed that visibility of enforcement, whether it be through more inspections, more inspectors, more fines, or more publicity, would greatly aid in compliance. It was perceived that the enforcement actions now being taken may not be as known as they should or might be. One industry participant noted that he observed an increasing sensitivity to criminal liability by business people as they observed their peers being subjected to such liability.

Regarding the existing structure for civil enforcement, it was generally agreed that on balance the existing structure was "okay". The existing civil enforcement tools generally include administratively imposed civil fines, administrative compliance orders, court injunctions, and on-scene out-of-service orders. Although discussed, there was no indication of a sense of need to have private parties help in enforcing the act through third-party or product-liability type actions.

Although civil liability and social regulation were discussed, no consensus or position evolved (other than individual viewpoints) as to whether alternative civil liability systems could or should replace government regulations as a means of controlling conduct pertaining to the transportation of hazardous materials and hazardous wastes. Possibly this is attributable to the fact, as posited by Johnson, that civil liability questions will not be resolved in the near future because industry and others have not yet adequately focused on the issues and their stake in them, and there is little consensus now among any of the involved groups. The alternative liability systems touched on in the discussions are set forth in the Johnson paper and will not be repeated here.

Two facets of the issue that were discussed related to (a) the use of cost/benefit analysis as a desirable tool for determining what, and therefore how, to regulate and (b) whether, if regulations are not going to be enforced, they should be on the books at all.

There was a difference of opinion as to the usefulness of cost/benefit analysis in discussing issues of safety of human lives. It was noted that the societal cost of regulating hazardous materials transportation may be better spent elsewhere in public health and safety. Whether regulation of hazardous materials transportation even achieves a "societal good" was discussed, and, if there is no need to regulate, changes in conduct should be left perhaps to civil tort or other forms of civil liability. Whether the problem is really the fact that there is overregulation and that the existing regulations should be pared down to those that truly meet societal needs was also examined.

This discussion led into a discussion on the validity of regulations that are not enforced. On the one hand, it was noted that, although it may be harmless to have the regulation that is not administratively enforced, civil tort liability arises from noncompliance. On the other hand, without the regulation on the books, industry would not change its conduct and the very existence of the regulation may in fact be changing behavior. In this regard, it was also noted that reliance on the civil tort system requires an injury to enforce against, while a body of civil regulations can be enforced before an injury occurs. It was also suggested that perhaps government guidelines could be used to substitute for detailed regulations that are not enforced.

Regarding the use of criminal sanctions, it was generally agreed that criminal fines and jail sentences should be reserved for the "exceptional cases" of wilful or intentional or repeat offenders who violate important substantive regulations. An example cited was the "midnight waste dumper". Criminal sanctions should not be used for the day-to-day policing of the regulations. The federal regulators pointed out that the prosecutor's caseload acted as a de facto screen such that only the worst cases did in fact get prosecuted. Also discussed and generally favored as a possible assistance to enforcement was a need to prioritize the classes of crimes perhaps into two classes of misdemeanors and two classes of felonies to reflect the various degrees of hazard that result from noncompliance. It was also generally agreed that criminal prosecutions should be directed to corporate executives and officers only where the evidence demonstrates intentional corporate noncompliance that is the direct result of an informed policy decision made by corporate officials. A requirement of intent should remain since the multitude of regulations provides for unavoidable violations by low-level corporate employees that would continually subject the corporation to liability. But it was generally agreed that criminal penalties are necessary since compliance must come from the top down. Without criminal liability, business judgments will continue to be exercised and take into account the risk of civil liability or civil forfeiture. Business judgment will not be an excuse for criminal liability since there is no room for judgment if an act is a crime.

It was considered, however, that criminal responsibility may not be a major issue at least in hazardous materials transportation because there has been little use of criminal sanctions in the past and no real efforts to reach high-level corporate officials. The 1980s may see greater use of criminal liability such as with hazardous waste disposal but not in the area of transportation.

Finally, it was discussed and recommended, albeit with qualifications and some dissent from the federal actors, that the federal government--particularly DOT--should consider adopting and publishing a policy statement on their enforcement philosophy both for criminal and civil liability. It was noted that such policy statements are or have been issued by other agencies such as EPA and OSHA. The federal regulators responded that establishing guidelines is difficult and inhibiting to the regulator. Discussion took place about whether the perceived difficulties depend on the degree of detail of the guidelines. It was pointed out that information is available as to the program emphasis of the federal regulators. It was also noted that the public might not need to know the guidelines but that the regulating agency should establish them to curb the arbitrariness of its internal decisionmaking.