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State Administrative Models for Toxic Substances Management

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State Administrative Models for Toxic Substances Management

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FOREWORD

This paper describes examples of State administrative responses to toxic substances problems. It is an initial effort in a continuing exploration of Federal-State cooperation for toxic substances control. We hope the products of this new focus will provide useful information to States about State problems and programs. Through continued information exchange and legislative policy analysis, the Program Integration Division (PID) plans to assist States to develop their own toxic substances strategies. These strategies when implemented in cooperation with EPA's Regional Offices enhance the probability of successful, nationwide toxic substances management. For more information on this project contact: Director, Program Integration Division, Office of Pesticides and Toxic Substances (TS-793), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460.

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Table of Contents

A. Background/Summary

The Toxic Substances Control Act (TSCA) of 1976, unlike the Clean Air Act and the Clean Water Act which provide funds to State/local agencies to administer and implement specific environmental programs, does not expressly delegate authority to State or local officals. However, State involvement and implementation efforts are crucial to the success of TSCA.

Currently, control efforts under TSCA necessarily focus on national problems (e.g., the widespread use of asbestos in schools) because of limited resources in EPA. The Federal government (EPA) both promulgates and enforces these regulations under TSCA. Thus, local chemical problems will continue to be the concern of State government.

Are States equipped to deal with chemical problems and crises?

This broad question was discussed by EPA staff with State executive and legislative branch people. The interviews were conducted during the summer of 1979 and in early 1980, and ranged from a few minutes to over two hours.

Persons interviewed included gubernatorial assistants, environmental management agency staff, legislators, and legislative staff. They represented 17 States in all

10 EPA Regions, as well as:

- The Great Lakes Regional Commission;
- The President's Office of Science and Technology Policy;
- The National Conference of State Legislatures;
- The National Governors' Association; and,
- The University of Michigan/Ford Foundation

While many people explained their programs in detail, others directed us to better sources of information, or confirmed that their States were not actively interested in general chemical issues or TSCA.

This paper discusses part of the findings about State chemical management. It describes several State administrative models that have been developed to manage chemicals and analyzes trends in State program development.

B. The Problems

z Developing an effective approach for dealing with chemical problems presents a difficult challenge to States. One

of the principal reasons for this is that many States -- like the Federal government -- have many agencies or departments dealing with toxic substances. This is because chemicals are everywhere -- in the workplace, in food, in consumer products, in all media of the environment, and in human beings and animals. They are, therefore, not easily classified under the jurisdiction of any one department. They involve authorities and issues corresponding to those administered at the Federal level by such agencies as the Food and Drug Administration (FDA), the Occupational Safety and Health Administration (OSHA), the Consumer Product Safety Commission (CPSC), the Departments of Agriculture and Transportation, and EPA. This complexity has meant that the States have been quicker to identify the need for some kind of toxics program than they have been to attempt solutions. They continue to explore methods of responding to the problems (usually perceived as episodic) posed by toxic substances, but only a few have defined their responses well enough to act.

In choosing management structure to cope with chemical problems, States have to determine the best way to put together all the pieces of the toxic substances puzzle -- within political and administrative constraints.

Political Constraints

Because improper management of chemicals can endanger public health, toxic substances management can be, and often is, a controversial and emotional issue. Many interest groups -- including industry, labor unions, private citizens and public health officials -- have a vested interest in ensuring that toxic substances are managed to their best advantage. Thus, there can be strong pressure for States to develop an organization that is responsive to, and often with representatives from, special interest groups. Identifying and responding to all special interests is a formidable task, and one which gives many States (and the Federal government) great difficulty.

Public responsiveness must often be balanced with the need for "economy and efficiency." A Governor, for example, must be concerned with keeping within the budget and minimizing conflicts with existing programs and organizational patterns. Taxing policies must also be considered in this political equation. Favorable tax environments have long been used to encourage business and industries to locate in a particular State. Harsh or unfavorable chemical management policies might offset these economic advantages for some industries. Lack of State uniformity on either taxing or chemical control policies may favor industry relocation. Every State must simultaneously balance the needs for public protection against protection of the economic base of the State.

Administrative Constraints

Expertise and the need for coordination also has an impact on the type of organizational structure chosen. Because the issues are complicated and technical, and cut across traditional organizations, it is necessary to gather together scientific professionals from different State agencies and non-government groups involved in toxic substances.

Almost without exception, these needs were discovered while in the midst of trying to cope with a specific incident, chemical or problem. Most of these are well known: PBB's in Michigan; Love Canal; PCB's in New York (Hudson River), Montana, Alabama, and North Carolina; and kepone in Virginia, to name only a few. Other States demonstrating interest in toxic substances also had identifiable "spurs," although less obvious or publicized: DBCP in Arkansas (also mentioned by California) and the publication of the "cancer atlas" identifying New Jersey as showing an extremely high incidence of many kinds of cancer, for example. Only in Maryland could State staff not identify the existence of a problem-specific moving force behind their program.

The significance of this finding is that these emergencies demonstrated to the States the difficulties in mobilizing

their resources to respond to a multi-media toxic substances problem. The presence of PBB's in Michigan cattle, for example, was described as the first "non-disease food problem" the State Department of Agriculture had faced. It involved the Departments of Agriculture, Health, and Natural Resources, and showed that those agencies had responsibility overlaps, duplications, and gaps. The State agencies, according to one Michigan interviewee, "didn't know how to cope with it." Arkansas staff commented on the tendency of media representatives to have a "segmented" view and to not see the "larger picture" in toxics management. Interviewees in Michigan, Minnesota, New Jersey, and Wisconsin stated that the various State agencies were not communicating adequately with one another on toxic substances problems.

C. State Administrative Responses

Three state administrative models are considered below. Some of the criteria for analyzing these models include: institutional viability, whether the system has a political or a technical focus, whether it provides for flexibility and involvement of many interests, and visibility for toxic substances issues.

State Toxic Substances Commission

This approach is now being taken in at least Maryland,

Michigan, and Virginia. (California and Wisconsin have also evinced interest in this approach, although neither had done so at the time of these discussions.) The authorizing legislation for these States enables or directs the governor to include representatives of industry and the public among the commission members, along with the heads of the appropriate State agencies.

Our example is the Michigan Toxic Substances Control Commission (see Appendix 1), which has several unique aspects. It is staffed by seven full-time employees, including an Executive Director, and has its own budget for contracting and research. The Executive Director summarized the mandatory and optional responsibilities of the Commission as follows:

1. Declaring "toxic substances emergencies;"

2. "Alerting the Governor and the legislature to potential problems" based upon trend data and the like; and,

3. Overseeing and monitoring the way "anyone does anything with toxic substances" in Michigan.

The first of these directly responds to the lessons learned from the PBB contamination of Michigan cattle. The Chairman of the Senate Natural Resources Committee, who wrote the act creating the Commission, believed that the

State agencies were not working effectively together to combat the PBB problem. The Commission therefore includes the Directors of Agriculture, Health, and Natural Resources as non-voting members, in order to "make them talk to each other publicly." However, it "can do most anything" in case of a toxic substances emergency. Section 6(d)(i) of the enabling legislation, in fact, allows the Commission, in such emergencies, to "make all decisions regarding the sale, use, and method of disposal of the identified toxic substances...."

The Act directs that the Commission include seven citizens as voting members, but does not require that they represent any particular mix of industrial, academic, consumer, or other interests.

The Maryland and Virginia approaches are similar to each other; both differ from Michigan's in several important respects. Neither Maryland nor Virginia gives its commission a full-time staff or director; each is staffed by toxic substances personnel assigned to the line Departments in the course of their normal duties. The Maryland and Virginia commissions report to their respective executive branch health officials, while the Michigan Commission reports directly to the Governor and to the legislature.

Neither the powers nor the responsibilities of the Maryland and Virginia commissions has the apparent reach of the

Michigan Commission. The contrast is especially sharp with respect to toxic substances emergencies: the thrust of the Maryland and Virginia legislation is clearly toward information and advice; neither law allows for the activist, directive role available to the Michigan Commission.

At least five benefits from the Commission approach emerge from these experiences: (1) it institutionalizes interest in toxic chemicals; (2) it de-politicizes chemical management; (3) it gives greater visibility to the chemicals problem, (4) it offers a way to recognize and consider the views of many interest groups in managing toxic substances, (5) the commission approach (except the Michigan independent type body) does not require that money be appropriated by the State for its livelihood.

The Commission approach institutionalizes chemical management in the sense that the loss of principal sponsors through a change of Governor need not mean the end of the State's program where there is a statutorily-constituted body. A change in Governor, even of party in power, will probably not entail a loss of momentum. Even the accession of a new Governor having no interest in the issue of toxic substances would leave a staff and mechanism in place for addressing such problems. (That will not last indefinitely; the Michigan Act includes a "sunset" provision giving the Commission a four-year life.)

Establishing a commission de-politicizes toxics management by isolating the Governor. A Governor's actions, or failure to act, may be questioned on bases that divert attention from the scientific aspects of the problem itself. A toxic substances commission is able to make investigations, draw conclusions, and offer public recommendations that do not require the Governor's signature. The Governor may oppose the commission, but at least the decision to support or oppose the commission can be seen as a political decision independent of the technical aspects of the problem at hand. The toxic substances commission can also be required to report to both the executive and legislative branches, thereby de-politicizing toxic substances management further in that the commission would not be a creature of either branch. This may be contrasted with the Maryland approach (the Council is "to advise the Secretary of Health and Mental Hygiene") or Virginia's ("...make recommendations to the (State) Board (of Health)."

The last strength of the commission concept is that it formally acknowledges the necessity for working with a variety of experts. The enabling legislation may direct that members of the commission include representatives of specific interests. The Maryland law includes, in addition to a number of State agencies, the

AFL-CIO; the Maryland Chamber of Commerce; and "any other private or governmental entity that the governor deems appropriate." The Virginia law directs the Governor to appoint one representative from each of "the fields of agriculture, medicine, labor, industry, and local government." Among these three laws, only Michigan's fails to specify the interests commission members should represent. Instead, it directs the governor to appoint citizens trained in one or more of several listed natural sciences. As noted earlier, the Michigan Commission does include an industry representative in its membership.

The most serious weakness of the commission approach is perhaps also the most obvious: it usually requires a new governmental agency, with new staff and new budget. In today's political climate, Governors are understandably loath to do anything that appears to expand government, no matter the purported merits of the new agency. Commissions are often politically difficult to manage. As noted earlier, the Michigan Act includes a "sunset" provision that limits the Toxic Substances Control Commission to a four-year life, which can address both expansion and management problems.

A second weakness to this approach is that it probably requires new legislation. This means, in part, that the

process may be slow, and that the final product may be very different from the initial proposal. This is a weakness in the sense that the other approaches, described below, offer an administrative simplicity and directness not possible if new legislation is required.

The last weakness is the possibility that any newly-created commission may be opposed by the existing toxic substances staffs in the State's agencies. Many States already have toxicologists, epidemiologists, and other environmental health professionals working on pieces of the toxic substances puzzle. The need for a new, interagency toxic substances group may be less obvious to them.

State Toxic Substances Task Force

This approach (see Appendix 2) is now being taken in at least Arkansas, New Jersey, and North Carolina. New York has shown interest in the approach, although it had not been implemented at the time of the discussions.

The task force approach differs from the commission approach in at least two ways:

1. The membership of the task force is entirely from executive branch agencies; and

2. No new budget or staff is assigned. The task force primarily coordinates and relies on the existing resources of the participating agencies (The New Jersey group does have an executive director).

The task force may be created by executive order or by legislation. The task forces in these three States are small, involving four (New Jersey), five (Arkansas), or six (North Carolina) member agencies. The product of the task force may tend toward the intangible of "better coordination," or toward a fairly comprehensive strategy document.

One strength of this approach is the ease with which the Governor can initiate a task force. North Carolina did so through legislation, but Arkansas and New Jersey used an executive order. A change of administration gave the incoming Governor the opportunity to easily change his predecessor's course. Deciding to continue, he had only to write a letter directing the chairman of the task force to reconvene the group.

A second strength is that the task force does not require additional staff or funds. It may, therefore, be perceived by the legislature and the public as a way to get agencies to

work together, rather than as an expansion of the State bureaucracy -- more efficiency instead of more government.

A third strength is that the task force draws upon the expertise of the agencies involved. It is, in fact, a device to foster the efficient use of available talent.

And last, it allows the Governor to "do something" about toxics and to do it publicly -- the two needs that prompted every State discussed in this paper to get involved.

The principal weakness of this approach is that it does not ensure either visibility or permanence to the State toxic substances program. An incoming Governor could just as well dissolve his predecessor's efforts as endorse them. Furthermore, a task force constituted to make recommendations to the Governor can do so and never be heard from again. The members are, after all, the Governor's employees serving on the task force as an "additional duty," and all have been borrowed from their full-time obligations as heads of agencies or departments. One gubernatorial staffer implied that differences between the old and the new Governor have left the future of their task force unclear.

Another weakness is that the task force is a part-time effort without funds or staff. Such work as is done is squeezed into the schedules and priorities of staffs already busy with their full-time duties.

A third weakness is the group's inability to direct State agencies. The task force is usually by definition advisory, and is expected to recommend actions to the Governor. The North Carolina act enumerates seven functions for the task force, in addition to "incident response," each of which allows the group to "study and make recommendations."

A fourth weakness is the failure of this approach to de-politicize the State's action on chemical problems or incidents. The task force is clearly a creature of the Governor, including as it does only members who report to him, and excluding the various interests outside of the executive branch, many of which may be directly affected by the State's action or inaction.

Personal Supervision by the Governor

This approach (see Appendix 3) is now being taken in at least Arkansas and North Carolina. In both cases, the States are also using the task force approach discussed above, but neither Governor initiated the task force in his State. The approach is also being used by California, but apparently as a transitional and planning device until a more permanent approach is developed.

The principal strength of this approach is also the most obvious: the Governor's personal interest and attention ensures

that all those who work for him will attach their own interest and attention to the problems. They know what the Governor wants and expects them to do. They also know that his interest heightens the probability that the policy, action, or other recommendation they send forward is likely to be adopted.

Second, the Governor can marshal the State's resources for those tasks and problems he thinks important. As a pragmatic matter, then, this approach should be the most certain to ensure that whatever talent or expertise is required from the State bureaucuracy will actually be made available. Stated differently, there is little chance that needed resources will be unavailable due to supposedly higher priority assignments on other problems or issues.

Third, this approach does not require any reorganization, new staff, or new budget. The Governor indeed may not be doing anything additional or new. He may instead simply be reordering the priorities of his administration (if only temporarily) to put toxic substances near the top of the State's and his personal agenda.

The Governor's interest will certainly not be either undivided or permanent. A change in his or her interest, or a change in governors, may quickly slow or stop

progress. Indeed, the change of Arkansas' governor early in 1979 seems to have changed -- at least briefly -- the pace of development of that State's program. Relying solely on the continuing attention of the Governor does not institutionalize the program.

The other notable weakness of this approach is that it politicizes the issue, if in no other sense because it may become "his/her issue." The governor's action or inaction, comments, allegations, or recommendation may be scrutinized differently than might be the case were there a commission or similar body involved.

D. Conclusions

1. Is one organizational type more "effective" than another? There is no simple answer. It is really too early to compare institutional types since the oldest toxic substances management organizations have only been in existence for two years. In addition, it is difficult to judge what "effective" means. There are, though, other interesting points that can be drawn from examining State institutional management of toxic substances. This is a highly visible, timely issue. It is a difficult management problem. In deciding which organizational structure to use, States are faced with administrative, legal and political constraints. Because proper management

of toxic substances cuts across different agencies, States have created new organizational responses which cut across different departments. Cross-cutting authority is required in order to coordinate all the actions and to get all involved parties talking. Finally, the approach selected by a State is determined by the "mood" of the times. One of the most striking examples of this is the use of the temporary organization headed by part-time "experts" with a wide variety of backgrounds. Such an approach reflects both our society's respect for scientific expertise and the desire of today's public to limit government spending.

2. Nearly every State currently active in intermedia, interagency toxic substances management was spurred to the effort by a specific incident or chemical.

3. States' institutional responses to the toxic substances management problem have taken three forms: (a) A commission or similar body outside the existing State organization chart; (b) A task force or similar body within the existing State organization chart; (c) personal supervision by the Governor's office.

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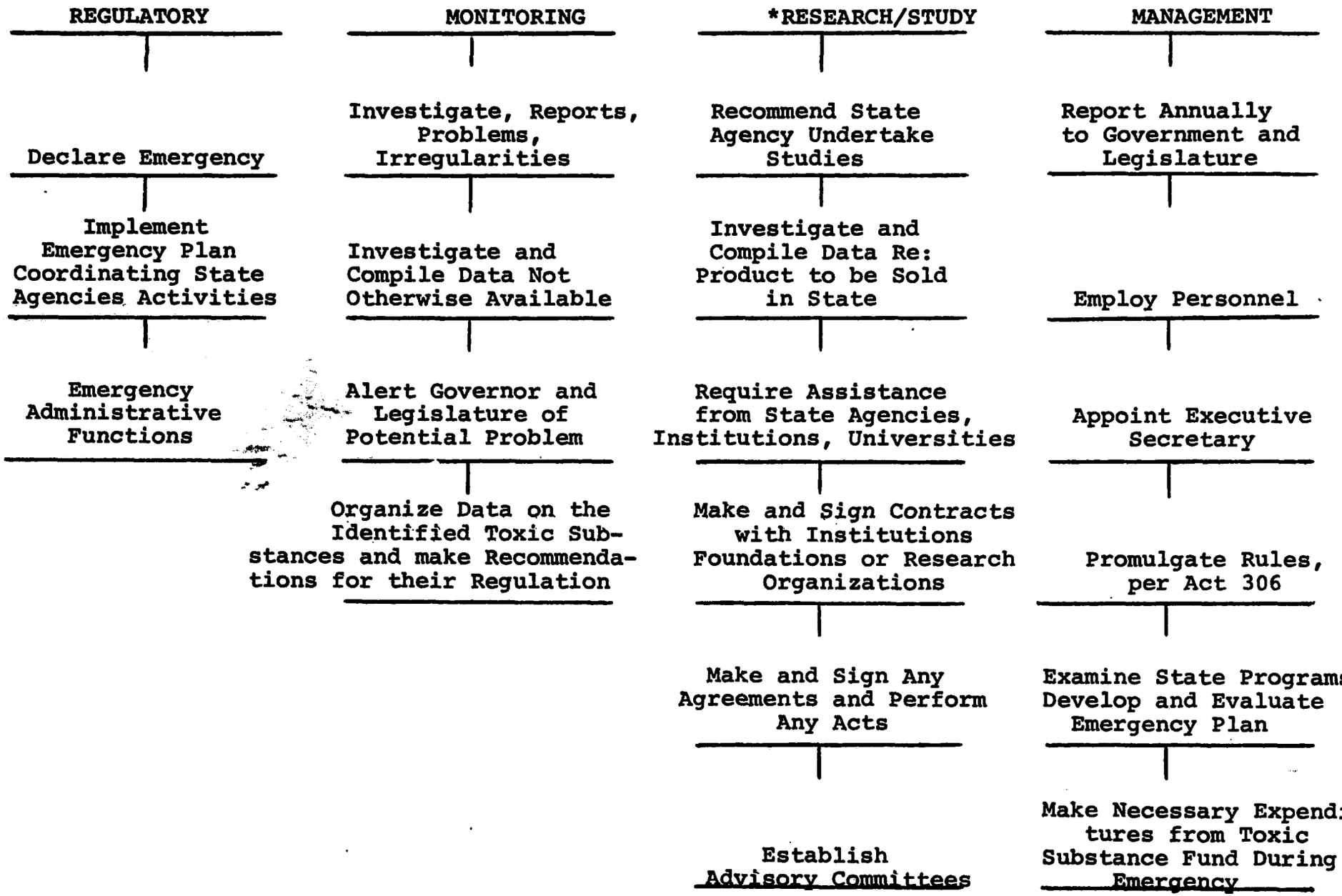
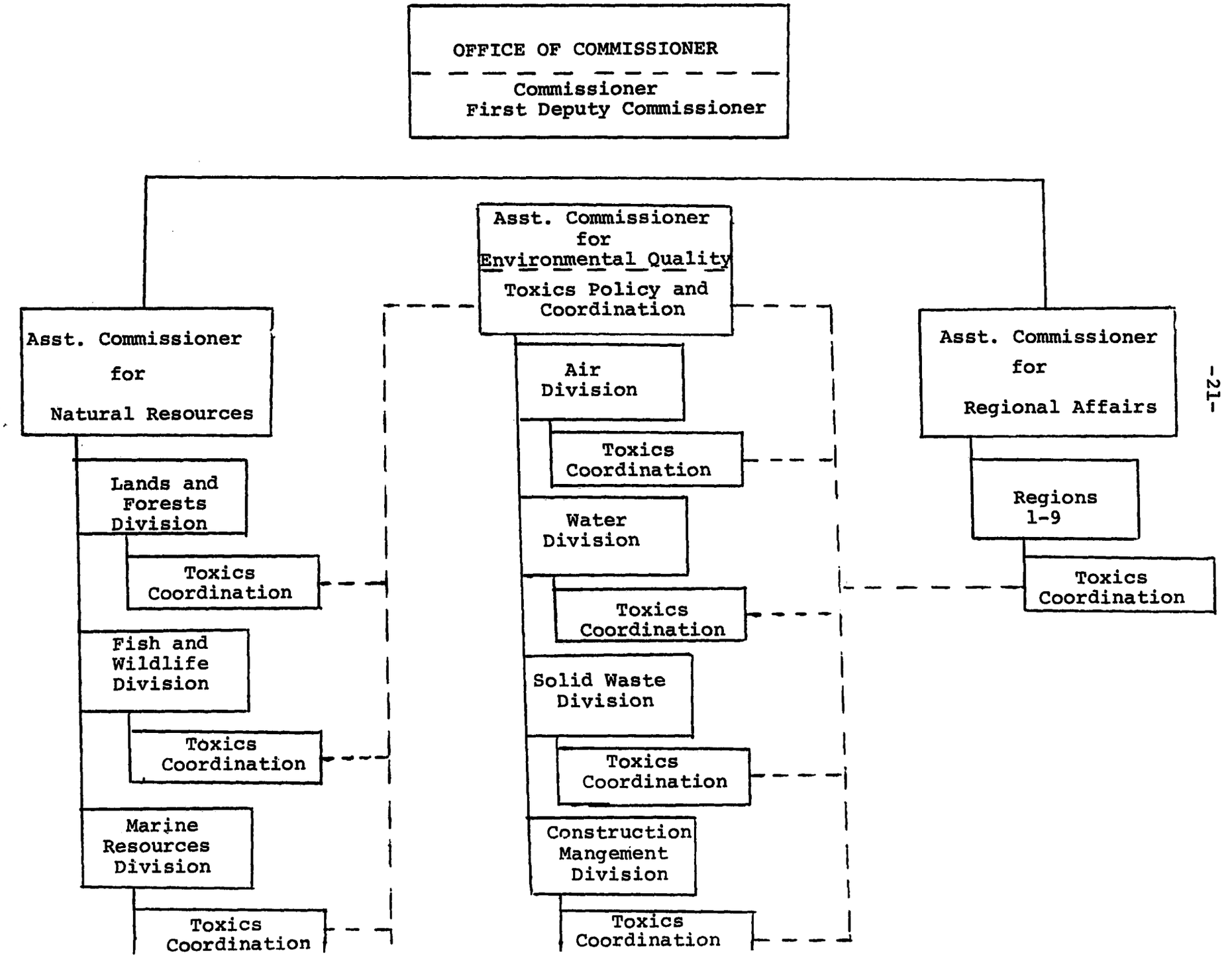
COMMISSION EXAMPLE



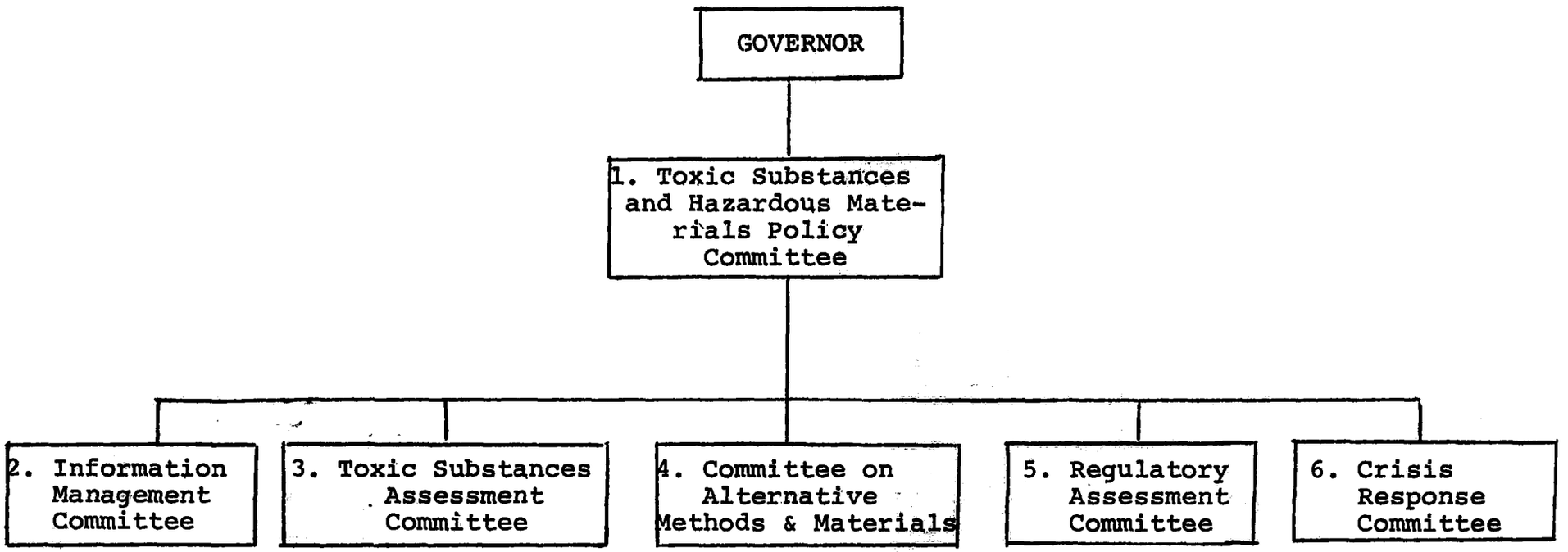
*Permissive function

TASK FORCE EXAMPLE



APPENDIX 2

GOVERNOR'S COMMISSION EXAMPLE



Elemental Responsibilities

1. Intergovernmental Cooperation and Coordination
2. Information Management
3. Assessment
4. Prevention and Control
5. Prevention and Control
6. Crisis Response

APPENDIX 3