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Homeland Security: Standards for State and Local Preparedness

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Summary

Some Members of Congress, as well Administration officials and other observers, believe that state and local governments should be held to established standards for terrorism preparedness. They argue that standards could improve the capability of first responders to deal with terrorist attacks, particularly those involving weapons of mass destruction (WMD).

Preparedness standards can be categorized by such attributes as scope, development process, and user community. They can include broad performance goals, as well as more specific operational procedures and equipment specifications. Traditionally, nongovernmental organizations develop preparedness standards, sometimes with the participation of federal agencies. Since the terrorist attacks of September 2001, however, a number of federal agencies have initiated efforts to develop preparedness standards, among which are the Federal Emergency Management Agency (FEMA, now in DHS), National Institute of Standards and Technology (NIST), and Center for Disease Control and Prevention (CDC).

The 107th Congress addressed the issue of preparedness standards, particularly in its debate on the Department of Homeland Security (DHS). Initial versions of the DHS bill (H.R. 5005 and S. 2452) took broad approaches, authorizing the new department to coordinate and develop standards for first responders. The Administration appeared to support such an approach in its *National Strategy for Homeland Security*. Ultimately, however, the enacted version (P.L. 107-296) took a narrower approach, instructing the department to develop standards for a limited number of functions, mostly related to response equipment and technology.

In the 108th Congress, a number of bills addressing first responder programs have included provisions relating to preparedness standards. In September 2003, the Senate Governmental Affairs Committee reported S. 1245, which, among other things, would require the DHS Secretary to develop National Performance Standards for state and local homeland security efforts. Other bills addressing preparedness standards include H.R. 105, H.R. 1449, H.R. 3158, H.R. 3227, and S. 321/H.R. 545.

There are a number of policy approaches Congress could take, should it desire to address preparedness standards. Encouraging the development and implementation of standards could give states and localities discretion in adapting standards to their unique preparedness needs, but may not lead to nationwide adoption. Federal assistance could be conditioned on meeting set standards, but this could limit recipients' flexibility with federal funds. Mandatory regulations is another approach that arguably could insure adherence to set standards, but would likely raise a number of federalism issues. On the other hand, Congress might not take any action on this issue. Many observers believe that defining a baseline level of preparedness is a daunting challenge with questionable benefits. Also, some observers contend that current nongovernmental and federal efforts to develop preparedness standards are sufficient to meet public safety needs.

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Homeland Security: Standards for State and Local Preparedness

Introduction

Is the United States prepared for a terrorist attack involving a weapon of mass destruction?¹ How will we know when we are prepared? These are some of the many questions policy makers have been asking about the nation's homeland security efforts. State and local first responders, including law enforcement, fire service, emergency medical service, and hazardous materials personnel, are widely acknowledged as being an invaluable homeland security resource.² Their proximity insures that they almost always will be among the first to arrive at the scene of a terrorist attack. Some observers believe the implementation of standards for state and local governments can improve preparedness not only for terrorist attacks, but for all types of disasters, be they man-made or natural.

Some state and local officials have expressed a desire for national preparedness standards — authoritative rules, principles, or measures against which the quality, level, or degree of preparedness can be measured — to guide their efforts in preparing for disasters generally and for terrorist attacks in particular. Proponents argue that standards would facilitate improvements in response capability and intergovernmental coordination, help states and localities identify preparedness gaps, and promote long-term sustained preparedness. They also contend that standards could lead to a national baseline of preparedness, against which states and localities could be held accountable for achieving established goals.³

Preparedness standards could also lead to greater accountability in federal assistance programs that Congress has authorized to help states and localities better prepare for natural and man-made disasters. Since September 2001, Congress has

¹ For the purposes of this report, a weapon of mass destruction (WMD) is defined as chemical, biological, radiological, nuclear, or any unconventional device capable of causing mass casualties.

² Although there is arguably less consensus on whether public health personnel should be considered first responders, this report includes public health in the definition.

³ See statements of Woodbury Fogg, Director, New Hampshire Office of Emergency Management and Amy E. Smithson, Henry L. Stimson Center, in U.S. Congress, House Committee on Government Reform, Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations, *A Silent War: Are Federal, State, and Local Governments Prepared for Biological and Chemical Attacks?*, hearings, 107th Cong., 1st sess., Oct. 5, 2001.

significantly increased funding for selected programs that provide training, equipment, and technical assistance to first responders.⁴ In early 2003, the Bush Administration proposed a restructuring of assistance programs that provide funding to states and localities to prepare for weapons of mass destruction (WMD) attacks. The 108th Congress has considered this proposal and several others (for more information on restructuring proposals, see CRS Report RL31475, *First Responder Initiative: Policy Issues and Options*, by Ben Canada). Standards could give Congress and federal agencies a means of gauging the effectiveness of new and existing preparedness programs.

Some observers, however, believe that standards would provide limited benefits. The wide range of possible terrorist weapons and tactics, the vast number of potential targets, and the varying preparedness needs of different communities are just some of the factors that would complicate the process of defining national preparedness goals. As one analyst commented, “It is one thing to suggest that an effective homeland defense system requires a floor — a base level of protection for all citizens. But defining and securing that floor is a daunting job.”⁵ Implementing preparedness standards could also pose a significant financial burden on states and localities and interfere with current state and local preparedness efforts.

Scope of This Report. This report provides a framework for discussing preparedness standards, identifies potential elements of a comprehensive federal policy, and discusses policy approaches that Congress might take in addressing this issue. This report also includes an Appendix with brief summaries of existing standards and current activities to develop new preparedness standards. Arguably, standards can assist in evaluating the effectiveness of the new Department of Homeland Security, evaluating preparedness grant programs, and identifying weaknesses in state and local preparedness. It can also aid policymakers in evaluating an agency’s compliance with the Government Performance and Results Act (GPRA), which requires federal agencies to measure their own performance.⁶

Legislation in the 108th Congress. A number of bills have been introduced into the 108th Congress addressing various aspects of preparedness standards. In September 2003, the Senate Governmental Affairs Committee reported S. 1245, the Homeland Security Grant Enhancement Act of 2003. This bill would instruct the DHS secretary to develop “National Performance Standards” for state and local preparedness efforts. As a condition of receiving federal funds, states would have to complete homeland security plans that seek the achievement of the national

⁴ Descriptions of these and other programs are available in CRS Report RL31227, *Terrorism Preparedness: Catalog of Selected Federal Assistance Programs*, coordinated by Ben Canada.

⁵ Donald F. Kettl, “Promoting State and Local Government Performance for Homeland Security,” The Century Foundation Homeland Security Project, June 2002, p. 3. Available at: [http://www.homelandsec.org/Pub_category/pdf/state_local_gov_perform.pdf], visited May 12, 2003.

⁶ P.L. 103-62; 107 Stat. 285.

performance standards.⁷ The bill would also create a Homeland Security Information Clearinghouse that would, among other duties, collect and disseminate information on voluntary standards for training, equipment, and exercises.⁸

Other bills introduced in the 108th Congress address preparedness standards, including:

- ! H.R. 105 — would establish standards for communications equipment, training, and response capability;
- ! H.R. 1449 — would authorize a first responder grant program and establish standards for terrorism preparedness and response, including training and equipment;
- ! H.R. 3158 — would establish a Task Force on Standards for Terrorism Preparedness; developed standards would be used in determining the needs of states and localities;
- ! H.R. 3227 — would require DHS to establish emergency preparedness and response standards, including standards for training, equipment, and communications systems; States and localities would have flexibility in meeting national minimum capabilities;
- ! S. 321/H.R. 545 — would promote the development of firefighting technology standards and model mutual aid agreements.

In addition to these proposals, Congress emphasized equipment and technology standards in appropriations legislation. For example, the conference report accompanying the FY2003 consolidated appropriations act (P.L. 108-7) states:

Standards — The conferees understand the need for minimum performance standards, testing, and evaluation in the areas of chemical, biological, radiological, and nuclear (CBRN) protective equipment, as well as voice/data communications equipment. The conferees, therefore, expect ODP to work closely with the National Institute of Standards and Technology (NIST) to test, evaluate, and develop minimum performance standards for CBRN protective equipment and voice/data communications equipment for first responders.⁹

The conference report for FY2004 DHS appropriations also addresses standards. It calls for The Office Science and Technology (OST) within DHS to undertake all standards development and research for first responder needs. ODP efforts to develop standards, including those conducted in cooperation with NIST, would be transferred to OST.¹⁰

⁷ S. 1245, sections 4(h) and (e)(4).

⁸ S. 1245, sec. 3(c).

⁹ U.S. Congress, Conference Committees, 2003, *Joint Resolution Making Consolidated Appropriations for the Fiscal Year Ending September 30, 2003, and for Other Purposes*, conference report to accompany H.J.Res. 2, H.Rept. 108-10, 108th Cong., 1st sess. (Washington: GPO, 2003), pp. 636-637.

¹⁰ U.S. Congress, Conference Committees, *Making Appropriations for the Department of* (continued...)

Legislation in the 107th Congress. Congress addressed preparedness standards during the second session of the 107th Congress, particularly in its debate on the Department of Homeland Security (DHS).

Homeland Security Act of 2002. Initial proposals for the DHS considered by the House and Senate, including H.R. 5005 and S. 2452, would arguably have given the new department broad authority to develop preparedness standards. The introduced version of H.R. 5005 proposed the development of guidelines for state and local response to weapons of mass destruction (WMD) incidents.¹¹ Likewise, initial versions of S. 2452 called for the establishment of training and equipment standards.¹²

The Bush Administration appeared to support a broad approach to developing preparedness standards in its *National Strategy for Homeland Security*, issued in July 2002. The *Strategy* proposed that the DHS seek the "... establishment of national standards for emergency response training and preparedness." It specifically called for equipment standards, a national training program, and a certification program for first responders.¹³

As the House and Senate DHS bills progressed toward enactment, however, their approaches to preparedness standards began to narrow, focusing mostly on technology and equipment standards. For example, the enacted version of the bill (P.L. 107-296) instructed the Homeland Security Institute to identify instances in which common standards could improve the usefulness of equipment used by first responders.¹⁴ It also instructs the Emergency Preparedness and Response Directorate to develop standards for Nuclear Incident Response Teams.¹⁵ The Act also created within the Justice Department an Office of Science and Technology charged with developing performance standards for technology used by state and local law enforcement.¹⁶

First Responder Bills. The 107th Congress also addressed preparedness standards in other homeland security bills. In October 2002, the Senate Environment and Public Works Committee reported the First Responders Terrorism Preparedness

¹⁰ (...continued)

Homeland Security for the Fiscal Year Ending September 30, 2004, and for Other Purposes, report to accompany H.R. 2555, H.Rept. 108-280, 108th Cong., 1st sess. (Washington: GPO, 2003).

¹¹ H.R. 5005 (introduced at the request of the Administration, June 2002), sec. 301(4).

¹² S. 2452 (as introduced, May 2002), sec. 103(a)(3)(F).

¹³ Office of Homeland Security, *National Strategy for Homeland Security*, (Washington: July 2002), pp. 44-45, 54. Available at [http://www.whitehouse.gov/homeland/book/nat_strat_hls.pdf], visited May 12, 2003.

¹⁴ P.L. 107-296, sec. 312(c)(4).

¹⁵ P.L. 107-296, sec. 502(2)(A).

¹⁶ P.L. 107-296, sec. 232(b)(3). The Act also contains numerous provisions pertaining to information security standards, which are beyond the scope of this report.

Act (S. 2664), which would have established the proposed First Responder Initiative grant program, and would authorize the Federal Emergency Management Agency (FEMA) to develop preparedness standards. The bill instructed FEMA to “establish clearly defined standards and guidelines for Federal, State, tribal, and local government terrorism preparedness and response.” It specifically called for standards in such functional areas as training, interoperable communications systems, and response equipment.¹⁷ This bill, however, was not considered by the full Senate and no parallel bill was introduced in the House.

Other Bills. A limited number of other bills introduced in the 107th Congress addressed preparedness standards. These bills generally addressed one specific aspect of emergency preparedness, including the following:

- ! H.R. 3176 — established protocols for responding to public health emergencies;
- ! H.R. 5441 — proposed the development of terrorism preparedness standards, including training and response capability;
- ! H.R. 5461 — established standards for regional response plans; and,
- ! S. 2862 — promoted the development of firefighting technology standards.¹⁸

Categorizing Preparedness Standards

Preparedness standards can be categorized by a number of attributes. This report categorizes standards by three selected attributes in order to provide a framework for discussing relevant issues: scope, standardization process, and user community. These categories are not mutually exclusive, and a particular standard may fall into more than one category.

Scope. Standards can be established at a *macro* or *micro* level. Macro-level standards are broad performance goals or benchmarks for a state or locality to satisfy. In the context of emergency preparedness, macro-level standards could establish performance goals or capability levels for states and localities to achieve and maintain. Some examples might resemble the following:

- ! States will establish and periodically exercise state-wide mutual aid agreements;
- ! State and local hazardous materials response teams will develop the capacity to effectively respond to WMD attacks; or,
- ! Local first responders will achieve an “awareness” level of training to respond to weapons of mass destruction.¹⁹

¹⁷ S. 2664 (as reported), sec. 616(c)(2), 616(c)(5), and 616(c)(6).

¹⁸ The Senate Committee on Commerce, Science, and Transportation reported S. 2862, the “Firefighting Research and Coordination Act,” on Nov. 18, 2002.

¹⁹ Adapted from Eric V. Larson and John E. Peters, *Preparing the U.S. Army for Homeland Security* (Washington: RAND, 2001), pp. 59, 287. Available at: (continued...)

Micro-level standards are specific operational procedures, training competencies, or equipment specifications that state and local responder units and first responders themselves must satisfy. There are numerous examples of micro-level standards for first responders (see the Appendix for examples). Non-governmental organizations, federal agencies, and even state and local governments, have developed and implemented standards for a wide range of response functions (*e.g.*, response planning, training, personal protective equipment), and for many responder groups (*e.g.*, firefighters, emergency medical service, law enforcement, hazardous materials response). Some specific examples are the National Fire Protection Association (NFPA) standards for responding to hazardous materials incidents, including:

- ! NFPA 471 — Recommended Practice for Responding to Hazardous Materials Incidents;
- ! NFPA 472 — Professional Competence of Responders to Hazardous Materials Incidents; and,
- ! NFPA 1994 — Protective Ensembles for Chemical/Biological Terrorism Incidents.²⁰

User Community. Standards may also be categorized by the particular first responder community to which they apply. Since the terrorist attacks of September 2001, a number of observers have offered their views on which public safety communities constitute “first responders.” The Homeland Security Act of 2002 used the term “emergency response provider,” defining it as “... federal, state, and local public safety, law enforcement, emergency response, emergency medical (including hospital emergency facilities), and related personnel, agencies, and authorities.”²¹

Some observers suggest that there should be no single definition of “first responder.” Instead, they prefer a flexible approach to identifying public safety communities as first responders, arguing that the nature of the perceived threat, or the consequences of a disaster, will determine what resources are needed. A flexible definition may be suitable for federal preparedness programs, as the Senate Environment and Public Works Committee indicated in its report on the First Responder Terrorism Preparedness Act of 2002:

There is broad consensus that any definition of first responders must include fire, emergency medical service, and law enforcement personnel. As FEMA implements the [First Responder Initiative], the Agency may need some

¹⁹ (...continued)

[<http://www.rand.org/publications/MR/MR1251>], visited May 12, 2003.

²⁰ Also see NFPA 473 and 1951. NFPA codes relating to hazardous materials response are available free of charge at: [<http://www.nfpa.org/Codes/CodesandStandards/HazMat/HazMat.asp>], visited May 12, 2003.

²¹ P.L. 107-296, sec. 2(6).

flexibility to expand the definition of first responders to meet the needs of all constituents.²²

Some observers suggest that, in the context of WMD incidents, public health and public works personnel should also be considered first responders. While preparedness standards can be categorized by user community, many standards, such as those for communications equipment and personal protective equipment, may apply to *all* users. Broad performance goals (macro-level standards) could also apply to all first responders, or to a governmental unit in general.

Standardization Process. At least three different processes can be used to develop standards — de facto process, voluntary consensus process, and regulatory process. Each process is a potential means of developing preparedness standards, and each has potential costs and benefits.

De Facto Process. This is not a structured development process, but, rather, a process that occurs through daily field operations. *De facto* standards in emergency management can develop when first responders, based on their experience and interaction with other responders, gradually adopt a specific operational procedure, training competency, or equipment specification. Relying on *de facto* standards allows states and localities much discretion in developing and implementing standards that meet their unique needs. Reliance on operational experience can fail, however, when appropriate standards are not developed in a timely manner, or in a manner consistent with formal development processes. This could result from lack of information, costly development, or minimal perceived benefit.²³

Voluntary Consensus Process. Most preparedness standards are developed through the voluntary consensus process, which typically uses a structured development process that involves a range of stakeholders. Many nongovernmental organizations, including the National Fire Protection Association (NFPA), use this process to play a significant role in developing preparedness standards. Federal agencies, such as FEMA and the National Institute of Standards and Technology, traditionally participate in voluntary consensus processes, and when appropriate, may seek to coordinate the development of preparedness standards. (See Appendix)

Congress endorsed the voluntary consensus process in the National Technology Transfer Advancement Act of 1995. The Act states that, “To the extent practicable, all Federal agencies and departments shall use, for procurement and regulatory applications, standards that are developed or adopted by voluntary consensus standards bodies.”²⁴ The Act also instructs federal agencies to participate in standards development activities of voluntary consensus organizations.

²² U.S. Congress, Senate Committee on Environment and Public Works, *First Responder Terrorism Preparedness Act of 2002*, report to accompany S. 2664, 107th Cong., 2nd sess., S.Rept. 107-295 (Washington: GPO, Oct. 2002), p. 5.

²³ U.S. Congress, Office of Technology Assessment, *Global Standards: Building Blocks for the Future*, TCT-512 (Washington: GPO, March 1992), pp. 101-103.

²⁴ P.L. 104-113, sec. 12(d)(1); 110 Stat. 783.

Standards development organizations generally seek to incorporate principles of due process into the standards development process. Such principles commonly include openness, balanced participation by stakeholders, consideration of views and opinions, written procedures, and an appeals process. The American National Standards Institute (ANSI) advocates these principles in its recommended procedures for standards development, which many standards development organizations follow.²⁵ Research has shown that the voluntary consensus process can be effective when the standards development organization obtains high participation from stakeholders and facilitates communication among participants. Lack of participation, or lack of measurable benefits from participation in standards setting, can detract from this approach. Standards development organizations must also adhere to due process principles, otherwise, they might lose support of their members.²⁶

Regulatory Process. Where authority exists, federal, state, or local governments may employ a regulatory process to develop and implement standards in selected functional areas. Governments may use this approach when other standardization processes are not progressing in a timely manner, or if existing standards are not adequate. When federal agencies seek to develop standards, they must meet or exceed statutory requirements for public review and comment.²⁷ The Hazardous Waste Operations and Emergency Response standard (HAZWOPER) is an example of a federally mandated standard for first responders (see summary below). The Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA) promulgated the regulations for HAZWOPER, specifying training competencies for personnel responding to a hazardous materials incident.

The regulatory process can facilitate widespread implementation of standards, since regulatory agencies have legal authority to enforce them. When promulgating regulations, federal agencies sometimes reference or adopt voluntary standards, thus making them mandatory. HAZWOPER, for example, contains several references to NFPA standards for response to hazardous materials incidents. Adopting voluntary consensus standards for regulatory purposes can arguably lead to greater acceptance and implementation. On the other hand, this process may be ineffective if the regulatory agency dominates the standards setting process, if stakeholders believe they have been excluded, if administrative processes are cumbersome, or if public goals are not achieved. Regulatory standards may also lose legitimacy over time if not adequately updated, or if public interest shifts.²⁸

²⁵ American National Standards Institute, *ANSI Procedures for the Development and Coordination of American National Standards* (New York: Jan. 2002), pp. 1-8.

²⁶ Office of Technology Assessment, *Global Standards*, pp. 104.

²⁷ Most procedures for regulatory activity are established in the Administrative Procedure Act and Executive Order 12866. Federal regulation setting is discussed in CRS Report RL31207, *Federal Regulatory Reform: An Overview*, by Gary L. Galemore.

²⁸ Office of Technology Assessment, *Global Standards*, pp. 104-105.

Overview of the HAZWOPER Standard

The Hazardous Waste Operations and Emergency Response standard (HAZWOPER) is a federal regulation issued by the Occupational Safety and Health Administration (OSHA) that specifies standards for employees responding to a hazardous materials incident, including public safety personnel. Congress directed OSHA to develop the regulation in Title I of the Superfund Amendments and Reauthorization Act of 1986 (SARA, P.L. 99-499). Congress originally authorized the development of the standard in Title I of the Comprehensive Environmental Response Compensation Liability and Recovery Act of 1980 (CERCLA, 42 U.S.C. 9601). After some years, however, Congress found OSHA's actions on the issue of hazardous materials response to be insufficient, and, thus, called for the standard in 1986.

HAZWOPER, which took effect in March 1990, addresses several elements of hazardous materials response. For example, it identifies necessary elements of an emergency response plan, such as lines of authority, site security, and evacuation. It also establishes different levels of training competency, such as Awareness, Operations, Technician, Specialist, and Incident Commander. Regulations specify the gradually increasing knowledge, skills, and abilities the responder must possess at each level. HAZWOPER also sets standards for personal protective equipment, decontamination, refresher training, and medical surveillance of first responders.

A number of HAZWOPER provisions were based on NFPA standards for hazardous materials response. The HAZWOPER standard has served as the basis of some federal agencies' response practices, including the Environmental Protection Agency and the U.S. Coast Guard.

Source: 29 CFR 1910.120; U.S. Department of Labor, Occupational Safety and Health Administration, "Inspection Procedures for the Hazardous Waste Operations and Emergency Response Standard," CPL 2-2.59A (Washington: April, 1998).

Is A Comprehensive Policy Needed?

A comprehensive federal policy on preparedness standards could address at least three issues. First, it could address the development and maintenance of preparedness standards that meet national preparedness goals. Second, it could promote state and local adoption of standards. And third, it could address the balance between the "all-hazards" approach and terrorism-oriented preparedness.

Development and Maintenance. A number of observers have cited the lack of performance goals (macro-level standards) for state and local preparedness as a major obstacle to better preparing the nation for terrorism. Observers have frequently cited a 2000 study by Richard Falkenrath, which argues,

This lack of broad but measurable objectives is unsustainable. It deprives policy-makers of the information they need to make rational resource allocations, and renders program managers unable to measure genuine progress. It also suggests

endlessly escalating program expenditures, since there is no logical end point to a process whose only goal is to improve from current standing.²⁹

In December 2002, the Gilmore Commission echoed this argument, stating that the federal government must develop a comprehensive approach to measuring the preparedness of states and localities. The commission's fourth annual report stated that "... without a comprehensive approach to measuring how well we are doing with the resources being applied at any point in time, there will be very little prospect for answering the question 'How well prepared are we?'"³⁰

Currently, there is a wide array of micro-level standards for general emergency preparedness. An argument could be made that the current array of standards, developed mostly by nongovernmental organizations, is sufficient to meet the preparedness needs of states and localities. Many of these existing standards may be modified to apply to terrorism preparedness, including standards for incident command, response to hazardous materials incidents, and some personal protective equipment.³¹ While a significant number of preparedness standards exist, many observers argue that new standards must be developed to address the potential scale, duration, and range of hazards presented by terrorist threats.³² For example, they have called for standards for terrorism preparedness, and, specifically, WMD response plans, WMD response simulations and exercises, interoperable communications infrastructure, bioterrorism preparedness activities, and response

²⁹ Richard A. Falkenrath, "The Problems of Preparedness: Challenges Facing the U.S. Domestic Preparedness Program," ESDP Discussion Paper ESDP-2000-05, John F. Kennedy School of Government, Harvard University, Dec. 2000, p. 15, available at: [http://bcsia.ksg.harvard.edu/BCSIA_content/documents/The_Problems_of_Preparedness.pdf], visited May 12, 2003. Also see generally, U.S. General Accounting Office, *Homeland Security: Responsibility and Accountability for Achieving National Goals*, GAO Report GAO-02-627T (Washington: GPO, 2002); and, Kettl, "Promoting State and Local Government Performance for Homeland Security."

³⁰ Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction (Gilmore Commission), *Fourth Annual Report to The President and The Congress*, Dec. 2002, p. 37. Available at: [<http://www.rand.org/nsrd/terrpanel/>], visited May 12, 2003.

³¹ See National Institute of Environmental Health Sciences, *Learning from Disasters: Weapons of Mass Destruction Preparedness Through Worker Training*, report of a National Technical Workshop, (Washington: April 2002), p. 39. Available at: [http://wetp.org/oldchfiles/awardee_mtgs/spring02/WMDreport.pdf], visited May 12, 2003; U.S. Federal Emergency Management Agency, Office of National Preparedness, *Assessment of Federal Terrorism Preparedness Training for State and Local Audiences*, April 10, 2002, pp. 44-45.

³² Brian A. Jackson, *et. al.*, *Protecting Emergency Responders: Lessons Learned from Terrorist Attacks*, RAND Science and Technology Policy Institute (Arlington: 2002), p. 5. Available at: [<http://www.rand.org/publications/CF/CF176/>], visited Dec. 17, 2002.

equipment.³³ (See the Appendix for an overview of existing standards and development activities.)

Neither the federal government, nor the nongovernmental sector, has a comprehensive, consolidated program for developing new preparedness standards. Rather, efforts to develop standards are dispersed among a number of nongovernmental organizations and federal entities. Since the attacks of September 2001, several observers have identified existing standards as applicable to terrorism preparedness, or begun developing new standards to address concerns about WMD attacks. Nearly all nongovernmental and federal efforts focus on developing micro-level standards, such as training competencies and equipment specifications (see Appendix).

Adoption. In addition to addressing standards development, a federal policy could also address state and local adoption of preparedness standards. On the one hand, encouraging or requiring adoption of standards could lead to long-term sustained preparedness. An independent study sponsored by the Council on Foreign Relations concluded that, as of one year after the September 2001 attacks, public emphasis on terrorism preparedness was decreasing. The report asserted that current homeland security initiatives were “reactive” and encouraged the federal government to take a proactive approach to preparedness.³⁴ Similarly, a June 2003 report issued by the Century Foundation also described the typical state approach to terrorism preparedness as “business as usual.”³⁵ Some observers believe state and local adoption of preparedness standards should be part of such a proactive approach, since they could lead to institutionalized and sustained preparedness. As one congressional witness testified,

The prerequisite for institutionalization is standards, and all of the response disciplines — fire, police, EMS, hospital care providers — expressed an abundance of frustration over the absence of standards and protocols to guide them. Standards command the attention of rescue and healthcare personnel because they are the backbone of accountability.³⁶

³³ Ronald D. Fricker, Jr., Jerry O. Jacobson, and Lois M. Davis, “Measuring and Evaluating Local Preparedness for a Chemical or Biological Terrorist Attack,” RAND Issue Paper, 2002, available at: [<http://www.rand.org/publications/IP/IP217/>]; U.S. General Accounting Office, *Homeland Security: Effective Intergovernmental Coordination is Key to Success*, GAO report GAO-02-1011T (Washington: GPO, Aug. 2002), pp. 13-15; “Safeguards lacking for emergency equipment,” *Consumer Reports*, Jan. 2003. p. 10.

³⁴ Council on Foreign Relations, *America Still Unprepared — America Still in Danger*, Report of an Independent Task Force (New York: Oct. 2002), pp. 12-16, 36.

³⁵ Donald F. Kettl, *The States and Homeland Security, Building the Missing Link*, Century Foundation Homeland Security Project (New York: June 2003), p. 4. Available at: [http://www.tcf.org/publications/homeland_security/kettpapers/kettpapers.htm]

³⁶ Statement of Amy Smithson, Henry L. Stimson Center, in House Committee on Government Reform, hearings, Oct. 5, 2001. Also see Amy Smithson and Leslie-Anne Levy, *Ataxia: The Chemical and Biological Terrorism Threat and the U.S. Response* (Washington: Henry L. Stimson Center, Oct. 2000), p. 301.

On the other hand, a federal policy on preparedness standards might limit state and local ability to experiment with different approaches to emergency preparedness. Depending on the policy, states and localities could have difficulty achieving set standards or adapting federal resources to meet their needs. Establishing a federal policy would also likely require Congress and federal agencies to periodically re-examine the policy. If this were not done in a timely manner, the policy could cease to be effective in preparing states and localities for terrorism and other disasters.

All-Hazards Approach. A comprehensive federal policy on preparedness standards could also affect the traditional “all-hazards” approach to emergency management.³⁷ This approach, advocated by state and local officials, as well as FEMA, stresses using existing institutions and plans to respond to *all* disasters, including acts of terrorism.³⁸ Some policy makers and observers have expressed concern that since the terrorist attacks of September 2001, federal emergency management policies have focused too heavily on terrorism, diverting resources from preparing for natural disasters, such as floods, hurricanes, and tornadoes.³⁹ The incorporation of FEMA into the Department of Homeland Security (DHS), and transfer of existing resources to terrorism preparedness programs, are just two causes of concern for proponents of the all-hazards approach. The Bush Administration and others, however, do not believe the recent emphasis on terrorism preparedness will bring such negative consequences. Specifically with regard to FEMA’s activities, the Administration emphasized that:

[The DHS] would continue FEMA’s efforts to reduce the loss of life and property and to protect our nation’s institutions from all types of hazards through a comprehensive, risk-based, all-hazards emergency management program of preparedness, mitigation, response, and recovery. And it will continue to change the emergency management culture from one that reacts to terrorism and other disasters, to one that proactively helps communities and citizens avoid becoming victims⁴⁰

If Congress addresses the issue of preparedness standards, an issue could be how such policies would affect overall federal emergency management policy. The all-hazards issue raised in the debate over a homeland security department might also arise in a debate over preparedness standards. Implementation of standards oriented solely toward terrorism preparedness might cause concern among proponents of the

³⁷ For more information on the “all-hazards” approach, see CRS Report RL31670, *Transfer of FEMA to the Department of Homeland Security: Issues for Congressional Oversight*, by Keith Bea; and CRS Report RL31490, *Department of Homeland Security: State and Local Preparedness Issues*, by Ben Canada.

³⁸ U.S. Federal Emergency Management Agency, *Guide for All-Hazard Emergency Operations Planning*, SLG-101, (Washington: Sept. 1996), p. iii. Available at: [<http://www.fema.gov/rrr/gaheop.shtm>], visited May 12, 2003.

³⁹ James Lee Witt and Associates, *Department of Homeland Security and FEMA* (Washington: 2002), unpublished.

⁴⁰ Office of Homeland Security, *Department of Homeland Security* (Washington: GPO, June 2002), p. 11. Available at: [<http://www.whitehouse.gov/deptofhomeland/book.pdf>], visited May 12, 2003.

all-hazards approach. On the other hand, failure to implement such standards could leave the nation insufficiently prepared for terrorist attacks involving WMD.

Policy Approaches

The 108th Congress could take at least four different approaches to preparedness standards: 1) maintain the status quo; 2) encourage development and adoption; 3) condition federal assistance; and 4) promulgate federal regulations. This section discusses selected aspects of each policy approach, including potential effectiveness, challenges, consequences, and other pertinent issues.

Maintain the Status Quo. There are a number of reasons why Congress might not take action on preparedness standards. Some observers suggest that state and local preparedness is sufficient in its current condition. They point to the local, state, and federal response to the World Trade Center attacks of September 2001 as evidence of the adequacy of the nation's response capability. One analysis, for example, states:

In most respects, the response was similar to what might be expected following a major natural disaster, such as an earthquake, although the scale and nature of the World Trade Center disaster likely increased the attraction of outside groups. The point is simply that a national emergency management system was already in existence and offered remarkable capacity to respond to the events on September 11. The system was able to deal with a terrorist disaster.⁴¹

Another possible reason for maintaining the status quo is that current standards, and standards development activities, may be sufficient to meet national preparedness goals. As discussed above, some nongovernmental organizations and federal agencies maintain standards that could apply to homeland security efforts. Some of these institutions are developing new standards that specifically address preparedness for WMD attacks. (see Appendix for examples)

Some observers suggest the federal government might encourage current efforts to develop training competencies and equipment standards (micro-level standards), but not establish broad performance goals (macro-level standards). They argue that the wide range of possible terrorist weapons and tactics, the countless number of potential targets, and the varying preparedness needs of different communities are just some of the factors that would complicate the process of defining national preparedness goals.

Encourage Development and Adoption. A policy approach of encouraging nongovernmental organizations and federal agencies to further develop preparedness standards, and encouraging states and localities to adopt the standards, would arguably be consistent with the Homeland Security Act of 2002. In the Act Congress affirmed its commitment to voluntary consensus standards, stating that, "All standards activities of the Department shall be conducted in accordance with

⁴¹ William L. Waugh, Jr. and Richard T. Sylves, "Organizing the War on Terrorism," *Public Administration Review*, Special Edition, Sept. 2002, p. 150.

section 12(d) of the National Technology Transfer Advancement Act of 1995”⁴² This policy approach would essentially rely on the current system of nongovernmental and federal standards development using the voluntary consensus process. States and localities would then have discretion in choosing whether or not to adopt the standards.

A 1995 National Research Council (NRC) study concluded that the voluntary standards process is an effective means of meeting public needs, especially when federal agencies participate in the development process. It noted that while the voluntary consensus process could be slow, regulatory standards setting by federal agencies generally took even longer for several reasons: federal agencies may have limited time and resources; private interests can delay the process through the legal system; and, agencies face stringent administrative requirements. The NRC further observed that voluntary consensus standards are often as stringent and demanding as federal regulatory standards would be. This may be due to private incentives to set high standards, such as forestalling government regulation, satisfying public demands, and reducing the risk of liability claims.⁴³

Options for Encouragement. There are a number of ways Congress could encourage the development of standards. One option would be to coordinate the standards development activities of entities with the Department of Homeland Security (DHS). The Homeland Security Act (P.L. 107-296) directed such entities as the Office of Science and Technology (OST), Homeland Security Institute, and the Emergency Preparedness and Response Directorate to develop specified types of preparedness standards, most relating to equipment.⁴⁴ Some entities relocated into the new department were developing preparedness standards before the DHS was created, including FEMA and ODP. The conference report for FY2004 DHS appropriations calls for OST to undertake all research and development for standards relating to first responder preparedness.⁴⁵

Another option would be to have DHS coordinate the activities of non-DHS agencies that develop preparedness standards. Although the Homeland Security Act transferred FEMA and ODP to the new department, and instructed the DHS to conduct some activities pertaining to equipment standards, it did not consolidate into the DHS many relevant programs.⁴⁶ Excluded programs include those in the National Institute of Standards and Technology, Centers for Disease Control and Prevention, the Justice Department’s National Institute of Justice, and other agencies (see

⁴² P.L. 107-296, sec. 102(g). The House Science Committee recommended this provision, stating that it wanted the new department to conform to the voluntary, consensus-based standards development process, and maintain the private sector’s leading role in developing standards. See House Committee on Science, “Committee Views on H.R. 5005,” available at: [<http://www.house.gov/science/hot/homeland/committeevws.htm>], visited May 12, 2003.

⁴³ National Research Council, *Standards, Conformity Assessment, and Trade: Into the 21st Century* (Washington: National Academy Press, 1995), p. 56.

⁴⁴ P.L. 107-296, sections 232(b)(3) and (b)(4); 312(c)(4); 502(2)(A);

⁴⁵ H.Rept. 108-280.

⁴⁶ P.L. 107-296, sec. 232(b)(3), 312(c)(4), and 502(2)(A).

Appendix). Consolidation of such programs into DHS could result in a comprehensive approach to preparedness standards, and facilitate coordination with nongovernmental organizations. The Bush Administration proposed this option in its *National Strategy*, calling for the DHS to coordinate standards.⁴⁷ This was also proposed in initial versions of the House and Senate DHS bills (H.R. 5005 and S. 2452).⁴⁸

Another option would be to increase grant funding to nongovernmental organizations to research and develop preparedness standards. Arguably, this option would take advantage of the organizations with considerable experience in standards development. Some organizations are already receiving federal grants for standards related projects. For example, the CDC, as part of its Centers for Public Health Preparedness program, funded a project at the Mailman School of Public Health at Columbia University to develop training competencies for public health workers responding to bioterrorism.⁴⁹

Any initiatives to develop preparedness standards might also emphasize the involvement of state and local interests. Their involvement in the development process could lead to greater acceptance of new and existing standards among state and local public safety agencies. This would be consistent with the *National Strategy for Homeland Security*, which calls for improved intergovernmental coordination among federal, state, and local governments, and among the public safety agencies within each level of government.⁵⁰ The U.S. General Accounting Office has emphasized this point in a series of reports on homeland security: “Given the need for a highly integrated approach to the homeland security challenge, national performance goals and measures may best be developed in a collaborative way involving all levels of government and the private sector.”⁵¹

Is This Enough? Were Congress to establish nationwide preparedness goals in legislation, or if the DHS advocated such goals, encouraging voluntary adoption of standards might not necessarily result in the desired level of preparedness. States and localities might not adopt voluntary standards for a variety of reasons, such as financial cost, disruption of current practices, assertion of state sovereignty, or little perceived benefit. This potential outcome is illustrated by the inconsistent use of the Incident Command System (ICS) across the nation. Although many government agencies and nongovernmental organizations recommend using ICS to coordinate emergency response, a survey by the National Emergency Management Association showed that ICS was not used consistently by the states. Some states mandate the

⁴⁷ Office of Homeland Security, *National Strategy for Homeland Security*, p. 11.

⁴⁸ H.R. 5005 (as introduced at the request of the Administration), sec. 301(4); S. 2452 (as reported June 24, 2002), sec. 103(a)(3)(F).

⁴⁹ The competencies are available at: [<http://www.nursing.hs.columbia.edu/institute-centers/chphsr/btcomps.html>], visited May 12, 2003.

⁵⁰ Office of Homeland Security, *National Strategy for Homeland Security*, p. 13.

⁵¹ U.S. General Accounting Office, *Homeland Security: Effective Intergovernmental Coordination Is Key to Success*, GAO Report GAO-02-1011T (Washington: GAO, Aug. 2002), p. 13.

use of ICS for all emergencies, while others mandate it only for selected types of emergencies, and still other states do not use it.⁵²

Condition Federal Assistance. A more assertive policy approach would be to adopt emergency preparedness standards that states and localities must achieve as a condition for receiving federal assistance for terrorism preparedness. Congress has a long tradition of conditioning federal grants in legislation.⁵³ For example, Congress requires environmental impact statements to be completed for any federally funded project “... significantly affecting the quality of the human environment”⁵⁴ Federal agencies may also place conditions on the awarding of assistance. The Domestic Preparedness Program, administered by the Office for Domestic Preparedness, for example, requires recipients to complete a needs assessment before receiving funds, and equipment grants may only be used to purchase approved equipment.⁵⁵

Conditioning preparedness assistance would require Congress or federal agencies to establish performance goals (macro-level standards) and possibly more specific operational and technical standards (micro-level standards). Some observers suggest that attaching such conditions to federal assistance is necessary to compel states and localities to achieve a minimum level of preparedness. As one analyst wrote:

The intergovernmental system has long been built on a clear bargain: the federal government provides benefits (whether money or flexibility) in exchange for state and local governments’ achievement of prescribed standards. In federal homeland security grants to state and local governments, therefore, the critical issue is not so much whether the federal government can — and should — define standards. It is what those standards ought to be — and how much flexibility state and local governments ought to be allowed in meeting them.⁵⁶

Options for Conditioning Grants. The approach taken to conditioning preparedness grants would directly impact the flexibility states and localities have with the use of federal funds. If the federal government required grant recipients to adhere to established operational and technical standards (micro-level standards) they would likely have less discretion in meeting standards and using federal funds. This could force some states and localities to alter their existing emergency response plans, replace equipment, and increase training, which could be a significant financial burden, even with federal assistance. Sparsely populated communities, or those perceiving themselves at little risk of a terrorist attack, might decline federal funds

⁵² National Emergency Management Association, “Trends in State Terrorism Preparedness” (Lexington, KY: Dec. 2001).

⁵³ The practice of conditioning federal grants in legislation is further discussed in CRS Report RL30778, *Federal Grants to State and Local Governments: Concepts for Legislative Design and Oversight*, by Ben Canada.

⁵⁴ P.L. 91-190; 83 Stat. 852.

⁵⁵ See ODP web site: [<http://www.ojp.usdoj.gov/odp/>].

⁵⁶ Kettl, *Promoting State and Local Government Performance*, p. 10.

to avoid having to adhere to specific standards. Requiring grant recipients to meet operational and technical standards, however, would arguably be an effective way of getting states and localities to adopt federally approved standards. Given the currently high level of public concern over terrorism preparedness, states and localities reluctant to accept federal funds with attached conditions might be more likely to accept the preparedness funds.

It is possible that federal establishment of performance goals (macro-level standards) could strike a balance between the competing needs for flexibility and accountability. Some performance measurement analysts suggest that government-established performance goals can hold states and localities accountable for results. If the goals are achieved, arguably, the federal government could allow flexibility in state and local activities.⁵⁷ This principle could apply to federal assistance for terrorism preparedness — Congress or federal agencies could establish preparedness goals, and states and localities would have discretion in determining how to achieve those goals. Some observers have called upon the federal government to take such action. One congressional witness testified that, “While we acknowledge the varying needs of individual communities and the diverse threat levels each may or may not confront, we do not think that it is unreasonable to establish a baseline of readiness that all communities should strive to attain”⁵⁸

S. 1245, as reported by the Senate Governmental Affairs Committee, would take the conditioning approach. The bill would require DHS to develop National Performance Standards for state and local preparedness efforts. States would have to incorporate these standards into their state homeland security plans and report annually on their progress in achieving the standards. S. 1245 instructs the DHS secretary to base (in part) the national performance standards on the objectives that states must address in their homeland security plans, but, otherwise, gives discretion to the DHS secretary in developing the standards.⁵⁹

Concerns in Conditioning Grants. As with the encouragement approach, conditioning federal assistance may not be adequate to meet congressional goals. States and localities might not participate in federal preparedness programs with stringent standards. Establishing preparedness goals also brings up the challenge of defining preparedness. Initiatives to establish national preparedness goals would likely have to consider a wide array of factors, including risk analyses,⁶⁰ state and local response capabilities, and financial cost (including long-term maintenance costs

⁵⁷ U.S. General Accounting Office, *Block Grants: Issues in Designing Accountability Provisions*, GAO Report GAO/AIMD-95-226 (Washington: GPO, 1995), pp. 10-13. Also see, Harry P. Hatry, *Performance Measurement: Getting Results* (Washington: The Urban Institute Press, 1991), p. 171.

⁵⁸ Statement of Paul M. Maniscalco, Past President, National Association of Emergency Medical Technicians, U.S. Congress, House Armed Services Committee, Military Procurement Subcommittee, *Crisis Response Capabilities to Domestic Acts of Terrorism Related to Weapons of Mass Destruction*, hearings, 107th Cong., 2nd sess., March 5, 2002.

⁵⁹ S. 1245, sec. 4(h).

⁶⁰ For more information on risk analysis, see CRS Report RS21348, *Risk Assessment in the President’s National Strategy for Homeland Security*, by Robert Buschmann.

for equipment and training). Such challenges could complicate the process of defining a preparedness baseline and reduce the potential usefulness of such a definition.

Conditioning federal assistance might also require Congress and federal agencies to consider a system of rewards and penalties for grant recipients. Grant programs may include rewards for meeting or exceeding standards, such as increased funding or regulatory flexibility. They may also set penalties for failing to meet standards, such as reduced funding or possible termination of the grant. Such a system would not only affect the level of accountability, but also the level of public safety. If a state failed to achieve a preparedness standard, would it receive less funding? If yes, how would the reduction in federal assistance affect the state's level of preparedness? Would states that achieve standards receive more federal assistance? If so, on what basis would more assistance be justified? These are just some questions that could be raised.

Promulgate Federal Regulations. Were Congress to assign a high priority to the development and implementation of preparedness standards, it could direct federal agencies to promulgate federal regulations. Arguably, incorporating preparedness standards into regulations could facilitate widespread compliance, since regulations are enforceable under law. On the other hand, developing and enforcing such regulations would likely present several challenges, including possibly basic legal issues.

A number of federal agencies enforce regulations addressing public health and safety, including the Environmental Protection Agency (EPA), National Highway and Traffic Safety Administration (NHTSA), and Occupational Safety and Health Administration (OSHA).⁶¹ The HAZWOPER standard, mandated by Congress in the Superfund Amendments and Reauthorization Act of 1986, is an example of a regulatory standard for first responders.⁶² Congress has recently used this policy approach to address infrastructure security issues. The "Public Health Security and Bioterrorism Preparedness Act of 2002," passed by Congress in June 2002, required community water systems serving more than 3,300 people to complete a vulnerability assessment and develop an emergency response plan. The legislation also lists some specific guidance for states and localities to follow.⁶³

Options for Promulgating Regulations. Were Congress to take a regulatory approach (or condition grants), it might have to consider whether federal agencies would develop new standards or adopt existing standards that are currently voluntary.

⁶¹ National Research Council, *Standards, Conformity Assessment, and Trade*, pp. 16-17.

⁶² The Act instructed the Secretary of Labor to promulgate regulations for the health and safety of workers engaged in hazardous waste operations. Congress required the regulations to address site analysis, training, medical surveillance, protective equipment, and emergency response, among other activities. P.L. 99-499, sec. 126; 100 Stat. 1690.

⁶³ P.L. 107-188, sec. 401. See also CRS Report RL31294, *Safeguarding the Nation's Drinking Water: EPA and Congressional Actions*, by Mary Tiemann, and CRS Report RS21026, *Terrorism and Security Issues Facing the Water Infrastructure Sector*, by Claudia Copeland and Betsy Cody.

Federal agencies might develop new preparedness standards through the federal rulemaking process if current standards used by states and localities do not satisfy congressional goals for preparedness, or if there is a perceived urgent need for new standards.⁶⁴

Should Congress instruct the DHS, or another federal agency, to establish preparedness standards in regulations, participation from standards developing organizations would likely be an issue. The Administrative Procedure Act (APA) sets minimum requirements for public participation in the federal rulemaking process, and agencies have discretion to grant additional procedural rights.⁶⁵ Congress could instruct federal agencies developing preparedness standards to open the rulemaking process to interested stakeholders, including the many nongovernmental organizations that develop standards. A more open federal rulemaking process could lead to greater credibility in the first responder community, and give states and localities more flexibility in meeting local preparedness needs.

There are also reasons why federal agencies might incorporate existing voluntary standards as federal regulations. First, some nongovernmental organizations, such as the NFPA, have more experience in developing preparedness standards. Such organizations have the necessary expertise and resources, and are familiar with standards development processes. Second, it would be consistent with the congressional policy established in section 102(g) of the Homeland Security Act of 2002, which affirms the practice of federal agencies adopting voluntary consensus standards for regulatory purposes (when practicable).⁶⁶ Nongovernmental organizations generally use the voluntary consensus approach, applying principles of due process, which could increase the credibility of federal regulations in the first responder community. This approach could also afford states and localities more flexibility in adapting to local preparedness needs, although it would be premature to reach a conclusion at this preliminary stage of policy development.

Because states and localities may take vastly different approaches to satisfying regulations, Congress would likely have to consider how much flexibility regulations would afford states and localities, and how federal agencies would enforce the regulations. The establishment of Local Emergency Planning Committees (LEPCs) by the states illustrates the various ways in which congressional mandates can be applied. The Emergency Planning and Community Right-to-Know Act of 1986 instructed each state to create a State Emergency Response Commission, which, in turn, created a Local Emergency Planning Committee (LEPC).⁶⁷ Although the LEPCs were designed to prepare communities for chemical accidents, states and localities have come to use them for a diverse range of functions. Some LEPCs focus

⁶⁴ Office of Technology Assessment, *Global Standards*, p. 104.

⁶⁵ 5 U.S.C. 551 *et seq.* For an overview of the APA, see “Administrative Procedure Act” in CRS Report RL30795, *General Management Laws: A Selective Compendium*.

⁶⁶ P.L. 107-296, sec. 102(g). Also see P.L. 104-113, sec. 12(d)(1); 110 Stat. 783.

⁶⁷ P.L. 99-499, sec. 301, sec. 303; 100 Stat. 1729. For more information, see CRS Report RL30798, *Environmental Laws: Summaries of Statutes Administered by the Environmental Protection Agency*, coordinated by Martin R. Lee.

only on chemical accidents, whereas others focus on all potential hazards facing a community. The committees also have shown various levels of activity and capability; some have ongoing projects and interactions with the community, while others exist in name only.⁶⁸ A similar pattern could arise if federal agencies incorporated preparedness standards into regulations.

Tenth Amendment Issues. Under certain circumstances, imposing federal mandates on states may raise Tenth Amendment issues.⁶⁹ The Tenth Amendment provides that “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁷⁰ The Supreme Court has interpreted this amendment to prohibit the federal government from “commandeering” state legislatures or executive branch officials to implement federal programs. This does not mean, however, that state activities may not be directly regulated by the federal government. The Court has made a distinction between constitutional “substantive regulation” and unconstitutional “commandeering.” The former occurs when a generally applicable law is applied to state activities, while the latter occurs when the federal government mandates how a state government promulgates or executes laws regarding its citizens.⁷¹

So, how does the Tenth Amendment limit the federal government from setting federal standards for state or local preparedness? First, it is important that mandated federal regulations not attempt to affect the relationship between a state and its citizens. For example, concerns have been raised regarding civil liability for emergency personnel who cross state lines, as the legal immunities for emergency

⁶⁸ U.S. Environmental Protection Agency, Office of Solid Waste and Emergency Response, “The Role of Local Emergency Planning Committees (LEPCs) and Other Local Agencies in the Risk Management Program of Clean Air Act (CAA) Section 112(r)” (Washington: March 1998). Available at: [http://www.epa.gov/swercepp/pubs/rmp-imp/lepc_rpt.html], visited May 12, 2003. Also see Michael K. Lindell and Marna J. Meier, “Effectiveness of Community Planning for Toxic Chemical Emergencies,” *Journal of the American Planning Association*, Spring 1994, pp. 222-234.

⁶⁹ Discussion of the Tenth Amendment was contributed by Kenneth R. Thomas, American Law Division, Congressional Research Service. For more information on the Tenth Amendment, see CRS Report RL30315, *Federalism, State Sovereignty and the Constitution: Basis and Limits of Congressional Power*.

⁷⁰ For example, in *New York v. United States*, the Congress had attempted to direct states to develop legislation on how to dispose of all low-level radioactive waste generated within the state. The Court found that although the Congress had the authority under the Commerce Clause to regulate low-level radioactive waste, it only had the power to regulate the waste directly, not to direct the states to promulgate regulations. Similarly, in *Printz v. United States*, 521 U.S. 898 (1997), the Court found that the Brady Handgun Act, which required state and local law enforcement officers to conduct background checks on prospective handgun purchasers within 5 business days of an attempted purchase, was an unlawful “commandeering” of state executive branch officials.

⁷¹ The Court held in *Reno v. Condon* that the Driver’s Privacy Protection Act of 1994, which regulates the sale of personal information gathered from persons seeking drivers licenses, was substantive regulation, not commandeering. The Court made this distinction in *Reno* because the state was not being directed on how to regulate its citizens, but rather on how to treat information which had been elicited from those citizens. 528 U.S. 141 (2000).

personnel that may exist in one state may not be honored in the courts of another jurisdiction. However, if the federal government mandated that all states provide immunity to emergency personnel from other states, this might be seen as an interference between a state and its citizens who had previously been authorized to seek civil damages. Consequently, this kind of federal mandate might raise Tenth Amendment concerns.

Another Tenth Amendment concern, not yet addressed by the Supreme Court, is whether legislation may be directed specifically at states. As noted, it is constitutional for states to be subjected to federal laws of general applicability. For instance, if a state is engaged in the handling of hazardous materials, it is subject to the previously mentioned Hazardous Waste Operations and Emergency Response standard (HAZWOPER).⁷² However, this standard is applicable to both public and private employees who handle hazardous waste. It would be unusual for the federal government to impose federal regulations on an activity, but limit its application to states, and to do so could result in constitutional challenges.⁷³

Other Concerns. Establishing and enforcing mandatory regulations for emergency preparedness would likely raise other federalism issues. For example, states and localities might argue that federal preparedness regulations would present an unfunded mandate. The “Unfunded Mandates Reform Act of 1995” (UMRA) established procedures intended to limit Congress and federal agencies from imposing requirements on states and localities without providing funds to pay for the cost of compliance.⁷⁴ The law, however, does not prohibit legislation or regulations that are unfunded (or under-funded), and permits exemptions for national security needs.⁷⁵ Congress may find that the threat of terrorism justifies mandating standards. Dissenting states, however, may use the judicial review procedures laid out in UMRA to challenge any regulations as unfunded mandates.⁷⁶

Interference with current emergency management practices might also be an issue. States may oppose federally created standards that are more stringent than current standards, thus preempting state and local regulations. More stringent regulatory standards could pose a significant burden, since equipment may need to be replaced, training retaken, and facilities modified. State and local officials have created response plans and established intergovernmental partnerships to address their unique needs with their available resources. Some states might strongly oppose

⁷² 29 C.F.R. 1910.120.

⁷³ In *Reno v. Condon*, an additional challenge was made to the Driver’s Privacy Protection Act because it only focused on the handling of information which had been obtained by states. However, because the Court in *Reno* determined that the regulation in question actually affected both state governments and private resellers of such information, the Court reserved the question as to whether a law which only regulated state activities would be constitutionally suspect. 528 U.S. 141.

⁷⁴ P.L. 104-4; 109 Stat. 48. For more information, see CRS Report RS20058, *Unfunded Mandates Reform Act Summarized*, by Keith Bea and Richard S. Beth.

⁷⁵ 2 U.S.C. 658a. Also see 2 U.S.C. 1503.

⁷⁶ 2 U.S.C. 1571.

such regulations, arguing that, among other things, terrorism-focused regulations would divert emergency management resources away from other public safety concerns, such as preparedness for reoccurring natural hazards.

Conclusion

Issues related to preparedness standards may be raised as Congress oversees the implementation of the new Department of Homeland Security, evaluates federal assistance programs, and assesses the nation's preparedness for possible terrorist attacks. Should it address preparedness standards, Congress would face a number of challenges. Among these would be deciding on which policy approach to take in the development of standards and their adoption by states and localities, in a context that fully addresses possible legal issues. Such policy approaches as encouragement, conditioning grants, and promulgating regulations have costs and benefits that could be considered in the legislative process.

Appendix: Examples of Current Standards and Development Activities

This appendix briefly describes selected nongovernmental organizations and federal agencies that are developing new terrorism preparedness standards, or maintain standards that *may* be used for terrorism preparedness. It is not a comprehensive listing, but a selection of examples pertinent to the scope of this report. Nearly all new initiatives focus on micro-level standards, including operational procedures, training competencies, and equipment specifications.

Nongovernmental Organizations.⁷⁷

National Fire Protection Association (NFPA). Arguably, the most active standards developing organization for the first responder community is the NFPA. ANSI has accredited the NFPA as a standards developing organization, indicating that association's procedures include due process requirements. Many of NFPA's efforts address fire safety and prevention, but also address a number of standards that apply to terrorism preparedness. NFPA currently has several standards for the management and organization of emergency management agencies, such as NFPA 1600, the "Standard for Disaster/Emergency Management and Business Continuity Programs." It also maintains many specific operational and equipment standards for responding to hazardous materials incidents that may apply to terrorism preparedness, including the following:⁷⁸

- ! NFPA 471 — Recommended Practice for Responding to Hazardous Materials Incidents;
- ! NFPA 472 — Professional Competence of Responders to Hazardous Materials Incidents;
- ! NFPA 473 — Professional Competence of Emergency Medical Responders to Hazardous Materials Incidents;
- ! NFPA 1951 — Protective Ensemble for Urban Search and Rescue Operations; and,
- ! NFPA 1994 — Protective Ensembles for Chemical/Biological Terrorism Incidents.⁷⁹

⁷⁷ This section does not discuss nongovernmental organizations that seek to accredit public safety agencies, such as the Commission on Fire Accreditation International (CFAI), Commission on Accreditation of Law Enforcement Agencies (CALEA), and Joint Commission on Accreditation of Health Organizations (JCAHO). Although these organizations develop preparedness standards, their focus is on general service improvement, not specifically terrorism preparedness.

⁷⁸ For more information on these codes, see the NFPA web site: [<http://www.nfpa.org>].

⁷⁹ NFPA codes relating to hazardous materials response are available free of charge at: [<http://www.nfpa.org/Codes/CodesandStandards/HazMat/HazMat.asp>], visited May 12, 2003.

National Association of County and City Health Officials (NACCHO) and Association of State and Territorial Health Officials (ASTHO). These organizations, and others, are presently working with the Centers for Disease Control and Prevention (CDC) to identify and define the core capacities needed by state and local public health systems to prepare for bioterrorism.⁸⁰ These capacities will address such public health functions as surveillance, laboratory identification, communication, and mobilization. This effort, known as the Bioterrorism Preparedness and Response Program, also seeks to build a consensus for the identified capacities and determine priorities for state and local improvements.⁸¹ NACCHO and ASTHO, as well as other related nongovernmental organizations, also participate in other standards setting activities that are sponsored by the CDC, including the National Public Health Performance Standards Program (discussed below).⁸²

American National Standards Institute (ANSI). In February 2003, ANSI established the Homeland Security Standards Panel with a mission “to catalog, promote, accelerate and coordinate the timely development of consensus standards ... and communicate the existence of such standards appropriately to governmental units and the private sector.” More specifically, the panel is attempting to identify and address gaps in existing preparedness standards and facilitate collaborative efforts among various standards developing organizations. At the time of this writing, membership on the panel includes dozens of private companies, trade associations, and governmental agencies from the federal and state levels of government.⁸³

Federal Programs.

Federal Emergency Management Agency (FEMA). FEMA is presently using existing standards, and seeking to develop new ones, to better prepare states and localities for all disasters, including terrorist attacks. Arguably, the most significant is the Emergency Management Accreditation Program (EMAP), which FEMA developed in coordination with the National Emergency Management Association (NEMA). This voluntary accreditation program allows states to assess their own capabilities compared to a comprehensive set of standards (called the “EMAP Standard”) that address nearly all emergency management functions. The functions are arranged into 13 categories: 1) laws and authorities; 2) hazard identification and risk assessment; 3) hazard mitigation; 4) resource management planning; 5) direction, control and coordination; 6) communications and warning;

⁸⁰ Other participating organizations include the Association for Professionals in Infection Control (APIC) and the Association of Public Health Laboratories (APHL).

⁸¹ For more information on this program, see the NACCHO web site: [<http://www.naccho.org/project63.cfm>], visited May 12, 2003.

⁸² For more information on preparedness, see CRS Report RL31719, *An Overview of the U.S. Public Health System in the Context of Bioterrorism*, by Holly Harvey.

⁸³ For more information, see ANSI web site: [http://www.ansi.org/standards_activities/standards_boards_panels/hssp/overview.aspx?menuid=3], visited May 12, 2003.

7) operations and procedures; 8) logistics and facilities; 9) training; 10) exercises, evaluations and corrective action; 11) crisis communications, public education and information; and, 12) finance and administration. FEMA believes that EMAP can serve as a catalyst for state and local governments to enhance their emergency management capabilities, and adhere to recognized preparedness standards.⁸⁴

FEMA's Office of National Preparedness (ONP) is also undertaking standards development activities. Among other programs, ONP is presently implementing a National Capability Assessment Program that includes a comprehensive baseline assessment of the capabilities of state emergency management programs. One goal of the program is to compare existing capabilities to established preparedness standards to determine where federal assistance is most needed.

Office for Domestic Preparedness (ODP). The ODP, currently in the Justice Department, focuses exclusively on preparing states and localities for terrorist attacks. The office, which will be transferred to the Border and Transportation Security directorate of the new Homeland Security Department, applies standards to some of its assistance programs. ODP's equipment grants program, for example, only allows recipients to purchase equipment that has been evaluated and approved.⁸⁵ The selected equipment was identified by the InterAgency Board for Equipment Standardization and InterOperability (discussed below).

In response to the perceived threat from WMD attacks, ODP developed a compilation of basic guidelines for state and local first responders. The guidelines address such responder communities as law enforcement, fire service, EMS, hazardous materials, and public works. While ODP explicitly states that the guidelines are not official standards, the document may serve as a source for future federal efforts to develop standards for WMD response.⁸⁶

National Institute of Justice (NIJ). The NIJ, within the Justice Department, conducts several programs to develop equipment standards. Arguably the Institute's best known standards program is AGILE, which seeks to develop interoperability standards for communications equipment used by law enforcement agencies.⁸⁷ The NIJ has also issued standards for types of equipment used by law enforcement and other first responders, including equipment for personal protection, detection, and decontamination. It is also conducting several "Critical Incident Technology Programs" that research procedures and equipment used in response to terrorist attacks and other critical incidents. These projects address such areas as urban search

⁸⁴ For more information on EMAP, see: [<http://www.emaponline.org>].

⁸⁵ For more information on this program, see ODP web site: [<http://www.ojp.usdoj.gov/odp/grants/equipment.htm>], visited May 12, 2003.

⁸⁶ U.S. Department of Justice, Office for Domestic Preparedness, *Emergency Responder Guidelines* (Washington: August 2002). Available at: [<http://www.ojp.usdoj.gov/odp/docs/EmergencyRespGuidelinesRevB.pdf>], visited May 12, 2003.

⁸⁷ See AGILE web site: [<http://www.agileprogram.org/>], visited May 12, 2003.

and rescue technology requirements, bomb disposal techniques, and incident command systems.⁸⁸

Centers for Disease Control and Prevention (CDC). The CDC is presently undertaking a number of standards development activities in coordination with several nongovernmental organizations. The CDC's National Public Health Performance Standards Program (NPHPSP) seeks to develop standards for state and local public health systems. The stated goal of the program is, "To improve the practice of public health by providing leadership in research, development, and implementation of science based performance standards." The NPHPSP is designed to enable state and local officials, as well as policy-making bodies, to assess the overall quality of service, including preparedness for bioterrorism.⁸⁹

The CDC administers the Centers for Public Health Preparedness program (CPHP), in which it partners with academic institutions to develop training programs, and undertake other efforts, to improve public health preparedness. While standards development is not among the primary goals of this program, some institutions are seeking to develop competencies for public health officials, which could be applied to preparedness efforts.⁹⁰ For example, in response to the perceived threat of bioterrorism, the CDC is funding a project at the Mailman School of Public Health at Columbia University to develop a set of competencies for public health workers responding to bioterrorism.⁹¹

The CDC has also partnered with other organizations to produce operational guides intended to provide state and local public health officials with a blueprint for preparing for bioterrorism. Standardization is not an explicit goal of these documents, but they effectively serve as common guidelines for officials to follow. Examples of such documents include the *Bioterrorism Readiness Plan: A Template for Healthcare Facilities* and *Planning Guidance for State Public Health Officials*.⁹²

InterAgency Board for Equipment Standardization and InterOperability (IAB). The Justice Department created the IAB in 1998. Its stated mission is to "... establish and coordinate local, state, and federal standardization, interoperability, and responder safety to prepare for, respond to, mitigate, and recover from any incident by identifying requirements for Chemical, Biological, Radiological, Nuclear or Explosives (CBRNE) incident response equipment." The IAB seeks to involve federal agencies, as well as state and local governments, in the development of standards for a range of equipment needs, including interoperable communications,

⁸⁸ The NIJ web site is: [<http://www.ojp.usdoj.gov/nij/>], visited May 12, 2003.

⁸⁹ For an overview of the NPHPSP, see the CDC web site: [<http://www.phppo.cdc.gov/nphpsp/>] and National Association of County and City Health Officials web site: [<http://www.naccho.org/project48.cfm>], visited May 12, 2003.

⁹⁰ For more information on this program, see the CDC web site: [<http://www.cdc.gov/programs/bio9.htm>], visited May 12, 2003.

⁹¹ The competencies is available at: [<http://www.nursing.hs.columbia.edu/institute-centers/chphsr/btcomps.html>], visited May 12, 2003.

⁹² At: [<http://www.bt.cdc.gov/HealthProfessionals/index.asp>], visited May 12, 2003.

personal protective gear, detection, decontamination, and medical equipment.⁹³ The Office for Domestic Preparedness (ODP) uses the IAB's list of approved equipment to determine what equipment grant recipients may purchase.

The IAB designated the Office of Law Enforcement Standards (OLES) in the National Institute of Standards and Technology (NIST) as "executive agent" for its efforts.⁹⁴ The OLES, among other activities, develops equipment standards and operating procedures for using equipment. As directed by the IAB, several OLES projects directly relate to terrorism preparedness, such as developing standards for biological and chemical protection, personal protective equipment, detection equipment, and respiratory equipment.⁹⁵

Interoperable Communications Programs. There are several federal programs focusing on interoperable communications. Agencies seeking to establish or coordinate standards include the Federal Communications Commission, National Telecommunications and Information Administration, Defense Department's Office of Spectrum Analysis, Justice Department's National Institute of Justice, the Treasury, and FEMA. While each program may have distinct goals, they generally address issues of spectrum management and interoperable equipment. The programs address interoperability not only among state and local first responders, but also among federal agencies, and among officials in different levels of government.⁹⁶

Project SAFECOM, a new initiative administered by FEMA, may be the most well-known federal initiative to develop interoperable communications standards, despite being relatively new. SAFECOM's long-term goals are to achieve nationwide federal-to-federal interoperability; federal-to-state/local interoperability; and state/local interoperability. The project will begin with a "gap analysis" to study the status and needs of states and localities. Program managers expect to produce a menu of communications equipment that will apply to federal assistance programs.⁹⁷

⁹³ See the IAB web site: [<http://www.iab.gov/>].

⁹⁴ For more information on the NIST, see CRS Report 95-30, *The National Institute of Standards and Technology: An Overview*, by Wendy Schacht.

⁹⁵ See the OLES site: [<http://www.eeel.nist.gov/oles/welcome.html>], visited May 12, 2003.

⁹⁶ For more information, see CRS Report RL31375, *Meeting Public Safety Spectrum Needs*, by Linda K. Moore.

⁹⁷ For more information, see briefing by Federal Wireless Users Group: [<http://snad.ncsl.nist.gov/fwuf/may02slides/wiesner.pdf>], visited May 12, 2003.