White House Review of Regulations
Under the Clean Air Act Amendments of 1990

"Every American expects and deserves to breathe clean air."
-George Bush¹

INTRODUCTION

For over ten years, various groups at the White House claimed the authority to review virtually all proposed and final regulations issued by executive agencies. Proponents of White House review of agency regulations claimed this review necessary to facilitate coordination among the various agencies in the executive branch and to ensure agency regulations accurately reflected administration policies.¹ Opponents claimed White House review undermined the goals of the Administrative Procedures Act (APA)³ by allowing unaccountable officials to make important, undocumented policy decisions, often as a result of interest group pressure not reflected in the rulemaking docket.⁴

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The regulations implementing the Clean Air Act Amendments of 1990 (CAAA or the Act)\(^5\) were subject to unusually intense scrutiny during the White House review process.\(^6\) This article reviews the Environmental Protection Agency's (EPA) development of these regulations and the Bush Administration's influence on the regulatory process. Even with the disbanding of the Council of Competitiveness,\(^7\) the framework for this scrutiny remains. While the nature of this review may change with the Clinton Administration, similar executive-branch scrutiny is likely to continue. As a result, the quality and intensity of the review of the CAAA regulations should be analyzed to evaluate whether it actually served the goals its proponents claimed, or whether it was, as its opponents asserted, a process that was at best bad policy and at worst illegal.

The examples and accompanying analyses presented in this article demonstrate that White House review under the Reagan and Bush Administrations did not serve the purposes claimed by its proponents. In fact, past and current versions of White House review undermine the normal administrative rulemaking process by vesting absolute decision-making authority with unelected officials at the Office of Management and Budget (OMB) and, formerly, the Council of Competitiveness. White House oversight results in an inefficient and cumbersome rulemaking process and creates an inappropriate bias in regulatory decisions made by executive agencies.

I

WHITE HOUSE REVIEW

A. Who is Involved and What is Required?

White House review in its current form originated in 1981 during President Reagan's first term with the issuance of Executive Order


\(^6\) In a House hearing on incinerators and National Park protection, held only four months after passage of the Clean Air Act Amendments of 1990, the debate was already focused on the Council on Competitiveness and its actions regarding the Act. Several Congressmen, including Representatives Waxman and Sikorski, sharply criticized the Council for its influence over the EPA. Others, including Representatives Dannemeyer and Holloway, approved of the actions of the Council. See Implementation Hearings (Part 1), supra note 1, at 162-78.

The purpose of E.O. 12,291 is to ensure that, within the constraints of the statute at issue, agencies consider the costs and benefits associated with alternative regulatory strategies, and choose the most cost-effective one. To accomplish this task, E.O. 12,291 vested the Director of the OMB and the Task Force for Regulatory Relief with the authority to review regulations. Although the Task Force disbanded in 1984, the Office of Information and Regulatory Affairs (OIRA) continues to carry out review within OMB.

During the Bush Administration, the character of White House review changed from what it was under President Reagan. Before 1989, OIRA conducted essentially all review of agency regulations under E.O. 12,291. Beginning in 1989, however, other White House groups, including the Council on Competitiveness and the Council

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9 The Council on Competitiveness was not created formally through the issuance of an executive order. Rather, President Bush announced the Council’s formation in a speech on February 9, 1989. See President’s Message to the Congress Transmitting the Fiscal Year 1990 Budget, 25 Weekly Comp. Pres. Doc. 184 (Feb. 9, 1989). The Council included the Vice President, the Secretary of the Treasury, the Attorney General, the Secretary of Commerce, the Chief of Staff, the Director of the Office of Management and Budget, and the Chairman of the Council of Economic Advisors. The Council’s mission was to continue the work of the Task Force on Regulatory Relief, and its stated goal was to “reduce the amount of regulation, [by] issuing rules only when required by law, and [by] ensuring that rules clearly maximize benefits and minimize costs, based on a sound analysis.” Office of Management & Budget, Regulatory Program of the United States Government, Apr. 1, 1991-Mar. 31, 1992, at 3 (1991) [hereinafter Regulatory Program]. The Council also planned to “seek out opportunities to deregulate and reduce, consistent with law, the burdens of existing regulations.” Id.

Nancy Mitchell, an economist and former Associate Director of the Council, claimed the Council “engaged primarily in dispute resolution.” Nancy Mitchell, Address at the Interagency Regulatory Colloquium, Wash., D.C. (Jan. 28, 1992). When disagreements between different agencies arose, the Council was to attempt to help work out the issues through high-level policy discussions. Id. In addition, the Council was authorized to review a regulation if members of the public indicated there was a problem. Id. Mitchell stated, however, that the Council did not keep any log or formal records of the contacts it received because there were too many calls to log and the contacts were fairly casual. Id. While the Council gave advice to agencies, Mitchell emphasized “the final regulatory decision lies with the agency.” Id.

Allan Hubbard, former Director of the Council, described the Council’s mandate as “broad-ranging.” Jeffrey Birnbaum, Gov’t Executive, The Deregulator, Sept. 1991, at 16. David McIntosh, the Council’s last Director, emphasized the Council tried “to get input from all sources. At the staff level we meet not only with businesses, but also consumers, labor, and environmental groups.” Id. at 17-18.
of Economic Advisors, became actively involved in reviewing administrative regulations. While the OIRA retained express authority under E.O. 12,291 to review agency regulations, the Council on Competitiveness claimed implied authority to review regulations under E.O. 12,291. Additionally, other agencies provided input during the White House review process. For example, the Department of Energy (DOE) extensively reviewed the CAAA regulations.

The future of White House review is uncertain under the Clinton Administration. The new administration has not taken an official position on the issue, nor has it moved to repeal or amend E.O. 12,291. As a result, the essential framework of the Reagan-Bush executive review process remains in place, despite the elimination of the Council on Competitiveness.

There are five circumstances under which White House review of an agency's regulatory process is required. First, under the Paperwork Reduction Act of 1980, an agency must obtain OMB approval before collecting information from government or private entities, such as when an agency conducts a survey or requires regulated entities to submit reports. Second, under E.O. 12,498, agencies must submit

\[\text{See Implementation Hearings (Part I), supra note 1, at 164.}\]

\[\text{10 It is unclear where agencies other than OMB obtain their authority for review of regulations. The source may be section 6(a)(5) of E.O. 12,291, which allows the OMB to "[i]dentify duplicative, overlapping and conflicting rules . . . [and] require appropriate interagency consultation to minimize such duplication, overlap, or conflict." Exec. Order No. 12,291, supra note 8. DOE's review of EPA regulations, however, has been far more extensive than merely identifying duplications, overlap, and conflicts. Rather, DOE engaged in discussions of the substantive policy underlying EPA regulations, whether or not there was any conflict or duplication with DOE regulations.}\]

\[\text{11 In a 1991 memorandum, the Council on Competitiveness announced that it would oversee the regulatory process established under E.O. 12,291, and that the review authority established under that order includes a wide variety of non-regulatory activities, including agency guidance and issuance of press releases. Memorandum from the Office of the Vice President to Heads of Executive Departments and Agencies (Mar. 22, 1991). Oversight of these non-regulatory activities is not within the scope of this article.}\]


\[\text{13 44 U.S.C.A. 3507(a).}\]

their proposed regulatory agendas to OMB so the White House can consolidate and prioritize proposed agency regulatory actions and so it can review them for duplications and inconsistencies. Under E.O. 12,498, an agency may not take any regulatory action until OMB approves its agenda, and OMB may "return for reconsideration any rule submitted for review under Executive Order 12,291 [which entails significant regulatory action but which] was not included in the agency's final Regulatory Program for that year."16

Third, major and other agency rules17 must be reviewed by OMB before they are proposed,18 and fourth, OMB must review all regulations before they are promulgated.19 OMB must use E.O. 12,291's cost-benefit criteria to evaluate proposed and final regulations.20 Finally, all record-keeping and reporting requirements, including any forms proposed for use by the agency, must be reviewed and approved by OMB at least once every three years.21

**B. The Purpose of White House Review**

According to its past proponents, White House review serves many salutary purposes, including ensuring that: activities are coordinated among agencies; regulations are consistent with administration policies; regulations are cost-effective; agencies are accountable to the public; and the public interest is protected. These proponents claimed that the realities of the current regulatory state necessitate such centralized control:

Regulations . . . demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic policy. Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator

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16 *Id.*, § 1(d).
17 E.O. 12,291 defines "major rule" to mean any regulation likely to result in: 1) an annual effect on the economy of $100 million or more; 2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or 3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Exec. Order No. 12,291, *supra* note 8, § 1(b).
18 *Id.*, § 3(c).
19 *Id.*
20 *Id.*, §§ 2, 3(e).
exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House.\textsuperscript{22}

Many agencies have overlapping jurisdictions. For example, both the EPA and the Occupational Safety and Health Administration (OSHA) have authority to regulate asbestos. Regulatory review by a centralized agency allows “identification of conflicts in the approaches adopted by different agencies with similar or related responsibilities and coordination of their activities.”\textsuperscript{23} The centralized review process can ensure that different agencies are not issuing duplicative or inconsistent regulations, and can ensure that all interested agencies have an opportunity to review relevant regulations.\textsuperscript{24}

Proponents of White House review claimed that a centralized agency should have authority to ensure that regulations are consistent with Administration policies, because “[h]owever decentralized the rulemaking process may have been in practice — and however prone to manipulation by congressional committees and their staffs and by private groups — the results belonged to the President as a political matter.”\textsuperscript{25} According to the \textit{Regulatory Program of the United States Government}, E.O. 12,498 “represents a process for planning and coordinating agency actions to ensure that they are consistent with both law and Presidential policies.”\textsuperscript{26} If OMB determines that part of an agency’s draft regulatory agenda is not consistent with administration policies, the agency may not promulgate regulations implementing that part of the regulatory agenda, in the absence of an emergency or an express judicial or statutory mandate.\textsuperscript{28}

E.O. 12,291 requires agencies to evaluate the potential costs and benefits of the regulations they plan to promulgate, and authorizes OMB to scrutinize such regulations using cost-benefit criteria.\textsuperscript{29} Even opponents of White House review should agree that the goal of mini-

\begin{itemize}
  \item \textsuperscript{22} Sierra Club v. Costle, 657 F.2d 298, 406 (D.C. Cir. 1981) (footnote omitted).
  \item \textsuperscript{23} DeMuth & Ginsburg, \textit{supra} note 2, at 1082.
  \item \textsuperscript{24} Exec. Order No. 12,498, \textit{supra} note 15, is the primary vehicle used to ensure coordination among federal agencies. It requires annual submission of an agency’s draft regulatory program, and OMB may evaluate the drafts to ensure there are no duplications or conflicts among agencies. \textit{Id.}, §§ 1,2,3.
  \item \textsuperscript{25} DeMuth & Ginsburg, \textit{supra} note 2, at 1079.
  \item \textsuperscript{26} \textit{Regulatory Program}, \textit{supra} note 9.
  \item \textsuperscript{27} \textit{Id.}, at 1.
  \item \textsuperscript{28} E.O. 12,498, \textit{supra} note 15, § 3(c).
  \item \textsuperscript{29} In promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation, all agencies, to the extent permitted by law, shall adhere to the following requirements: . . . (b) Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society; (c) Regulatory objectives shall
\end{itemize}
mizing the costs and maximizing the benefits of regulations is worthwhile. It also seems intuitively reasonable that having an independent agency assess the benefits and costs of regulations should help ensure that benefits are not overestimated and costs underestimated.

Proponents of White House review also claimed that the process protects the public interest by making agencies more accountable to the public, because "regulation tends to favor narrow, well-organized groups at the expense of the general public." They reasoned that the President, as represented by an office that lacks any program responsibilities, is better able to look at the nation’s interests as a whole, and consider all the potential costs and benefits of the proposed regulatory action. White House review can thus help ensure that agencies fully consider the prospective effects of regulation by subjecting them to a "hard look" before promulgation. According to proponents, White House review restrains agencies from spending too much "through regulations that spend society’s resources but do not appear in the federal government’s fiscal budget," a tendency "reinforced by the public participation in the rulemaking process, which as a practical matter is limited to those organized groups with the largest and most immediate stakes in the results."

E.O. 12,291 clarifies that White House review does not "displac[e] the agencies’ responsibilities delegated by law," and relevant case law leads to the conclusion that the White House lacks the authority to do so. Proponents of White House review emphasized that its role

be chosen to maximize the net benefits to society; (d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; and (e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society . . .

Exec. Order No. 12,291, supra note 8, § 2.

30 DeMuth & Ginsburg, supra note 2, at 1080.
31 Id. at 1082.
32 Id.
33 Id. at 1081.
34 Exec. Order No. 12,291, supra note 8, § 3(f)(3).
35 See Kendall v. United States ex rel. Stokes, 37 U.S. 524, 610-613 (1838). Congress may impose duties upon executive officers, "and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President." Id. at 610; See also Myers v. United States, 272 U.S. 52, 135 (1926). Although the President has an absolute right to remove an executive officer, "there may be duties so peculiary and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance." Id.; and see Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce, 102d Cong., 1st Sess. (1991) (statement of Prof. Cass R. Sunstein, Univ. of Chicago) ("[E]ven a fairly extreme view of the Constitution, allowing presidential displacement [of an executive officer], would not permit the Council [on Competitiveness] to displace agency authority.") Id.
is purely advisory, and that sole authority and responsibility for decisions rested with the agency vested with statutory authority to promulgate the regulation. The White House expected an agency to respond to its questions, and at times suggested changes to regulations. Only the agency, however, could actually change the regulation.

C. The Problems with White House Review

1. White House Review is Inconsistent with its Purposes, as Articulated by its Proponents

In the modern regulatory state, agencies promulgate so many regulations that there clearly is a need for a centralized agency to perform the functions that proponents of White House review claimed as a justification for its existence. As the case studies presented below demonstrate, however, White House review has not actually served these functions.

None of the examples of White House review discussed below involved "coordinating" among agencies to ensure regulatory consistency, although sometimes there was a clear need for coordination, particularly between EPA and DOE. Instead of using its authority to coordinate among competing agencies, in some cases the White House essentially ordered the EPA, the agency with the statutory authority and sole responsibility for promulgating the relevant regulations, to accept the DOE's position. This occurred even though the EPA General Counsel's office determined that the DOE's position was not legally supportable.

It is one thing for the President to use OMB supervision of executive agencies to coordinate the issuance of agency regulations so that they are consistent with congressional statutes; but it is quite another to use the system of OMB control to frustrate or dismantle the very regulatory scheme enacted by Congress.

36 For example, James MacRae, former Acting Director of OIRA, said: "There is a belief here that we muscle [the agencies] into certain things. That is just not true in my view. [EPA Administrator Reilly] hasn't said he was compelled to do something he didn't agree with [in the course of the CAAA regulatory process]. These things are really collegial discussions." Senate Committee Expected to Pass Bill Shedding "Sunshine" on Regulatory Review, 22 Env't Rep. (BNA) 1801, 1801 (Nov. 22, 1991).


38 Morrison, supra note 4, at 1063.
Perhaps more than anything, the people involved in White House review did not attempt to ensure that all regulations were consistent with administration policies. In all of the examples presented below, changes were made to EPA regulations because certain aspects were perceived inconsistent with Bush Administration policies. For example, the Council on Competitiveness declared a proposed recycling rule was inconsistent with the administration's policy of Federalism which "requires agencies to avoid Federal regulations in areas traditionally reserved for State and local government." Assuming the White House has authority to ensure all regulations are consistent with administration policies, surely only high-level political appointees, such as members of the former Council on Competitiveness, should be granted authority to make these determinations. Under the Bush Administration review process, unappointed OMB desk officers and Council on Competitiveness staff were presumed to have a better knowledge of "administration policies" than EPA political appointees. Although the

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39 House Staff Report on the Council on Competitiveness, supra note 11, Att. 9.
40 Some authors disagree with the assumption the President has the legal authority to oversee all activities of the executive branch and to make changes to ensure consistency with administration policies. "[T]here is little evidence . . . that the framers, having just escaped from the oppressive authority of King George, intended to vest implicitly in the President the absolute authority to control activities of the executive branch." Olson, supra note 4, at 15. "Even assuming the Executive Order [12,291] to be an implicit presidential grant of supervisory authority to OMB, may a unilateral presidential action in the domestic arena, unsupported by any legislation, properly vest in OMB the authority to assume decisionmaking discretion Congress clearly has vested in the EPA Administrator?" Id. at 21.
41 "While the Executive Order [12,291] establishes cost-benefit analysis and net benefit maximization as the criteria by which OMB should judge rules, OMB officials admit that their regulatory review can be simply a means of assuring that the rules comply with the 'cosmic presidential policies' as OMB staff see them." Id. at 53.

These staff will also attempt to wrap themselves in the mantle of the President himself, defending their actions by asserting the right of the President himself to supervise his agencies and departments. The fact is, however, that the President is utterly disengaged from this process. For the most part, we see the spectacle of senior Senatorially-confirmed officials — those whom the Congress and the public take to be the decision-makers — being strong-armed by obscure and, relatively speaking, low-ranking White House staff.

The Council on Competitiveness is instructive in this regard. . . . The Council can be asked to hear appeals from agencies whose regulations are being blocked by OMB. While the full Council does meet on occasion, by far the bulk of its work is done by its staff. It is to staff members . . . that EPA's air officials must report and respond in bi-weekly meetings. In practice, when it has met, the full Council has acted essentially as a rubber stamp for the White House staff view. And for public consumption, when the Council overrules EPA the Administrator must adopt its views as though they were his own.\n
Interference in Environmental Regulation by the Council on Competitiveness, the
Council no longer exists, OMB desk officers continue to have primary authority under E.O. 12,291 to review agency regulations.

The central focus of White House review, according to E.O. 12,291, is an objective, cost-benefit analysis of the agency’s draft regulation. In reality, however, cost-benefit tests of the Bush Administration were an effective tool for opponents of stringent environmental or health standards to challenge these regulations under the guise of objectivity. Opponents could claim the costs of the regulations outweigh the benefits, because the costs of controlling pollution are readily quantified, while the benefits are difficult to evaluate in monetary terms.42

Recently, the OMB went even further toward using economic analyses as a weapon against environmental and health regulations. In one situation, the OMB blocked an OSHA regulation limiting worker exposure to toxic chemicals, claiming that the regulation would cause more deaths or illnesses through indirectly reducing people’s disposable incomes than would be saved through decreased exposure to toxic chemicals.43 The policy, written by James MacRae, former Acting Director of OIRA, asserted that each $7.5 million in regulatory expenses would cause one death from lowered incomes. In a meeting with the Senate Government Affairs Committee, MacRae stated that the OMB would use this test broadly across agency regulations, and would reject regulations that cause too many deaths from decreased incomes.44

In spite of the ostensible focus of White House review on cost-benefit analyses, the examples below reveal that cost-benefit analyses were mentioned rarely if at all under the Bush Administration. Instead, White House review focused primarily on political and policy issues.45 Some of these issues, such as the WEPCO debacle discussed below, also could be characterized as cost-benefit issues, not because


42 Most people would agree, for example, that cleaning up a stream is a laudable goal, yet few would agree on the monetary value of the clean stream.


44 Id.

45 White House consideration primarily of political and policy issues is not unique to review of regulations implementing the Clean Air Act Amendments. Several years ago, one author wrote that a “pivotal review criterion is the political impact of the rule .... OMB ‘political antennae’ often pick up strong signals from industry transmitters.” Olson, supra note 4, at 53. Furthermore, White House review tends to “politicize technical issues if only because of the Office’s admittedly anti-regulatory bias.” Id. at 14.
of potential costs to public welfare, but because the proposed regulations involved costs to industry. White House review under the Bush Administration, however, cannot accurately be characterized as a cost-benefit review since in most instances, the White House looked solely at the costs of the regulation, without any indication the benefits were even considered.\footnote{This lack of concern for the benefits of environmental regulation extends beyond review of regulations implementing the Clean Air Act Amendments. Several years ago, one author commented that "if a rule is to be relaxed, OMB often is not concerned with whether the net societal benefits are greater with the rule intact or with the relaxation. Research has not uncovered a single instance of OMB's insistence that EPA maximize net benefits by increasing health or environmental protection." \textit{Id.} at 55.}

Although the White House often expressed concern over the costs of regulation, characterizing White House review as other than a political review is misleading. The issues concerning the White House with respect to CAAA permits and WEPCO regulation (discussed \textit{infra}) were those that generated the most political controversy, both before and after passage of the Clean Air Act Amendments. These issues were debated in Congress, debated again during the agency regulatory process, and then revisited during White House review. The fact the White House took the positions advocated by industry in all of the following examples further illustrates the review was concerned primarily with political issues, not with actual cost-benefit analyses. While it is possible that in many cases industry was correct in arguing that a proposal did not maximize net benefits, it seems unlikely this would be true in all cases. Indeed, in response to the OMB's opposition to an EPA recycling proposal, Representative Waxman, Chairman of the House Subcommittee on Health and the Environment, stated "this rule would pass any imaginable test because the long-term national costs are negative while benefits are positive."\footnote{\textit{Implementation Hearings (Part I), supra} note 1, at 162 (statement of Rep. Waxman).}

Contrary to what its proponents claimed, White House review during the CAAA regulatory process did not protect the public interest, nor did it make agencies more accountable to the public. President Ford, on signing the Government in the Sunshine Act, said, "In a democracy, the public has a right to know not only what the government decides, but why and by what process. . . .[T]he decisionmaking business of regulatory agencies can and should be open to the public."\footnote{Remarks Upon Signing the Government in the Sunshine Act, 3 \textsc{Pub. Papers} 2235-36 (Sept. 13, 1976).} This is the essence of accountability. Nonetheless, the Council on Competitiveness refused to document its contacts with outside
groups.\textsuperscript{49} The OMB has a policy allowing only top officials, not desk officers, to meet with industry or the public. In addition, the OMB is supposed to recommend to members of the public with whom it meets that they submit written comments to the relevant agency. These policies, however, generally have been ignored.\textsuperscript{50} Agencies are required to place the OMB comments in their rulemaking dockets, and possibly as a result, the OMB rarely provides its comments in writing.\textsuperscript{51}

Although the public may not know with whom members of Congress meet, their votes are on the public record. Similarly, the public sees what the president signs into law and what he vetoes. Additionally, the public has an opportunity to comment on all agency proposals, and may view agency dockets for all rulemaking, which must contain all the information needed to sustain the rulemaking. Yet the public had no way of finding out what the White House is doing during the CAAA regulatory process, especially when it made decisions based on \textit{ex parte} contacts or when it internally influenced agency decisions. Decisions at the White House were often made by unelected officials who are not even appointed with the advice and consent of the Sen-

\textsuperscript{49} In response to complaints about the Council’s refusal to document contacts, Jeff Nesbit, former Council spokesperson, said, “We don’t ask Mr. Waxman to discuss his policy discussions with the AFL-CIO or his staff, so I don’t think it’s quite fair for him to ask us to discuss internal White House business.” \textit{Rep. Waxman Assails Quayle Council; Watchdog Groups Call for Director to Quit}, \textit{DAILY REP. FOR EXECUTIVES} (BNA), Dec. 9, 1991, at A19.

\textsuperscript{50} While ostensibly prohibiting staff from meeting with industry, the OMB policy allows staff to discuss “paperwork” requirements, which essentially include many regulatory requirements. Staff are also “encouraged…to review any written material” submitted to OIRA. Contacts with Non-Federal Employees, Memorandum from Jim J. Tozzi, Deputy Administrator, Office of Information & Regulatory Affairs, to Desk Officers, reprinted in \textit{Role of OMB in Regulation: Hearings of the Oversight and Investigations Subcomm. of the House Comm. on Energy and Commerce}, 97th Cong., 1st Sess. 177-78 (1981). OMB policy also requires its staff members to “regularly advise those members of the public with whom they communicate that the relevant factual materials submitted to them should also be sent to the agency for inclusion in the rulemaking record.” David A. Stockman, Director, Office of Management & Budget, Certain Communications Pursuant to Executive Order 12,291 (Memorandum M-81-9) (June 11, 1981), reprinted in \textit{Regulatory Reform Act: Hearings Before the Subcomm. on Admin. Law and Govtl. Relations of the House Comm. on the Judiciary}, 98th Cong., 1st Sess. 971, 980 (1983). OMB lacks a system to monitor whether its staff follows these recommendations. “The Stockman guidelines do not call for any docketing or recording of oral contacts, or of written legal or policy arguments. Only ‘factual materials’ are covered.” Olson, supra note 4, at 62.

\textsuperscript{51} See Peter Behr, \textit{If There’s A New Rule, Jim Tozzi Has Read It; Office of Management and Budget}, \textit{WASH. POST}, July 10, 1981, at A21.
It is hard to see how this process, about which little was known and whose secrecy was scrupulously guarded by the White House, could help make agency regulations more accountable.

White House review does not protect the public interest by ensuring that agencies fully consider the effects of regulation before promulgation. There are relatively few OMB desk officers, and each is responsible for many highly technical regulations. These desk officers usually have backgrounds in public administration or economics rather than in the technical areas involved in the regulations they review. As a result, "the technical complexity of regulatory policy probably forecloses desk officers from being the best forum to make what are in effect unilateral decisions on legislative policy." The shortage of White House staff, both at the OMB and the Council on Competitiveness, and the staff's lack of technical expertise may have actually decreased the objectivity and rationality of decisionmaking. How could overworked desk officers, who lacked technical expertise in their areas of responsibility, protect the public interest and make agencies more accountable to the public?

Contrary to the claims of its proponents, recommendations provided during White House review of the CAAA regulations were only nominally "advisory." In reality, they were orders disguised as advice, and executive agencies were in a very weak position vis-a-vis the OMB. The OMB was and continues to be an extremely powerful agency. Jim Tozzi, former Deputy Administrator of OIRA, once said, "[t]he Government works using three things: money, people, and regulations; the agency must get all three from OMB." To reject the OMB's "advice" would be politically costly for an agency head, especially when all subsequent rulemaking must undergo White House review.

At a speech before the Interagency Regulatory Colloquium at the Department of Transportation in Washington, D.C., on January 28, 1992, Nancy Mitchell, an economist and Associate Director of the Council on Competitiveness, claimed the Council itself had never had a meeting to discuss Clean Air Act policy. Nancy Mitchell, Address at the Interagency Regulatory Colloquium, supra note 9. If that is true, virtually all of the changes discussed below that have been imposed on the EPA have come from the staff level, not from political appointees.

James C. Miller, former OIRA Director, said: "If you're the toughest kid on the block, most kids won't pick a fight with you. The executive order [12,291] establishes things quite clearly." Deregulation HQ: An Interview on the New Executive Order with Murray L. Weidenbaum and James C. Miller III, REGULATION, Mar.-Apr. 1981, at 22.  

Olson, supra note, at 6 (interview with Jim Tozzi, Deputy Administrator, Office of Information and Regulatory Affairs, Wash., D.C. (June 14, 1983)).
Furthermore, E.O. 12,291 provides that an agency may not publish a proposed or final rule, if OMB requests a review of the rule, until the agency has responded to OMB’s comments. Presumably, if the White House keeps commenting, it can delay the rule indefinitely. For example, the operating permits rule was delayed more than seven months past its statutory deadline because of White House review. The WEPCO rulemaking process also illustrates this type of White House “advice.” In May 8, 1991, a memo from Richard Schmalensee of the Council of Economic Advisors, to Bill Rosenberg, then EPA Assistant Administrator for Air and Radiation, stated that the “attached table indicates where and how the current draft must be revised in order to achieve [the Administration’s WEPCO policy].”

Gary McCutchen of EPA’s Office of Air Quality Planning and Standards then wrote to interested persons at the EPA that “in order to meet the commitment made by the Administrator to Michael Boskin, Council of Economic Advisors . . . this rulemaking will not undergo” the normal internal review processes at the EPA.

Although the Council on Competitiveness lacked collateral power over agency budgets, in some ways it had even more power over executive agencies than the OMB. Former Vice President Quayle chaired the Council, and the other six members were all high-level political appointees. Thus, to reject a “recommendation” of the Council would have been political suicide for the head of an agency, who likely would have been forced to resign. Even if the agency head did not resign, he or she would have faced the prospect of having every subsequent regulation subjected to even more intense scrutiny from an even less sympathetic White House. Thus, in deciding whether to reject a “recommendation” of the Council, an agency head had to consider not only the importance of the regulation at issue, but his or her own career and the importance of any other pending regulations that would be reviewed by the White House.

Even members of the White House staff occasionally acknowledged that, in reality, the White House dictated regulatory changes to agencies. James MacRae, Acting Director of the OIRA during the Bush Administration, said, “[w]e get views and I’d like to think we’re as

56 Exec. Order No. 12,291, supra note 8, § 3(f).
57 See infra note 183 and accompanying text.
58 See infra notes 206-239 and accompanying text.
59 Implementation Hearings (Part 1), supra note 1, at 336 (emphasis added).
60 Id. at 342.
61 See supra note 9, for a listing of Council member titles. The Council, with its economic and anti-regulatory bias, was not likely to be sympathetic towards environmental, health, and safety regulations.
smart as those guys [from various other federal agencies] and we figure things out for ourselves . . . . If the agency heads feel they cannot carry out the law, the ethical thing to do is to quit." Former OIRA Director DeMuth once admitted at a congressional hearing that he could not think of any instance when an agency had ignored OMB's "advice." Thus, while agency heads supposedly have the authority to reject White House advice, in reality such advice has rarely, if ever, been rejected.

2. White House Review as it Existed and as it Currently Exists is Unnecessary and Unfair

All of the problems with White House review discussed above have been present since President Reagan issued E.O. 12,291 in 1981. Some of the problems, however, were exacerbated under the Bush Administration's system of White House review. For example, the pressure on agency heads to give in to White House demands increased because of the Council on Competitiveness' political clout. These problems were amply documented by authors throughout the 1980s. The following problems with White House review, however, arose in the later years of the Bush Administration, either as a result of the changing character of White House review or as a result of recent innovations in agency rulemaking.

In developing regulations to implement the Clean Air Act Amendments of 1990, the EPA created an open rulemaking process and sought to involve interested parties to an unprecedented degree. Under the traditional regulatory approach, the White House served as a conduit for industry to convey its views to the agency, often after the publication of proposed rules. Because these views often had not been submitted to the agency for inclusion in the docket for public review and comment, the rulemaking process mandated by the Administrative Procedures Act was effectively circum-

62 Dana Priest, Competitiveness Council Suspected of Unduly Influencing Regulators; Secrecy Foils Senate Panel's Attempt to Probe Vice President's Group, WASH. POST, Nov. 18, 1991, at A19 (quoting James B. MacRae, Jr., Acting Director of Office of Information and Regulatory Affairs).

63 Rep. Collins: When OMB disagrees with an agency and feels that a standard does not comply with the cost-benefit analysis, based on Executive orders, could that agency actually proceed to implement it, or target a standard anyway?

DeMuth: Sure.

Rep. Collins: It could. Do you know of any that have done that?

DeMuth: No. Wait a minute, let me think. No, I think the answer is 'No.'

OMB Control of OSHA Rulemaking: Hearings Before the Subcomm. on Manpower and Housing of the House Comm. on Government Operations, 97th Cong., 2d Sess. 350 (1982).

64 See Olson, supra note 4; Morrison, supra note 4; Jack, supra note 4.

vented. Under the EPA's revised approach, however, members of industry and environmental groups, state and local agencies, and academia were involved early in the process, meeting with the EPA to discuss approaches to implement the CAAA. Under the new approach, these groups reviewed drafts of CAAA rules and articulated their concerns early in the regulatory process, rather than waiting to react to the publication of proposed rules. Thus, to the extent White House review was designed to serve as a vehicle for industry to articulate and advocate its concerns in response to published proposed rules, such a role served no valid purpose under the revised scheme, because these groups already had participated extensively in the EPA rulemaking process. Industry no longer needed the White House as its advocate.

However, the continued availability of White House review actually may have undermined the open rulemaking process EPA established to implement the Clean Air Act Amendments. For example, knowledge of recourse to the White House may have made industry groups less likely to work towards consensus during the EPA's open process. As Representative Waxman noted:

Some commentors, including past supporters of White House review, have argued that if the White House fails to disclose substantive ex parte contacts, it violates the APA. See Clean Air Act Implementation (Part 2): Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce, 102d Cong., 1st Sess. 292 (1991) [hereinafter Implementation Hearings (Part 2)] (Statement of Prof. Cass R. Sunstein, Univ. of Chicago). Nowhere in the APA, however, are ex parte contacts explicitly required to be disclosed. "In notice and comment rulemaking, the APA does not explicitly require disclosure of ex parte contacts. It is therefore possible to think that there are no legal constraints on such contacts. Nevertheless, this is probably an incorrect review of the law." Id.

The Supreme Court has held that judicial review must be based on the full administrative record that was before the agency when it made its decision. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419-20 (1971). Thus, to the extent that ex parte contacts with the White House influence agency decisions, they should be placed in the administrative record; otherwise, judicial review will not be based on the full record that was before the agency. In Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977), however, the court held that undocketed ex parte communications will not automatically invalidate agency rulemakings that do not involve "conflicting private claims to a valuable privilege." Id. at 475 (quoting Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959)). This decision implies that ex parte contacts in rulemakings such as those implementing the Clean Air Act Amendments need not be disclosed. Nonetheless, dicta in the same opinion suggests that the result would be different where those ex parte contacts "materially influenced the action ultimately taken." Id. at 476. The Supreme Court has not addressed the question of whether failure to disclose ex parte contacts that significantly influence agency decisions in an informal rulemaking violates the APA and invalidates the rulemaking. At best, however, the failure of the White House to disclose substantive ex parte contacts is of questionable legality.
[I]f industry can go to Vice President Quayle's Office to seek major weakening changes, even ones that are, I think, in clear violation of the law, then why would they ever want to participate in good faith with EPA in any negotiated rulemaking efforts where they would have to settle for half a loaf?"\(^ {67} \)

In addition, the open rulemaking process meant that all interested parties had a more complete understanding of the issues and resolutions being considered by the agency, and they often knew of actual proposed regulatory language. This knowledge allowed industry to be much more explicit when persuading the White House to recommend changes. Since the White House's comments and recommendations were more detailed and complex, the EPA may have found it more difficult and time-consuming to get its rules out of White House review than it would be in the absence of the open rulemaking process. This may have induced the EPA to abandon or reduce its attempts to achieve greater consensus in the rulemakings through identifying issues early and discussing them with all interested parties. Such an effect would be unfortunate, because this consensus-building rulemaking process should lead to regulations which are more thought-out, rational, and defensible, and which could be implemented more effectively than regulations issued by the agency without any prior discussions with interested parties.

Allowing industry a second bite at the apple, through White House review, is unfair to parties lacking special access to the White House, and undermines the APA's goal of having an open, reasoned rulemaking process.\(^ {68} \) Proponents of White House review claimed that such contacts may be helpful because they enable the White House to ask agencies difficult questions, and in some instances, it may be more appropriate for the White House to meet with outside groups than for agencies to do so.\(^ {69} \) These groups argued that White House contacts with outside groups are irrelevant, even if undocumented, because only information in the docket can be used to support a rule. Thus,

\(^ {67} \) Implementation Hearings (Part 1), supra note 1, at 267.

\(^ {68} \) It's nice that we got [access to the Council on Competitiveness], but I guess that there may be times when we will be concerned about an organization like the Competitiveness Council, which nobody knows a whole lot about and nobody knows who does what to whom there. We don't think you should have to go around the back door to groups that are not out there in the open and who do not function in the substantive area to achieve this kind of objective.


\(^ {69} \) DeMuth & Ginsburg, supra note 2, at 1086. Support for such a view, however, involves contacts with foreign governments, not with industry contacts. Id.
because these contacts have not been docketed, they have no effect.\textsuperscript{70}

The open rulemaking process pursued under the Clean Air Act Amendments shows that reality is closer to what opponents of White House review claim: undocketed \textit{ex parte} contacts "impede public participation, reasoned and accountable decisionmaking, and meaningful judicial review," and may cause "the extensive APA informal rulemaking procedures designed to ensure meaningful public participation in rulemaking [to] become mere window dressing."\textsuperscript{71} One example is the CAAA permits proposal,\textsuperscript{72} wherein the EPA conducted extensive discussions with all interested parties, including industry, state and local agencies, and environmental groups. The EPA concluded, based on its consultations, that the "minor permit amendment" advocated by industry was not appropriate. The industry arguments apparently persuaded the White House, however, and the issue was revisited during White House review. As a result, the EPA eventually changed the proposal to include the industry view. Thus, in some ways, the open rulemaking process conducted before White House review was meaningless. All the input provided to the EPA by interested parties was superseded by the influence industry exerted through the White House.

3. The Past and Current White House Review Processes are Inefficient

In the 1980s, when only the OIRA conducted regulatory review, delay was a common occurrence. Such delay was aggravated under the Bush Administration, where regulations such as those implementing the CAAA underwent review by both the OIRA and the Council on Competitiveness, usually at the staff level. In addition, the Council of Economic Advisors sometimes became involved in reviewing regulations, as did the DOE. This multi-tiered review greatly lengthened the entire regulatory review process.\textsuperscript{73} All these groups conducted

\textsuperscript{70} \textit{Id.}

\textsuperscript{71} Olson, \textit{supra} note 4, at 31.

\textsuperscript{72} \textit{See infra} notes 123-199 and accompanying text.

\textsuperscript{73} This multi-tiered review process also makes it more likely an agency had to make more concessions before it could propose or promulgate its rules, because each group (OIRA, the Council on Competitiveness, the Council of Economic Advisors, and even DOE) may have sought different concessions before it released the rule from White House review. In addition, more concessions may have been made because of the time spent negotiating with multiple groups. For example, an agency may have modified its rule to satisfy what it believed were all the OIRA's concerns. While the agency negotiated with the Council of Economic Advisors, however, OIRA might have found other aspects of the rule it felt unsatisfactory, and may have sought additional rule changes from the agency.
essentially the same review with no clear delineation of authority, yet the EPA was forced to respond to all their concerns. It is plain to see why it is inefficient to have three or four different groups conducting essentially the same review.

As discussed, both the OIRA and the Council on Competitiveness claimed authority to review regulations under E.O. 12,291. E.O. 12,291 sets deadlines for review — sixty days for major rule proposals,74 thirty days for final major rules,75 and ten days for non-major proposed and final rules76 — but it allows the Director of the OMB to request an extension.77 There is virtually no time limit on White House review, however, once an extension has been granted. For example, E.O. 12,291 provides that “[u]pon receiving notice that the [OMB] Director intends to submit views with respect to any . . . final rule, the agency shall . . . refrain from publishing its . . . final rule until the agency has responded to the Director’s views, and incorporated those views and the agency’s response in the rulemaking file.”78 Although E.O. 12,291 provides that rules shall not be delayed beyond statutory or judicial deadlines,79 in reality, statutory deadlines were routinely ignored by the White House. For example, as a result of White House review, the Title V operating permits regulations missed their statutory deadline under the Clean Air Act Amendments by over seven months, despite the Acting Director of OIRA’s explicit promise that the rule would not be held beyond its statutory deadline.80 Generally, the White House would claim the rule was delayed because the EPA had not provided the White House with responses to its inquiries.81

74 Exec. Order No. 12,291, supra note 8, § 3(c)(2).
75 Id.
76 Id., § 3(c)(3).
77 Id., § 3(f)(1).
78 Id., § 3(f)(2).
79 Id., § 8(2).
80 Rep. Sikorski: Mr. MacRae, the White House’s favorite weapon is delay, if not ambiguity of terms and some grant of informal grant of authority. If you don’t like an agency’s rule, you don’t have to kill it officially, you can sit on it indefinitely. . . . I want your assurance that this will not happen to the permit rule or to any other rules under the new Clean Air Act. Will you commit to us that OMB will not hold any regulations past their due date under the new Clean Air Act?

Mr. MacRae (Acting Director of OIRA): Absolutely.

Implementation Hearings (Part 1), supra note 1, at 266-67.
81 For example, the following exchange took place regarding a hazardous waste rulemaking that was undergoing White House review:

Rep. Waxman: Mr. MacRae, let me turn to the hazardous waste rulemaking. We have already waited a year and a half for that regulation and you have told Mr. Sikorski you are not going to hold up regulations. When will that be cleared from OMB?
A delay in issuing regulations would be worthwhile if, as proponents of White House review claimed, "the minor costs resulting from briefly delaying the implementation of regulations that OMB ultimately approve[d] as cost-effective . . . [were] a small price to pay for avoiding the huge costs of issuing ill-considered regulations."82 White House review of regulations implementing the Clean Air Act Amendments, however, tended to rehash debates already discussed at length during the open rulemaking forum.83 For example, White House review of the Title V permits rule focused on, among other things, operational flexibility and minor permit amendments. These provisions were discussed at length during the EPA's roundtable process, and operational flexibility was also discussed at length during the legislative debate.84 Thus, for the operating permits rule, the focus of White House review was on topics that could hardly be called "ill-considered," whether or not one agrees with the ultimate result the agency reached.


Mr. MacRae (Acting Director of OIRA): There have been active and ongoing discussions between us, OMB, and EPA, with regard to this rulemaking, and it is my understanding that the EPA will be coming forward shortly — I don’t know when exactly — but shortly with what they — the response to some recommendations we have made.

Rep. Waxman: But your position is not being held up at OMB? Is it EPA that is holding this up?

Mr. MacRae: I would not say —.

Rep. Waxman: Are you waiting for EPA to finally give in to OMB?

Mr. MacRae: EPA is holding it up. I think that they are acting rapidly on it. This is also a very complicated rule, too.

Id. at 271.

82 DeMuth & Ginsburg, supra note 2, at 1088.

83 White House review tended to rehash debates prior to passage of the CAAA as well. According to C. Boyden Gray, former member of the Task Force for Regulatory Reform and White House Counsel, in 1981:

If you go to the agency first, don’t be too pessimistic if they can’t solve the problem there. If they don’t, that is what the Task Force is for. We had an example of that not too long ago. . . . [L]awyers representing the individual companies and trade associations showed up and I asked if they had a problem. They said they did and we made a couple of phone calls and straightened it out, alerted the top people at the agency that there was a little hanky panky going on in the bottom of the agency, and it was cleared up very rapidly. So, the system does work if you use us as sort of an appeal. You can act as a double-check on the agency that you might encounter problems with.


84 See infra notes 123-199 and accompanying text.
White House review increases the time and cost involved in issuing regulations. Regulatory Impact Analyses, as required under E.O. 12,291, are time-consuming and expensive. White House review alone adds time to the regulatory process, and the more groups conducting the review, the greater the delay. Furthermore, it can be expensive for the EPA to conduct the analyses required to respond to White House requests for information. The time and money spent would be worthwhile if convincing evidence proved that White House review maximizes the net benefits of regulations. The evidence, however, is far from clear.

In 1983, the OMB asserted that its regulatory review saved the American public over ten billion dollars by requiring regulations to meet cost-benefit standards. Interestingly, twenty percent of the regulations OMB reviewed were from the EPA. The OMB's estimates, however, do not consider the costs of failing to implement the environmental controls that the OMB stopped or delayed. Nor did the estimates include the cost of government resources needed to conduct Regulatory Impact Analyses or the cost to redraft rules in response to White House comments. Criticism of the OMB's methods for calculating savings achieved through E.O. 12,291 elicited reluctant admissions from OIRA's former Administrator that estimates "were mainly from industry sources," that estimates did not consider benefits of the regulations in place, and that, on the whole, "[i]t is conceivable" that OMB's regulatory reform efforts may have saved nothing and may have cost the American public.

As one critic put it:

The Administration has principally used the system of OMB review created by the Executive Orders [12,291 and 12,498] to implement a myopic vision of the regulatory process which places the elimination of cost to industry above all other considerations. In doing so, however, the Administration has imposed a significant price on the public resulting from the delay it causes in adoption of needed protections. . . . Although insisting on least-

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85 See Exec. Order No. 12,291, supra note 8, § 3(a).
87 Id.
88 Olson, supra note 4, at 41 (quoting Role of OMB in Regulation, supra note 50, at 114-15).
cost solutions for industry, the Administration’s program produces greatest-cost solutions for government. In deciding whether to undertake the elaborate regulatory analyses required by the first Executive Order [12,291], there is no indication that the Administration considered a cost-benefit analysis of this process — even though the costs of the documents required by the Order have been estimated at several hundred thousand dollars each. Similarly, the vast amount of additional resources spent in justifying proposed regulations to OMB, as well as in obtaining the necessary OMB clearance to undertake the studies needed to decide whether to begin work on a problem in earnest, are all burdens on the federal treasury, yet there is no indication that these costs have been balanced against the benefits to be derived from this complex labyrinth of OMB overlay.\(^8^9\)

White House review does not achieve its purported purposes. It unnecessarily impedes agencies’ open rulemaking process, and allows certain privileged parties a second bite at the apple, while denying other parties the same. The process is inefficient, requiring the EPA to respond to numerous groups which have each conducted essentially the same review, and merely rehashes debates that have already been presented to the EPA, Congress, or both. The process is expensive, yet there is no convincing documentation that the benefits of the review have outweighed the costs. Viewed in this light, the process of White House review as it stands is a failure.

### II

**The Realities of White House Review: Case Studies**

#### A. Introduction

The White House has been extensively involved in the activities undertaken by the EPA to implement the Clean Air Act Amendments, and has significantly influenced other environmental regulations as well.\(^9^0\) The following examples show that White House review extends

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90. The EPA is not the only federal agency whose actions have been subject to intense pressure from the White House. Activities of the Food and Drug Administration (FDA) have also been heavily scrutinized. For example, on November 21, 1991, the FDA turned over documents pursuant to a subpoena from the House Subcommittee on Human Resources and Intergovernmental Relations. The Subcommittee was concerned that the Council on Competitiveness had been improperly influencing the agency. Dana Priest, *Competitiveness Council Under Scrutiny: Critics Charge Panel Lets Industry Exert Back-Door Influencing on Implementing Laws*, *WASH. POST*, Nov. 26, 1991, at A19.
far beyond merely analyzing the costs and benefits of regulatory action and coordinating among agencies. These examples also illustrate how the White House role does not protect the public interest or ensure accountability. Rather, these examples demonstrate how White House review influenced the EPA to make radical departures from earlier policies without adequate explanation. Often, the circumstances surrounding policy changes were unclear, but there were suggestions that the regulatory review groups at the White House were influenced by either their own views of what the policies should be, or by arguments from industry groups, rather than by legitimate cost-benefit analyses.91

1. Recycling

While a candidate for President, George Bush stated that “Japan’s recycling rate is 50 percent, yet some feel that the EPA’s national goal of 25 percent reduction in waste is excessive. I’d like to see us exceed that goal in my first term.”92 However, the Bush Administration failed to live up to this goal.

In November, 1989, the EPA proposed its municipal waste combustor rule.93 The proposal required municipal waste combustors to separate and recycle at least twenty-five percent of their waste. Municipal waste combustors would be free to decide which portions of their waste stream would be recycled, whether it be newspapers or scrap metal. The proposal provided that a municipal waste combustor could be exempt from the regulation if it showed that there was no local market for the recycled product, and that the costs of recycling exceeded the costs of incinerating. However, the EPA’s final rule did not include the recycling requirement.94 According to a fact sheet put out by the Council on Competitiveness, the source separation requirement was “not consistent with several of the Administration’s regulatory prin-

91 Cost-benefit analysis can be a useful tool, but it is also susceptible to misuse. For example, it can be very effective for devaluing environmental, health, and safety regulations, because the costs of controls often can be quite high and can be estimated accurately, while the less-tangible benefits can be very difficult to quantify. Thus, under the guise of objectivity, opponents of environmental, health, and safety regulations can claim that the regulations simply do not meet cost-benefit standards.


ciples," the "principle of Federalism" embodied in E.O. 12,612, and the cost-benefit requirements laid out in E.O. 12,291. The administration provided no further explanation.

2. Lead Acid Batteries

The municipal waste combustor proposal also contained a ban on the incineration of lead acid batteries, the type commonly used in cars. These batteries are a significant source of lead, a heavy metal which causes adverse human health effects. The EPA's final rule did not contain a ban on incineration of lead acid batteries, reportedly because the Council on Competitiveness opposed it. The preamble to the final rule stated that:

EPA has decided not to adopt the proposed prohibition on burning lead acid batteries. Although many commentors supported the proposal, others questioned whether it was possible to achieve 100 percent compliance with the prohibition. In considering these comments, it is EPA's view that, although lead acid batteries are certainly a significant source of lead in MWC [municipal waste combustion] emissions, there are already strong regulatory mechanisms in place to discourage combustion of lead acid batteries. In particular, [another regulation] requires municipal waste combustors to have in place inspection procedures to avoid accepting hazardous waste as a condition of being exempt from [additional] regulation. This requirement would apply to lead acid batteries generated from commercial and industrial establishments, which typically are hazardous wastes. Given this existing system (corroborated by many industry commentors who have stated they already seek to remove all lead acid batteries from MSW [municipal solid waste],

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95 One area of the proposed rule which was contrary to the administration's regulatory agenda was the use of performance rather than design standards. A design standard, for example, would require a plant to install a certain piece of pollution control equipment, such as a scrubber on a smokestack. A performance standard, in contrast, would require a plant to achieve a certain level of pollution reduction, but would allow the plant to determine the most cost-effective way to make the reduction. The recycling requirement thus could be viewed as a performance standard because it mandated a certain percentage of waste to be recycled, but allowed the plant flexibility to determine how and what to recycle.

96 President's Council on Competitiveness Fact Sheet (Dec. 19, 1990), reprinted in Implementation Hearings (Part 2), supra note 66, at 381. Some members of Congress, including Representative Waxman, alleged the Council on Competitiveness killed the recycling requirement as a result of Vice President Quayle's financial holdings in two newspaper companies, one which opposed the recycling requirement, and one which did not use recycled materials to produce its paper. See generally HOUSE STAFF REPORT ON THE COUNCIL ON COMPETITIVENESS, supra note 11.

the Agency does not believe that a further prohibition is necessary.\textsuperscript{98}

Household batteries, however, are not subject to regulation and remain a major source of lead. On September 17, 1991, the administration announced "it was canceling its efforts to require recycling of [all] lead batteries."\textsuperscript{99}

3. The Grand Canyon

Environmentalists believe that emissions from the Navajo Generating Station, in Page, Arizona, contribute to visibility problems at the Grand Canyon National Park. After ten years of lawsuits between industry and environmentalists, the EPA submitted a proposal to the White House to apply special pollution controls, called best available retrofit technology (BART), at the plant. The proposal would have required a ninety percent reduction in sulfur dioxide (SO\textsubscript{2}) emissions from the plant.\textsuperscript{100} On February 8, 1991, the EPA proposed the Navajo plant achieve a seventy percent reduction in SO\textsubscript{2} emissions, and requested comments on fifty and ninety percent control levels.\textsuperscript{101} The change from ninety to seventy percent control technology reportedly was imposed by the Council on Competitiveness.\textsuperscript{102} According to the EPA's cost-benefit analysis, however, the ninety percent control requirement would have been more cost-effective than the seventy percent requirement.\textsuperscript{103} Following the EPA's proposal,

\textsuperscript{99} Implementation Hearings (Part 2), supra note 66, at 4.
\textsuperscript{100} Sulfur Dioxide Emission Reduction Plan for Grand Canyon Utility Accepted by EPA, 22 Envr't Rep. (BNA) 1340, 1340 (Sept. 20, 1991).
\textsuperscript{102} "The original EPA rule would also have reduced sulfur dioxide emissions by 90%. But the President's Council on Competitiveness, chaired by Vice President Dan Quayle, alleged that the cost would be too high, the White House said at the time." Sulfur Dioxide Emission Reduction Plan for Grand Canyon Utility Accepted by EPA, supra note 100, at 1340.
\textsuperscript{103} Representative Henry Waxman stated:

EPA's analysis indicated that 90 percent emissions control would produce some $220 million to $330 million dollars per year in benefits. EPA also estimated that the benefits of the less stringent, 70 percent control option would be $100 million to $190 million per year. Finally, EPA estimated that the added annual cost of taking the more stringent, 90 percent control option over the 70 percent control option is $8.2 million. If we put these numbers together, for $8.2 million more in costs, the 90 percent control option yields more than $100 million per year in added benefits, so you would expect that we would find that the 90 percent control option would be right up the alley of the guys at OMB and the Council on Competitiveness, who supposedly live and die for cost-effectiveness, but that is not the way it happened. They came back and sent comments to EPA that never even mentioned cost-effectiveness and instead, focus on technical issues clearly beyond their expertise as economists and beyond the stated mission of their review. There was never a response to EPA's detailed rebuttal.

industry and environmental groups put together a compromise proposal that would reduce sulfur dioxide emissions by ninety percent, but lengthened the averaging period for compliance, thereby reducing the control costs. It was this compromise that EPA finally adopted in September 1991.

In announcing the final compromise at the rim of the Grand Canyon, George Bush stated "our administration has crafted a new common-sense approach to environmental issues, one that honors our love of the environment and our commitment to growth." In this case, the final rule contained a more stringent limit than the proposal, but only because industry and the environmental groups were able to agree on a compromise. President Bush claimed the Grand Canyon rule as a victory for his administration, but in reality, without the industry-environmental group compromise, the final rule probably would have contained the less stringent limitation.

4. Acid Rain

The acid rain requirements of the Clean Air Act Amendments require the utility industry to make massive reductions in sulfur dioxide (SO\(_2\)) emissions. The CAAA creates a market-based system for sources to reduce SO\(_2\) emissions in the most cost-effective manner possible, and requires accurate emissions monitoring to ensure the mandated reductions are achieved.

To help implement the program, the EPA formed the Acid Rain Advisory Committee (ARAC), consisting of forty-four members from industry, environmental groups, state air pollution control agencies, state public utility commissions, academia, labor, and pollution control equipment vendors. The ARAC met regularly before the acid rain rules were proposed and once afterwards, and in between meetings, members exchanged issue papers and participated in numerous conference calls. The EPA used the Committee to identify and resolve

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104 According to one source, the "industry-environmentalist agreement was three times tougher than a proposal put together by EPA in February, and at a lower cost than the 1991 proposal." Sulfur Dioxide Emission Reduction Plan for Grand Canyon Utility Accepted by EPA, supra note 100, at 1340.


106 Sulfur Dioxide Emission Reduction Plan for Grand Canyon Utility Accepted by EPA, supra note 100, at 1340.

107 See 42 U.S.C.A § 7651.

108 Id., § 7651b.

109 Id., § 7651k.

110 EPA Press Office Announcement (Nov. 27, 1990), reprinted in Implementation Hearings (Part I), supra note 1, at 16.
contentious issues before it wrote the proposed acid rain rules.111

The EPA then transmitted the draft proposed rules to the White House for interagency review on June 21, 1991. The White House held the rules for over four months, rather than the sixty days allowed under E.O. 12,291, making it nearly impossible for the EPA to meet its statutory deadline for promulgation.112 On October 16, 1991, Allan Hubbard, then Director of the Council on Competitiveness, chaired an interagency meeting on the acid rain monitoring proposal.113 Following this meeting, the EPA relaxed its provisions for calculating emissions when monitors are not functioning properly (i.e. "missing data"), in spite of the recommendations in a memorandum by the EPA staff which showed that if the EPA used an alternative method for estimating missing data — a ninetieth percentile approach rather than the highest value approach — there would be an incentive for sources to turn off their monitors when operating at maximum capacity.114

The previous summer, at least one utility had recommended that the

111 The ARAC is one significant tool which we are using in an attempt to break the pattern of promulgation/litigation which has characterized the implementation of environmental legislation over the past decade. This Committee, and continuing discussions with other interested individuals, has helped us to identify issues associated with implementation of the acid rain provisions, and address those issues in a fully informed manner. Id. at 143 (statement of William Rosenberg, Assistant Administrator for Air and Radiation, EPA).

112 The draft proposed rules were released by OMB at the very end of October, and were signed by the EPA Administrator on October 31, 1991. Publication in the Federal Register took over four weeks, until December 3, 1991, because of the length of the package. See 56 Fed. Reg 63,002 (1991). Thus, EPA's 60-day comment period on the rules did not end until February 12, 1992. This left EPA only three months and three days to respond to over a thousand comment letters, and to write the final rule and preamble language. In addition, the EPA was to allow the White House thirty days for interagency review prior to promulgating final rules. Thus, EPA really had only two months to complete its review of comments and final rule writing, an almost impossible task. As a result, the final acid rains were not published until January 11, 1993. 58 Fed. Reg. 3590 (1993) (to be codified at 40 C.F.R. pts. 72, 73, 75, 77, 78).

113 Allan Hubbard has been accused of at least an appearance of conflict of interest as a result of his role in changes to the proposed acid rain rules. Hubbard owns between $15,000 and $50,000 in stock (approximately 1000 shares) in PSI Energy, one of the largest and most polluting electric utility companies in the country. He has also been accused of a conflict of interest because of his role in changes to the Title V permit rule, because he owns over $250,000 in stock in a chemical company that would have been affected by those rules. See generally STAFF OF SUBCOMM. ON HEALTH AND THE ENVIRONMENT OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 102D CONG., 1ST SESS., REPORT ON APPARENT CONFLICT OF INTEREST IN COUNCIL ON COMPETITIVENESS REVIEW OF EPA ACID RAIN RULE (Comm. Print 1991); see also HOUSE STAFF REPORT ON THE COUNCIL ON COMPETITIVENESS, supra note 11, at 2.

EPA relax its missing data procedures because they were "punitive" and would result in an overestimation of emissions. At that time, the EPA did not accept the suggestion; it believed the missing data regime would ensure sources kept their monitors operating as much as possible, without incentives to turn off monitors and estimate emissions.

5. Nitrogen Oxides

The White House was also extensively involved in the development of regulations to implement the nitrogen oxides (NO\textsubscript{x}) provisions of the Clean Air Act Amendments. The EPA planned a regulatory-negotiation ("reg-neg") process to develop these regulations, chose members for the reg-neg effort, and scheduled a meeting for June 11-12, 1991. Then, on June 7, 1991, the EPA announced it was canceling the regulatory-negotiation. Reportedly, the OMB was responsible for instigating the cancellation.


\[\text{\textsuperscript{117}}\text{ In a regulatory-negotiation, or "reg - neg" process, parties likely to be affected by the rule are identified, and representative parties are asked to participate and negotiate the actual regulatory language. The goal of a regulatory-negotiation is to arrive at consensus on regulatory language. Because the actual rule language is agreed upon by the participants, the White House plays a diminished role in review of regulations that have gone through the regulatory-negotiation process. The Administrative Conference of the United States holds that once participants in a regulatory negotiation achieve consensus, the agency should publish the negotiated text as a proposed rule, and if the agency makes any changes to the text, it should explain why. Admin. Conf. of the United States, Procedures for Negotiating Proposed Regulations (Rec. No. 82-4), reprinted in WALTER GELLHORN ET AL., ADMINISTRATIVE LAW 346 (8th ed. 1987). Presumably, the agency would need a very good reason for not publishing the text as negotiated. For example, if the general counsel did not believe the rule was legally sustainable as negotiated, changes would be justified. As a result, it is much more difficult for the White House to change a reg-neg proposal, and some of its control over the rulemaking process is lost.}\]

\[\text{\textsuperscript{118}}\text{ Reg-Neg for NO\textsubscript{x} Scrapped; EPA, Environmentalists Point Finger At OMB, INSIDE EPA, June 14, 1991, at 1.}\]

\[\text{\textsuperscript{119}}\text{ In a major blow to EPA's consensus approach to new regulations under the Clean Air Act, a negotiated rulemaking effort for nitrogen oxide emissions was scrapped last week, dismaying both EPA staff and environmentalists who attribute its failure to the Office of Management & Budget. These sources point out that a negotiated rulemaking — which involves all affected and outside interest groups in the crafting of a regulation — is not subject to the same OMB oversight; therefore, under such an approach OMB would not control a rule's development as much as it usually does. But OMB must approve such a process before it can formally begin, and in this case it has elected not to, derailing the plan just days before it was to begin.}\]

\textit{Id.}
According to trade press reports, in January 1992 the Council on Competitiveness decided to review the EPA's progress on the NO\textsubscript{x} proposal — even though no proposed regulatory language had been written yet and no internal agency review processes had been completed. While the EPA argued for more effective control technology, the Council and the DOE supported a less stringent — and less costly — alternative. After over ten months of disagreement, the EPA proposed a rule containing both options.

The two major case studies presented below — Title V of the Clean Air Act (operating permits) and WEPCO — clearly show the interaction between the White House and the EPA during the Bush Administration, and illustrate some of the more onerous abuses of White House review. The issues presented in each case study illustrate different problems associated with White House review. A clear trend in both examples, however, is that the White House exerted substantial influence over the policy decisions made in both rules.

These case studies demonstrate how White House review was inconsistent with its ostensible purposes. They show the White House indefinitely delayed regulations which did not meet its political agenda, even when statutory deadlines mandated the rules' release. These examples also show how the White House review team rehashed old debates and directed the EPA to make certain policy decisions, even when the EPA believed such decisions were legally unsupportable. While there is no direct evidence of ex parte contacts influencing White House review in these cases — because the White House did not keep or would not divulge records of these contacts — the tenor of the White House arguments strongly suggests ex parte contacts did

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120 White House Council on Competitiveness to Examine EPA's CAA NO\textsubscript{x} Rule, INSIDE EPA, Jan. 3, 1992, at 1.

Industry sources are hopeful that the Council's review will benefit utilities because DOE will have major input. "DOE's views appear to be prevailing over EPA's," an industry source says, adding that this may result in a strong Council statement opposing [EPA's] outline. . . .

Environmentalists say the Council's involvement is highly unusual at such an early stage of the rulemaking process and will probably result in a weaker final rule. One environmentalist calls it "outrageous" that the Council is reviewing "outlines" of a rule before the proposal has even cleared agency review. "The Council staff are setting themselves up as EPA's new [Air Office] Assistant Administrator" this source says, adding that "obviously in this case, the Council is strangling the baby in the crib."

Id. at 8.

121 Environmental Groups Challenge New EPA to Tighten NO\textsubscript{x} Controls, UTIL. ENV'T REP., Feb. 19, 1993, at 7.

occur. Even with the abolition of the Council on Competitiveness, these case studies illustrate why White House review must be reformed to promote a more open, reasoned, and efficient rulemaking process.

B. Title V of the Clean Air Act - Operating Permits

Although Title V itself does not impose emissions reductions standards, it is in some ways the most important part of the Clean Air Act. Prior to the 1990 Amendments, emissions standards that applied to an individual source were often scattered among any number of documents, including regulations promulgated by both the states and the EPA. As a result, it was often difficult to ascertain what standards applied to an individual source, making compliance and enforcement efforts cumbersome.

Title V attempts to solve this problem by creating a federal operating permit program. Congress modeled Title V after the Clean Water Act permits program, and as a result, most sources of air emissions are required to obtain an operating permit. These permits will articulate all CAA requirements that apply to a particular source, including emissions standards, monitoring and reporting requirements, and operation and maintenance requirements. The permit program's purpose is to help sources know which requirements apply to them, and to enable the EPA, the states and the public to accurately assess compliance with the Act.

1. The Legislative Debate

Senator Chafee introduced the Bush Administration bill, S.1490, which included a permits title, in the Senate on August 3, 1989. Representative Dingell introduced a companion bill, H.R.3030, in the House on July 27, 1989. Another clean air bill, S.1630, was introduced by Senators Baucus and Chafee on September 14, 1989. The bill reported out of the Senate Subcommittee on Environmental Protection of the Committee on Environment and Public Works consisted of S.1630, and portions of the Administration bill, S.1490. Although the Senate initially considered the bill during the second session of

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123 42 U.S.C.A. § 7661. When the Clean Air Act Amendments of 1990 were passed, numerous states already had permit programs in place, though some were only construction permit programs, while others were operating permit programs.


125 See 42 U.S.C.A. §§ 7661a.c.


the 101st Congress, it delayed floor debate from February 1, 1990, until March 5, 1990, while senators, the administration, and lobbyists negotiated on various aspects of the bill.129

Industry opposed the administration's proposed permit provision, expressing concern that the permits title was based on an improper analogy to the Clean Water Act permits provision. It argued that wastewater could be collected in a central location and discharged from a limited number of discrete outfalls, each with individual permit requirements. In contrast, air emissions may occur from hundreds of locations at a given source, and setting individual requirements for each emissions point would prove exceptionally burdensome on both the source and the permitting authority. Industry feared that minor operating changes at a particular source would trigger a time-consuming permit revision process involving public notice and comment. When required in the past, these changes had taken as long as eighteen months to be approved. Industry was concerned that such a system would prevent them from making needed operational changes in a timely manner, and hamper their competitiveness in world markets.130

While the Senate reached agreement on other portions of the bill during the delay in the floor debate, it could not reach consensus on the permitting provisions. During the floor debate at the end of March 1990, Senators Dole (R-Kan), Nickles (R-Okla.), and Heflin (D-Ala) offered an amendment that completely replaced the permitting and enforcement titles of S.1630.131 The amendment allowed sources greater flexibility to change their permit requirements without going through public notice and comment.132 The amendment was "strongly supported by industry representatives, and strongly opposed by representatives of state air pollution control authorities and environmental groups."133 Interestingly, the Bush Administration supported the amendment, despite the fact its original permitting and enforcement proposals had been adopted essentially without change by the Senate


130 Id. at 10,182-83. In contrast, environmental groups were "concerned that industry would use the arguments over the need for flexibility and protection [from citizen's suits] as a means to transform the permit requirement into a device for avoiding applicable requirements of the Act." Id. at 10,183.


132 Id. at S3212-13.

133 Roady, supra note 129, at 10,181 n.11.
Environment and Public Works Committee.\footnote{134}

The Senate came very close to passing the amendment. A motion to table the amendment following several hours of debate was defeated by one vote.\footnote{135} The amendment was then defeated following a vote on the merits, again by one vote.\footnote{136} The amendment, slightly modified, was reconsidered just before final passage of the bill. On April 3, 1990, the amendment was again defeated by one vote.\footnote{137} Thus, the final Senate bill contained the original permit proposal (as modified during the February-March negotiations), which was still supported by Senators Baucus and Chafee, but no longer supported by the Administration.\footnote{138}

The House version of the permits title varied in some respects from the Senate bill. Most significant were differences between the bills’ operational flexibility provisions. The Senate bill required operating permits to include all reasonably anticipated operating conditions identified by the applicant. Emissions limitations, monitoring, and other requirements would be set for each specific operating condition, and the permit would authorize the facility to operate under these different operating conditions. The bill also authorized shifts in emissions among different sources within a facility without requiring a permit revision, “as long as the changes were authorized by the permit, the facility provided thirty days written notice of the proposed change, and the changes did not increase the rate of emissions or the total emissions allowed under the permit.”\footnote{139}

The House bill did not require permits to contain reasonably anticipated operating conditions. Instead, it specified that no permit revision would be needed for changes at a facility, if changes “did not constitute ‘modifications’ under Title I of the Act, and if the changes did not exceed the emissions allowable under the permit . . .”\footnote{140} The

\footnote{134}{This amendment was offered following the breakdown of discussions between representatives of the Committee on Environment and Public Works and representatives from the Administration and other interested groups — discussions that were conducted informally at the same time as the negotiations on the balance of the bill were underway in the office of the majority leader. Those discussions resulted in a number of modifications in the permit and enforcement provisions of S. 1630, but the changes were not sufficient to persuade the Administration to embrace those provisions as modified.}


\footnote{136}{See id. at 136 S3240.}


\footnote{138}{Roady, supra note 129, at 10,181 n.11.}

\footnote{139}{Id. at 10,187.}

\footnote{140}{Id. A “modification” under Title I includes either relatively major changes in equipment or processes at the source, or significant increases in emissions. 42 U.S.C.A. § 6411(a)(4).}
The Clean Air Act Amendments of 1990

Bill required facilities to provide the permitting authority with advance notice of operational changes. 141

A conference committee resolved differences between the two bills' permits titles during August and September of 1990, 142 and arrived at a compromise provision on operational flexibility. Like the House bill, the compromise allowed changes that were not "modifications" under Title I without a permit revision. Like the Senate bill, it required that the changes not increase either the total rate or the total tonnage of emissions. The agreement also included a requirement of advance written notice, but the notice period was shortened from the thirty days required under the Senate bill to seven days. 143

2. Post-Passage: The Pre-Proposal Process

Following passage of the Act on November 15, 1990, the EPA convened a permits "roundtable." 144 The roundtable included representatives from industry, state and local agencies, environmental groups, and other organizations, and many of the participants had been involved in the legislative debates on the Act. The EPA used the roundtable process as a supplement to the APA-mandated public notice and comment rulemaking process, to "bring together parties on all sides of controversial issues so that the EPA understands the perspectives of interested parties on as many issues as possible before [proposing] regulations." 145 Wherever possible, the EPA used the roundtable process to try to build consensus among the parties before publishing a proposed rule. 146 The EPA freely shared its conceptual approach on

141 Id.
142 Id. at 10,182.
143 Id. at 10,187-88.
144 The roundtable was similar to the Acid Rain Advisory Committee (ARAC), but meetings were much smaller and less formal. Unlike a regulatory negotiation, the goal of the roundtable was not to reach consensus on actual regulatory language; rather, the group was charged with the task of identifying and, where possible, resolving contentious issues affecting implementation of the program.
145 Implementation Hearings (Part I), supra note 1, at 127 (statement of William Rosenberg, Ass't Admin., Office of Air & Radiation, EPA)
146 The EPA found the roundtable process to be a valuable one: Involvement of this [roundtable] group was critical to obtain a better balanced dialogue on Title V in order to obtain the broad-based perspective essential to implementing this comprehensive program. Feedback from this group was perceived as an important real-world calibration of that part of the new statute which received limited legislative debate in order to promote better, more effective rules with less chance to become ensnared in litigation that would jeopardize the implementation of this critical program. While the objective of this activity was not to reach consensus, it did serve to provide EPA with extremely valuable insight — first from a conceptual standpoint, and later from more specific comments received on draft language.

Id.
operating permits with the roundtable to obtain more useful feedback. Later, actual drafts of regulatory language were circulated, and subsequent roundtables included discussions on possible changes to the draft rule.\footnote{In some ways, the roundtable process may have hurt the EPA. Usually, EPA does not share copies of its draft regulatory language with any outside entities prior to publication of a proposed rule (although the trade press often manages to obtain and leak certain inside information). As a result, interest groups that wish to press their case with the White House can only talk in terms of general regulatory concepts; they cannot propose changes to specific regulatory language. The Title V roundtable process, in contrast, resulted in all interested parties obtaining copies of the draft regulation that went to the White House for review. Thus, parties who felt that the proposal did not adequately address their concerns would have been able to approach White House staff with actual language changes to the draft regulations. While there is no evidence in the public record that any groups did so, the White House’s recommended changes make this a clear possibility.}

Nonetheless, the issue of operational flexibility continued to be controversial. Industry supported provisions allowing maximum operational flexibility while environmental groups, and state and local governments supported more limited flexibility provisions.\footnote{Although this paper discusses only operational flexibility and the related permit revisions issue, several other issues remained contentious throughout the Title V proposal process. These included the scope of the permit shield, the five year permitting deferral for non-major sources (with industry supporting a permanent exemption), enforceable compliance planning requirements, and whether state requirements that went beyond the minimum requirements of the 1990 Amendments should be enforceable by the federal government and by citizens under the enforcement and citizen suit provisions of the Clean Air Act. The scope of this paper does not permit a full discussion of all of the controversial issues surrounding the operating permits program; as a result, discussion will be limited to the single most contentious issue, operational flexibility and permit revisions.} Environmental groups argued that sources should go through a full permit revision process, including public notice and comment, for any increase in emissions. State and local regulators were willing to compromise with a five ton per year emissions increase, and a more expedited permit revision procedure. Industry groups, however, continued to argue for a regulation allowing emissions increases of up to ten tons per year without requiring a permit revision. Some of the more strident industry groups, led by the National Environmental Development Association (NEDA), argued sources should be allowed to increase emissions by up to forty tons per year without public notice and comment and with only seven days notice to the regulating state.\footnote{Draft Emission Permit Proposal Causes Stir; Waxman Says Some Provisions Violate 1990 Air Act, 21 Env't Rep. (BNA) 2139, 2140 (1991). The forty ton per year approach is analogous to Title I of the Act. Under the EPA’s New Source Review Program, a source needs to undergo review only if the net emissions increase for any pollutant is “significant.” For ozone, nitrogen oxides and sulfur dioxide, forty tons per year is a significant increase triggering review. EPA, OFFICE OF AIR & RADIATION, DRAFT NEW SOURCE REVIEW WORKSHOP MANUAL A20, A33 (1990).} Under the in-
dustry approach, sources would be protected from enforcement action for all changes made in this way. One anonymous EPA official commented that industry’s interpretation of the provision was “not a correct reading” of the statute.\(^{150}\) According to S. William Becker, Executive Director of the State and Territorial Air Pollution Program Administrators (STAPPA), it was unlikely that Congress “intended EPA to allow industries to be able to increase their emissions without going through the permitting provisions. . . . We don’t think the law allows that.”\(^{151}\)

When members of the NEDA met with the Council on Competitiveness on March 29, 1991, Becker expressed concern that the permits proposal would accommodate industry desires, and neglect the concerns of state and local air quality authorities, regulators, and public interest groups.\(^{152}\) According to Becker, “pressures have been put on EPA by the Council on Competitiveness and the White House.”\(^{153}\)

3. White House Review of the Operating Permits Proposal

The EPA sent its proposed permit regulation to the White House for review on April 2, 1991.\(^{154}\) On April 6, David McIntosh, then Deputy Director of the Council on Competitiveness, sent a memo to the EPA, suggesting over 100 changes to the EPA’s proposed permits regulation, including a recommendation to provide sources with greater operational flexibility.\(^{155}\) In the draft regulation sent to the White House, emissions rate changes below a certain level could be made with seven days notice to the state permitting authority and without public notice and comment. These changes were called “minor permit amendments.” However, if the change resulted in even an

\(^{150}\) Permit Rule May Be Proposed in Mid-April; Competitiveness Council Unlikely to Review It, 21 ENV’T REP. (BNA) 2219 (1991).

\(^{151}\) Air Pollution: Draft Emission Permit Proposal Causes Stir; Waxman Says Some Provisions Violate 1990 Air Act, supra note 149, at 2140 (quoting S. William Becker). “We were very upbeat about the proposal until about two months ago. . . . Since then the draft has encountered a series of changes making it ‘a lot weaker and less responsive to the intent of the legislation.’” Id.

\(^{152}\) Id.

\(^{153}\) Permit Rule May Be Proposed in Mid-April; Competitiveness Council Unlikely to Review It, supra note 150, at 2220 (quoting S. William Becker).

\(^{154}\) The draft proposal EPA sent to OMB is contained in the EPA rulemaking docket, and can be viewed by the public. See EPA Air Doc. No. A-90-33.

\(^{155}\) According to William Rosenberg, EPA’s Assistant Administrator for Air and Radiation, the memorandum, although transmitted on the Vice President’s letterhead, was not really from the Council on Competitiveness. Rather, it was a compilation of comments from various White House groups which were reviewing the proposal pursuant to E.O. 12,291. The proposal, according to Rosenberg, was never officially reviewed by the full Council on Competitiveness. See Implementation Hearings (Part 1), supra note 1, at 228.
inadvertent violation of the Act, the source would be subject to enforcement action.

Upon reviewing the draft regulation, the White House recommended that the EPA expand minor permit amendments to include emissions increases of up to forty tons per year. It also recommended that the permit shield⁵¹ extend to all such minor permit amendments, effectively preventing the EPA or citizen groups from taking enforcement action against the source.⁵² The EPA proposal adopted all of these changes.⁵³

The idea that the scope of permit amendments be extended to include emissions increases of up to forty tons per year did not come up for the first time during White House review. Industry first recommended this approach during the roundtable process and EPA rejected it. After White House review, however, the EPA included this expanded definition in the final draft of the proposed rule.⁵⁴

Under the EPA's draft regulation, the operational flexibility provi-

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⁵¹ Where permit provisions have gone through proper procedure, including notice and comment, compliance with the permit is deemed to be compliance with the Act, and the source is "shielded" from enforcement action so long as it complies with the permit. This is known as the "permit shield."


⁵³ Minor permit amendments were a major topic of debate during the House hearing on permits. The following discussion illustrates how the minor permit amendment procedure made it into EPA's proposal:

Rep. Waxman: And you supported the change to EPA's original proposal that would allow this so-called minor permit amendment?

Mr. MacRae (OIRA Acting Director): We support the process and we support the fact that we provided comments and a compilation of comments. We certainly do and we support clearly what Mr. Rosenberg and what the agency has now published.

Mr. Elliott (EPA General Counsel): I would just like to correct one factual thing, if I might, Mr. Chairman. It is not, in fact, correct that the memo that the Chair has referred to was the first time that this idea came up in the process. On the contrary, this particular approach was suggested in the first of seven round tables and there was a great deal of discussion about whether this approach or an alternative approach was the approach it should follow.

Rep. Waxman: Excuse me, Mr. Elliott. All I know is EPA sent to the White House a proposal that EPA was suggesting to be the permit proposal and that proposal by EPA had a limit on the amount of pollution that a permit would be permitted to otherwise restrict. The proposal coming from the Vice President's Office takes the EPA's draft and writes in there changes and the changes that are written are now the changes that are part of the whole draft, which EPA has supported.

Mr. Elliott: I think that is accurate.

Implementation Hearings (Part I), supra note 1, at 224.
sion was interpreted to mean permits would address multiple operating conditions if requested by the source. However, after White House review, this provision was interpreted in the proposed rule to mean that "[n]either notification nor permit revision is required for changes at the source . . . that are not regulated or prohibited by the permit."¹⁶⁰ Sources could also unilaterally change permit conditions so long as the changes caused no increase in pollutant emissions limited at the source and did not violate any requirement of the Act.¹⁶¹ In its preamble to the proposed rule, the EPA stated:

[A] permit change is not affirmatively required. . . under [state] or federal law merely because an existing permit does not address the practice. Thus, changes in industrial practices and procedures that do not run afoul of the terms of a permit can be made without seeking any change to the terms of the permit.¹⁶²

Perhaps the most interesting aspect about the final proposal is that, as the EPA described it, there seems to be no purpose to having a permit at all. An EPA representative said that "[b]y changing the permit, you are not in any way changing the legal requirements applicable to the source."¹⁶³ The purpose of the permit provision was to comprehensively articulate all of the Clean Air Act requirements applicable to an individual source. Permits are ineffective if sources can unilaterally change permit requirements as long as they do not increase emissions or violate applicable requirements of the Act. During a House Health and the Environment Subcommittee hearing on permits, Representative Holloway asked whether "even though [sources] can exceed their permit, [the EPA proposed rule] does not allow them to exceed the law?"¹⁶⁴ William Rosenberg, the EPA's Assistant Administrator for Air and Radiation, responded, "[t]hey can't exceed their permit. . . . They can amend their permit so that the permit is within the law."¹⁶⁵ If this is true, what is the point of having a permit?

¹⁶¹ One effect of this provision is that a source would be allowed to emit unlimited amounts of a given pollutant, so long as the permit does not contain an express limitation on that pollutant, and so long as there is no limitation on it that would apply to the source elsewhere in the Act. In contrast, under the Clean Water Act, a source may not discharge any pollutant in any amount unless there is a limitation for that pollutant contained in the permit. 33 U.S.C.A. § 1342(a).
¹⁶³ Implementation Hearing (Part I), supra note 1, at 233 (statement of E. Donald Elliott, General Counsel, EPA).
¹⁶⁴ Id. at 236 (statement of Rep. Holloway).
¹⁶⁵ Id. (statement of William Rosenberg).
The real significance of this provision lies in its interaction with the permit shield and its effect on enforcement under the Act. Under the proposal, the permit shield extends to these permit changes, and neither the EPA nor citizen groups can sue the source for violating the Act so long as the source complies with its permit.\(^{166}\) Thus, the permit could enable sources to escape enforcement for violations of the Act, rather than serve to enhance compliance and promote enforceability by articulating all applicable requirements in one document.

4. Public Comments and the EPA’s Changes to the Proposal

Following a remarkably short period for White House review (only 22 days), EPA Administrator William Reilly signed the permits proposal on April 24, 1991.\(^{167}\) The proposal was published in the *Federal Register* on May 10, 1991,\(^{168}\) starting a sixty day period for public comment. As expected, industry generally supported the proposed regulations, but asked for more flexibility in certain areas. Environmentalists and state and local air permitting agencies strongly opposed the proposal, claiming it would undermine the Act and hinder enforcement efforts.\(^{169}\) A sampling of these comments follows and additional

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\(^{166}\) The following dialogue illustrates the issue:

Rep. Waxman: The reason it [the operational flexibility provision in EPA’s proposal] is significant is that if the permit is amended by this unilateral action for which there is no comment or opportunity to be heard, as a shield, that source cannot be sued because they are acting pursuant to the permit, now amended, which means that if they are violating the law, they cannot be held accountable. Isn’t that true?

Mr. Elliott: I think that is correct.

Rep. Waxman: I think that is quite significant.

*Id.* at 233.

\(^{167}\) While interagency review took only 22 days, the White House had been reviewing copies of the draft permits proposal before EPA’s official submission for interagency review. Thus, the White House reviewing team had already had an opportunity to become familiar with the contents of the proposal before its official submission by EPA.


\(^{169}\) One unnamed environmentalist accused the White House of making changes to appease industry which EPA already had rejected: “[B]ecause industry didn’t get what they wanted [in the roundtable process], they had a second round where they got OMB to make changes behind closed doors... That’s the real process, while the roundtable process is bogus.” *Operational Flexibility: EPA Plan Meets Industry Approval Exceeding State & Environmental Plans*, INSIDE EPA’S CLEAN AIR REP., May 9, 1991, at 7.
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comments can be found in EPA's Air Docket No. A-90-33.

On April 30, 1991, the State and Territorial Air Pollution Program Administrators (STAPPA) wrote a letter to Representative Waxman complaining about the permits proposal. STAPPA noted significant changes had been made after the last workgroup and roundtable meetings, and that the changes would make it difficult for state and local agencies to meet their obligations under the Act. As it stood, the proposal allowed state and local permitting authorities to determine how large emissions increases could be before the minor permit amendment provisions would no longer apply, triggering the full permit revision process. The effects of this provision, according to STAPPA, would be to "subject individual state and local air quality agencies to intense political battles to determine the appropriate cutoff . . . [to] create inequities and competition among state and local areas, and . . . [to] encourage industry to 'shop around' for the region with the most lenient permitting program." Nine Attorneys General also signed a letter claiming that the proposed permits rule would impair states' abilities to meet ambient air quality standards and undermine the enforceability of the Act.

Perhaps the most eloquent criticism of the proposed permits rule came from David Hawkins, Senior Attorney for the Natural Resources Defense Council (NRDC), in his testimony at the EPA's June 5, 1991, public hearing on the permits rule in Washington, D.C. He questioned why Congress or the public would place trust in an administration that would "create a world of disappearing control requirements, immunity from citizen oversight, and new defenses against enforcement efforts." Hawkins argued that the proposed regulatory language on

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171 Id.
172 Id. at 269.

When questioned about provisions in the legislation that did not define EPA's duties with absolute precision, [EPA Administrator] Reilly asked that the Congress and the public place some trust in an Administration that pledged to make clean air a priority:
operational flexibility was directly contrary to the language of the Act. The minor permit amendment provisions, according to Hawkins, deserved the "George Orwell Terminology Award of 1991." Permit revisions, he argued, could result in significant increases in emissions, yet the public would have no opportunity to review or challenge the revisions in court. Hawkins also objected to an extension of the permit shield to changes made under both the minor permit and the operational flexibility provisions. Finally, he questioned the purpose behind the operational flexibility and minor permit amendment provisions:

The purpose of the permit program was to increase the certainty and enforceability of specific source compliance obligations beyond what was provided by a dispersed collection of requirements contained in [state and federal regulations]. But what has been written into the proposed permit rule is an approach that makes obligations certain and enforceable only if they have been explicitly spelled out in the [state and federal regulations]! Despite industry's support for the proposed regulation, the EPA ultimately tried to tighten its final regulations in response to the barrage

. . . . [Reilly said] I hope we can put to rest some of the past distrust Congress has had for the EPA and the Administration on the environment and that we can prove worthy of that trust.

. . . .

While the Administration's legislative proposal for an operating permits program was advertised by President Bush as a means of improving enforcement of the law, the proposal as it stands would do the opposite. . . .

. . . .Why would an Administration that asks to be trusted in implementing the new law want to adopt rules that allow pollution sources to evade compliance? Why should anyone trust an Administration that proposes such an approach?

Id. at 1-4.

175 Id. at 2-5.

176 Id. at 5.

177 Id. at 5-8. Section 502(b)(6) of the Act limits judicial review to those persons who participated in the public comment period, the applicant, and any person who could obtain judicial review of that action under applicable law. 42 U.S.C.A. § 7661a(b)(6). Since there is no public comment period on minor permit amendments, presumably members of the public who object to the change would not be able to seek judicial relief.

178 Proposed Rules for Operating Permit Programs: Public Hearings Before the U.S. Environmental Protection Agency, supra note 174, at 8 (statement of David G. Hawkins).

179 Id. at 7.
of comments from environmentalists and state and local agencies. In fact, the EPA abandoned the minor permit amendment approach following a memorandum by E. Donald Elliott, EPA's General Counsel, stating that the minor permit amendment approach adopted in the proposed regulation would not likely survive judicial review. As a result, the EPA made changes to the rule in order to make it more legally defensible. According to Timothy Williamson, Senior Policy Analyst in the EPA's Air Policy Office, "[o]ne theme that's been bouncing around the halls is you don't want the permit program to become the S&L scandal of environmental control." However, the EPA remained sensitive to industry needs for an expeditious process. Existing procedures for public notice and comment changes to permits can take up to eighteen months, a delay which makes it very difficult for sources to rapidly change their operations. Thus, for changes resulting in emissions increases of less than forty tons per year, the EPA tried to develop a more streamlined revision process that would still allow for public comment.

5. White House Review of Final Rule

The EPA transmitted its draft final permits regulation to the White House on October 15, 1991. This allowed the White House thirty days for review before the Act's statutory deadline for promulgation. However, the rule was not released from the White House until June 24, 1992, more than seven months after the statutory deadline.

Vice President Quayle and EPA Administrator Reilly met on December 16, 1991, to discuss the permits rule. Reilly also met with other members of the Council on Competitiveness, although one White House Insider said Reilly had no allies in the Council with respect to the permits rule. The White House was concerned about providing flexibility to industry, while EPA officials were concerned about

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180 See Interference in Environmental Regulation, supra note 41, at 5.
182 The permits rule had a statutory deadline of November 15, 1991. See 42 U.S.C.A. § 7661a(b).
183 State and local permitting authorities are the entities most hurt by this delay. CAA § 502(d)(1) requires states to submit operating permits programs to EPA for approval by no later than November 15, 1993. By that time, states need legislative authority to implement Title V, as well as all regulations necessary to implement the program. The longer it takes EPA to issue the final rules, the less time states will have to get their programs in place. States' failure to submit operating permit programs results in sanctions under § 179(b) of the Act, including loss of state highway funds. See 42 U.S.C.A. § 7509; 40 C.F.R. § 70.10(a) (1993).
creating a credible program. One anonymous EPA official said, "If people think the program is closed to public view and companies are escaping regulation, this program won't work."185

On February 6, 1992, Attorneys General from four northeastern states, as well as the Natural Resources Defense Council (NRDC) and the Sierra Club Legal Defense Fund (SCLDF), notified EPA Administrator William Reilly that they would file suit if the permits regulation was not promulgated within sixty days. The SCLDF expressed concern that the regulations were being held up by the OMB and the Council on Competitiveness to water-down the provisions.186 On April 13, 1992, several states joined SCLDF and filed suit in the Federal District Court in the Eastern District of New York to compel the EPA to issue the final regulations.187

On April 3, 1992, the Council scheduled a meeting with EPA Administrator Reilly to discuss the permits rule. According to a media report, a few hours before the meeting the EPA received a memo from the Council stating the Department of Justice (DOJ) agreed with the White House position on operational flexibility and minor permit amendments.188 Following receipt of the memo, Reilly decided not to attend the Council meeting, and sent two EPA staff members instead.189 According to an unnamed Council official, it was "exceptionally rare for an agency head to turn down the Vice President's request to attend a Council session called to discuss his own agency's proposal."190

The EPA's refusal to agree to the Council's changes led Vice President Quayle to send a memorandum to the President, asking him to settle the dispute.191 When Bush sided with the Council on Competitiveness, Reilly requested a legal opinion from the Department of Justice, because in the opinion of EPA General Counsel E. Donald Elliott, public notice was required before a permit could be revised to increase emissions. Subsequently, Barry Hartman, DOJ's Acting As-

185 Id.
188 Bob Davis & Rose Gutfeld, Quayle's Council and Reilly's EPA Star in Pollution Battle That Didn't Happen, Wall St. J., Apr. 6, 1992, at A18.
189 Id. If the Council truly offered only recommendations on proposed rules, rather than orders, there would have been no reason for Reilly to skip this meeting. Clearly, Reilly wanted to avoid being ordered by the Council to make changes to the rule that his own staff believed were not legally defensible.
190 Id.
sistant Attorney General, issued an opinion that the EPA had discretion to exempt *de minimis* emissions increases from public notice and comment in Clean Air Act permit regulations.\(^{192}\)

The White House released the final permits regulation on June 24, 1992, and it was published in the *Federal Register* on July 21.\(^{193}\) The minor permit amendment provision in the final rule, now called a "minor permit modification," still applies to emissions increases of up to forty tons per year.\(^{194}\) Sources must still notify the state, but can make changes without waiting seven days for the state approval.\(^{195}\) States now have ninety days from receipt of the notice to veto the proposed change.\(^{196}\) This ninety day period includes forty-five days for the EPA to review the proposed change, but does not include an opportunity for public comment. Furthermore, the permit shield will not apply to these changes, so if a state disapproves the change, the source would be in violation of its permit from the time it implemented the change.\(^{197}\) Some states have expressed concern, however, that it will be politically impossible for them to veto a change if a source has already implemented the change, for example, by modifying production processes.\(^{198}\)

Environmental groups filed suit over the regulations, claiming it illegal to allow sources to make changes that increase emissions above permitted levels without an opportunity for public notice and comment.\(^{199}\)

**C. New Source Review and WEPCO**

1. **What is WEPCO?**

   The New Source Review program under the Clean Air Act defines certain significant changes and renovations at utility plants as "modifications."\(^{200}\) When a source makes a "modification," the EPA requires it to install specified pollution control equipment ("best available control technology" or "BACT") to reduce emissions. Installing this

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\(^{194}\) 40 C.F.R. § 70.7(e)(2).

\(^{195}\) *Id.*, § 70.7(e)(2)(ii).

\(^{196}\) *Id.*, § 70.7(d)(3).

\(^{197}\) *Id.*, § 70.7(d)(4).


\(^{199}\) *NRDC, EDF, Sierra Club Sue Agency, Call Air Permitting Rule Illegal*, 23 *Env't Rep.* (BNA) 1185, 1188-89 (1992).

equipment can cost millions or even hundreds of millions of dollars. The name "WEPCO" comes from a lawsuit between Wisconsin Electric Power Company and the EPA over when New Source Review applies.\textsuperscript{201} To determine whether a change is significant enough to be considered a modification, the EPA compares actual emissions for the two years before the change (the "baseline"), to potential emissions after the change, based on the maximum rated capacity of the source. If net emissions increase, the change is deemed a modification.\textsuperscript{202} The rationale behind the New Source Review program is that the best time for a source to install pollution control equipment is at the same time that it makes other significant changes to the plant.

The 1990 Amendments greatly increased the likelihood that utilities would be subject to New Source Review. For instance, the acid rain standards in the Act necessitate massive pollution reductions from utility sources. To comply, utilities have to make changes in operations and equipment. However, the acid rain program was intended to be a market-based system to allow utilities to implement the most cost-effective means of achieving pollution reductions. New Source Review, in contrast, mandates what pollution control equipment the source must install. The WEPCO dilemma is that by making changes to comply with the acid rain requirements in the most cost-effective manner possible, utilities may trigger New Source Review, thereby losing the flexibility the acid rain program was intended to provide.

2. The Legislative Debate

The utility industry looked for a WEPCO "fix" from Congress. The Bush Administration's WEPCO proposal, which was strongly supported by the Department of Energy (DOE), included three major changes to existing policy and regulations. First, the administration wanted to exempt from New Source Review any changes made to accommodate increased demand for electricity and the accompanying need to install pollution control equipment.

Second, the administration wanted to give utility sources more flexibility to change the baseline against which pollution increases would be measured. The proposal allowed a comparison of the potential


\textsuperscript{202} The difficulty for utilities is that if a source is only operating at forty to fifty percent capacity before the change, and the EPA assumes a maximum capacity of seventy to eighty percent after the change, the EPA's analysis will almost always find an increase in emissions.
emissions before the change, based on the maximum rated capacity, to the potential emissions after the change (a “potential to potential” test). Alternately, the proposal gave sources the discretion to pick the highest level of operations during the previous five to ten years as its baseline for measuring emissions increases. The baseline would then be compared to the actual emissions after the change (an “actual to actual” test).

Third, the administration wanted to define a specific type of nitrogen oxides (NO\textsubscript{x}) control equipment ("low NO\textsubscript{x} burners") as "best available control technology," even though other types of NO\textsubscript{x} controls were more effective. Thus, sources subject to New Source Review would be required to install low NO\textsubscript{x} burners, rather than other more costly and effective controls. These proposed changes, which were strongly supported by the utility industry, went beyond what was needed to resolve the conflict between the New Source Review program and the acid rain program.\textsuperscript{203}

On April 3, 1990, the administration’s WEPCO proposal was rejected by the Senate,\textsuperscript{204} and Senate and House conferees could not agree on a resolution of the WEPCO issue either. As a result, the Clean Air Act does not address the issue. Two sentences were added to the conference report explaining that, “[T]he deletion of most provisions relating to the WEPCO decision is not intended to affect or prejudice in any way the issues or the resolution of the WEPCO matter. At the same time, the conferees urge a quick resolution of the WEPCO matter by EPA as appropriate.”\textsuperscript{205}

3. Early White House Action on WEPCO

Following passage of the Act, the EPA’s Office of General Counsel evaluated the feasibility of achieving the administration’s WEPCO

\textsuperscript{203} The pollution control equipment exemption alone likely would have resolved the conflict between the two programs. In addition, the “potential to potential” test would have alleviated some of the inequities in the New Source Review analysis. The potential to potential test, however, could lead to abuse because it allows a utility to increase actual emissions without triggering New Source Review, by increasing capacity (but not potential capacity) after the change. Thus, a source could increase capacity from thirty to sixty percent after a renovation, but so long as the potential capacity of the source did not increase, New Source Review would not be triggered. A comparison of actual to actual emissions would also alleviate some of the inequities, and would not lead to as much abuse, especially if the EPA placed limitations on the source’s allowable capacity after the change. The New Source Review exemption for changes made to accommodate increased demand for electricity and the low NO\textsubscript{x} burner best available technology presumption, however, were not necessary to resolve conflicts between the New Source Review and the acid rain programs, nor were they needed to alleviate inequities in the New Source Review program.


\textsuperscript{205} See Implementation Hearings (Part I), supra note 1, at 288.
goals through regulatory action. An internal EPA draft memorandum discussing the "legal constraints to carrying out the Administration’s WEPCO legislative initiative through administrative action" notes that giving companies the discretion to pick the highest level of operations during the previous five to ten years, while consistent with the administration’s approach, "would appear to conflict with the [existing regulations]."\(^{206}\) The EPA attorneys determined that any regulatory change to exclude system demand growth would probably not survive judicial review because of the strong indications that the statutory modification provisions were intended to address long-term emissions increases . . . . .

. . . [So] a methodology factoring out demand growth over an entire utility system may be difficult to defend even after notice and comment rulemaking.\(^{207}\)

On February 26, 1991, David Rivken, DOE’s Associate General Counsel, responded that the EPA would have discretion to implement the administration’s WEPCO goals through rulemaking.\(^{208}\) EPA attorney Gregory Foote wrote margin notes on a copy of this memo saying DOE’s legal interpretation was “hogwash” and “mostly garbage.”\(^{209}\)

On April 25, 1991, the President of Edison Electric Institute (EEI), a utility lobbying group, sent a letter to the Secretary of Energy and the EPA Administrator requesting “a good WEPCO fix,” and looking for a “blanket pollution control exclusion.”\(^{210}\) Linda Stuntz, DOE’s Acting Assistant Secretary for Fossil Energy, later wrote to Bill Rosenberg, EPA’s Assistant Administrator for Air and Radiation, objecting to the EPA’s draft WEPCO rule, and requesting a “good and

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\(^{206}\) Draft Memorandum from Gregory Foote, Ass’t General Counsel, EPA, & William Tyndall, Att’y, Air & Radiation Div., EPA, to E. Donald Elliot, Ass’t Admin. & General Counsel, EPA (Jan. 4, 1991), reprinted in Implementation Hearings (Part 1), supra note 1, at 369-70.

\(^{207}\) Id. at 320, 363. This conclusion was further bolstered by the finding that "there is no indication in the statute, regulation or preamble to suggest that Congress or the EPA considered the underlying motivation for a modification project to be relevant in determining whether the project would result in an emissions increase." Id. at 363.

\(^{208}\) Draft Memorandum from David Rivkin, Assoc. General Counsel, DOE, to Stephen Wakefield, General Counsel, DOE (Feb. 26, 1991), reprinted in Implementation Hearings (Part 1), supra note 1, at 332-35.

\(^{209}\) Id.

comprehensive WEPCO fix.” The memo criticized the EPA’s approach as “not responsive to the needs of the electric utility industry,” and recommended a blanket pollution control exclusion from New Source Review, and an “actual-to-actual” or “potential-to-potential” emissions test.

On April 29, 1991, the DOE issued comments on the EPA’s latest WEPCO regulatory proposal, objecting to the EPA’s approach and recommending that “increased utilization in response to demand growth should be excluded from the [New Source Review analysis].”

On May 3, 1991, the DOE wrote a proposed rule for the EPA which included all its previously recommended changes. The proposed rule did not indicate anywhere that it was actually written by DOE: the only indication that DOE wrote it comes from looking at the entry in the docket index for the proposed WEPCO rule. The proposed rule excluded pollution control projects and changes made to accommodate increased demand from New Source Review. The proposal also allowed the source owners a choice between a “potential-to-potential” or an “actual-to-actual” comparison for emissions increases.

On May 8, 1991, Richard Schmalensee of the White House Council of Economic Advisors, wrote an urgent memorandum to Bill Rosenberg, EPA’s Assistant Administrator for Air and Radiation, stating, “we must proceed to adopt the Administration’s policy on WEPCO through regulatory and administrative actions in areas that remain subject to interpretation under the Clean Air Act.” Schmalensee also stated he “had been led to believe that the EPA would use the Administration’s legislative proposal as the basis for crafting its WEPCO rule . . . . The attached table indicates where and how the current draft must be revised in order to achieve [the Administration’s WEPCO policy].”
On May 20, 1991, Linda Stuntz wrote a memo to Richard Schmalensee, providing him with the DOE’s revisions of the EPA’s draft WEPCO proposal. Among other things, the DOE deleted references to nitrogen oxide control technologies other than low-NO<sub>x</sub> burners, and removed discussions of some of the problems with low-NO<sub>x</sub> burners. On May 21, 1991, David Rivkin, DOE Counsel, wrote a memo to E. Donald Elliott, EPA General Counsel, about the latest WEPCO draft. Among other things, the memo stated that the EPA “regrettably . . . takes the position that pollution control projects are not ‘environmentally beneficial’ if annual emissions, generated by the utilities involved, increase.” The DOE instead proposed to exclude projects from New Source Review if the projects “might increase hourly or annual emissions of a regulated pollutant — but not the emissions rate of that pollutant . . . — where the overall reductions are clearly environmentally beneficial.” The DOE also acknowledged that low NO<sub>x</sub> burners could increase carbon dioxide or particulate emissions.

4. The Agency Process

On May 17, 1991, Gary McCutchen, EPA’s Chief of the New Source Review Section, sent a memo to interested persons within the EPA explaining that “the rulemaking will not undergo [normal agency review processes].” The memo included an informational copy of the proposed rule, but did not ask for comments. While the EPA had been using an expedited rulemaking process under the Act that eliminated many of the steps in the EPA review process, no other rules eliminated all of the steps in the internal agency review process.

The EPA published the proposed WEPCO rule in the Federal Register.
The rule provided that pollution control projects at utility sources would be exempt from New Source Review requirements (i.e., they would not be defined as "modifications"), unless the project rendered the unit less environmentally beneficial than before the change. Improvements in capacity and/or efficiency were not included as part of the pollution control project. The proposal also allowed sources to calculate emissions changes using either a potential-to-potential or an actual-to-actual test, and the source owners could choose any two year period within the previous 5 years to be representative of source operations. Additionally, increases in demand growth could be excluded from the projection of future actual emissions, and low NO\textsubscript{x} burners were presumed to be best available control technology. Finally, the baseline was modified to be the highest hourly emissions rate achievable at any time during the five year period prior to the change.

5. Public Comments

As with the Title V proposal, industry was generally pleased with the WEPCO proposal. Environmentalists and state and local agencies opposed it, as did certain pollution control equipment manufacturers. The Industrial Gas Cleaning Institute (IGCI) commented that defining low NO\textsubscript{x} burners as presumed best available control technology would have the practical effect of foreclosing other NO\textsubscript{x} control technologies, including proven control technologies over twice as effective as low NO\textsubscript{x} burners.

In a July 10, 1991, letter to Representative Waxman, the Northeast

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226 Id. at 27,640 (codified at 40 C.F.R. §§ 51.165(a)(1)(v)(C)(8), 60.14(h)).
227 Id. at 27,640-41 (codified at 40 C.F.R. § 51.165(a)(1)(xxvi)).
228 Id. at 27,640 (codified at 40 C.F.R. § 51.165(a)(1)(xxi)).
229 Id. (codified at 40 C.F.R. § 51.165(a)(1)(xxi)(B)).
230 Id. at 27,643 (codified at 40 C.F.R. § 52.21(b)(38)(iii)).
231 Id. at 27,645 (codified at 40 C.F.R. § 60.14(h)(i)(j)).
232 See EPA to Add Key Details, Plans to Issue Final WEPCO Rule Soon, UTILITY ENV'T REP., Nov. 29, 1991, at 36.

Faced with large pollution control projects required by the Clean Air Act Amendments, utilities tried in Congress to get relief from review of these projects as official new sources of pollution. Unsuccessful on Capitol Hill, they got Congress to direct the Bush Administration to address the issue. After close work with DOE and the Office of Management and Budget, EPA gave utilities what they have said is the broad relief they were seeking. It covers more than pollution control projects.

Id.

States for Coordinated Air Use Management (NESCAUM) expressed concern that the proposed rule would prevent the northeastern states from achieving their ozone attainment goals, by not allowing them to impose more stringent NOx requirements on utilities. The letter noted the EPA proposal ignored the agency’s own guidelines for determining best available control technology, which required the use of a “top-down” approach.

In a hearing with the House Subcommittee on Health and the Environment, Bill Rosenberg, the EPA’s Assistant Administrator for Air and Radiation, explained the agency’s shift in position on the WEPCO issue. He claimed the policy change arose from the need to be consistent with the market-based acid rain program and the desire to reduce uncertainty for sources trying to comply with that program. Rosenberg also explained that the normal agency review process was not used because of the need to accelerate the rulemaking process, and that the rulemaking decision was based on the EPA’s understanding that Congress had not rejected the administration’s WEPCO proposal.

In response to a request from Representative Waxman, the EPA reopened the comment period on the WEPCO rule on November 25, 1991. The comment period remained open until December 10, 1991, and the final WEPCO rule was promulgated on July 21, 1992.

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234 Letter from Edward Davis, Chairman, Northeast States for Coordinated Air Use Management (NESCAUM), to Rep. Henry Waxman (July 19, 1991), reprinted in Implementation Hearings (Part 1), supra note 1, at 358. The EPA’s New Source Review Workshop Manual includes five steps for determining best available control technology: (1) identify all control technologies (including “technologies in application outside the United States to the extent that the technologies have been successfully demonstrated in practice on full scale operations”); (2) eliminate technically infeasible options; (3) rank remaining control technologies by control effectiveness; (4) evaluate the most effective controls and document the results; and (5) select best available control technology. EPA, OFFICE OF AIR & RADIATION, supra note 149, at B5-10.


236 Implementation Hearings (Part 1), supra note 1, at 376 (statement of William Rosenberg, Ass’t Admin, Office of Air & Radiation, EPA).

237 Id.

language in the final regulations is virtually identical to the proposed regulatory language except it does not include the best available control technology presumption for low-NO\textsubscript{x} burners.\textsuperscript{239}

III

A Proposal for Reform

As the above case studies show, White House review does not achieve its claimed purposes. Rather, it furthers the interests of politically-favored groups, allowing them a "second bite at the apple" which is denied to less-favored groups.\textsuperscript{240} The process is generally slow, inefficient, and re-hashes arguments already presented to the EPA and Congress. In addition, the process undermines the spirit, if not the letter, of the APA and intrudes on agencies' open rulemaking processes. For all of these reasons, White House review must be reformed beyond simply eliminating the Council on Competitiveness.

White House review is useful and need not be wholly sacrificed in a proposal for reform. To reduce some of the shortcomings of proposed regulations, it is useful to have a centralized office with no program responsibilities, to: review agency regulations; ensure coordination among agencies; foster agency accountability; and maximize the net benefits of regulations in the absence of express statutory mandates prohibiting cost/benefit review. Two approaches are possible: a radical approach, where authority for regulatory review is vested in an agency other than the OMB and the White House; and a moderate approach, where the existing structure is retained with some modifications.

A. The Radical Approach

So long as regulatory review remains vested in the OMB, it will be inherently coercive. The OMB retains too much external power independent of its ability to review regulations. It is responsible for determining the budgets and personnel ceilings of the agencies, as well as reviewing their regulations. The OMB holds so much power over the agencies that its recommendations will always have more authority than mere "advice." This is true under any administration, regardless of its political agenda. Although the comments on regulations may

\textsuperscript{239} The failure to promulgate the BACT presumption should not be interpreted as a defeat for the White House, however; the question of whether low-NO\textsubscript{x} burners are presumptively BACT is still being debated between the EPA and the DOE in the context of the nitrogen oxides proposal.

\textsuperscript{240} This is true regardless of the administration in power.
differ under a liberal administration when compared to a conservative administration, the coercive atmosphere remains the same. Under the Bush Administration, the problem was exacerbated when the Council on Competitiveness became involved. This group had so much power that it was political suicide for an agency head to reject the Council’s “recommendations.”

In addition, the OMB is philosophically against regulation. Thus, to truly reform the current process and ensure that it meets the goals of “policy coordination, greater political accountability, and balanced regulatory decisions,”\(^2\) authority for regulatory review should be vested in a new regulatory review board with a more evenly balanced philosophy than OMB.

This regulatory review board should include a small number of members appointed by the President, subject to the advice and consent of the Senate. This should ensure that board members change on a fairly regular basis. If necessary, a limited term could be imposed. The members should be taken from a variety of disciplines to ensure the board has a balanced viewpoint. By diversifying its membership, the board would avoid some of the one-sidedness exhibited by the Council on Competitiveness, the Council of Economic Advisors and the OMB — all of which look almost solely at economics without considering the importance of other goals such as promoting health, safety, and the environment.

Further, the board members should each have his or her own staff, with the technical expertise to assist in review of regulations, and the board itself should have sufficient resources to review regulations expeditiously and thoroughly. A time limit should be imposed on the length of review, with an opportunity for limited extensions to consider particularly complex or controversial regulations. Additionally, the board should be “statutorily required to conduct its reviews on the record, to accept comments on the record from all persons, to avoid consideration of non-statutory criteria, to not displace agency authority, and to review only major rules of national importance.”\(^2\) Provisions could be made, however, for interested persons to petition the board for review if the board determines that it will not review a particular regulation.

Finally, the board should have the authority to make any recommendations it wants to the agency. Since the agency has ultimate authority for issuing the regulations, however, the recommendations need not be compulsory. Where the board strongly believes that its recommen-

\(^2\) DeMuth & Ginsburg, supra note 2, at 1081.

\(^2\) Olson, supra note 4, at 78.
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dations should be accepted, it can petition the President "to step in, unlike the present system under which cabinet officers must go hat in hand to the President to object to OMB decisions."^{243}

B. The Moderate Approach

As an alternative to the radical reform proposed above, Congress could place certain limitations on the current White House review process to ensure that it is more expedient and fair. To begin with, only one group should be given the authority to review regulations under E.O. 12291. That group could be the OIRA or even the Council of Economic Advisors, but such authority should not extend beyond one distinct group. Agencies should not be forced to address the concerns of numerous groups, all reviewing regulations with essentially the same criteria. Having more than one group reviewing regulations under a cost-benefit standard is neither useful nor efficient, and certainly is not cost-effective.

Second, a strict deadline should be imposed on the reviewing authority. E.O. 12291 should be amended or Congress should pass legislation mandating a thirty-day review period with one thirty-day extension. After sixty days, however, White House review should be terminated whether or not concurrence has been obtained. This approach would prevent the White House from exerting pressure by holding a regulatory package indefinitely, and would remove the pressure on agency administrators from signing rules without prior White House concurrence.

Third, Congress should pass a "sunshine" law similar to the one proposed by Senator Glenn in 1991.^{244} All comments on agency rulemakings should be provided in writing, preferably with a rationale, and placed in the rulemaking docket for public comment. The docket should include comments from the any other group providing comments during White House review.^{245} Where verbal comments are provided, the agency should be responsible for documenting and placing them in the docket, just as agencies are already required to do when they have verbal *ex parte* communications during the rulemaking process. In addition, agency meetings with the White House should be documented with the date, time, and parties present. Preferably, the topics discussed should also be briefly documented.

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^{243} Morrison, *supra* note 4, at 1073.


^{245} Currently, only comments from OMB generally are placed in rulemaking dockets. The other White House groups tend to claim privilege and require the agencies not to put their comments in the docket.
Finally, when White House personnel communicate with outside entities about rulemaking, either over the phone or in person, the conversations should be summarized and placed in the rulemaking docket.

Some proponents of White House review have objected to "sunshine" proposals, claiming they violate the principle of executive privilege; "inhibit freedom of discussion at the policy planning stage;" and are simply unwieldy. The application of the executive privilege, however, is inappropriate. Generally, courts have upheld claims of executive privilege only when asserted by the President, "or by the head of an executive department who has personally participated in the decision to assert the privilege. . . . The rebuttable presumption of executive privilege accorded to presidential communications logically must attenuate, eventually to inconsequence, as executive authority is delegated farther from the Oval Office." The argument that sunshine laws are unwieldy is trivial. If agencies can document these contacts, so can the White House.

It is true that a "sunshine" requirement might inhibit discussions. The constraints a "sunshine" law would place on the White House, however, are no greater than those already imposed on administrative agencies by the APA, and these agencies continue to function effectively in spite of the constraints. Furthermore, the White House has proven these constraints are necessary to protect against abuses of the process, such as the White House serving as a conduit for industry concerns, and mandating that agencies make changes but preventing those agencies from divulging who mandated the changes and why. As one commentator wrote:

The principles developed by the courts applicable to ex parte contacts between the decisionmaking agency and outside parties should apply to contacts between OMB staff and outside parties during rulemaking review. This analogy is proper if OMB is either a new decisionmaker or has access to and influences the decisionmaker as an agent for private parties, circumstances which appear to exist.

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246 137 Cong. Rec. S 16,978 (daily ed. Nov. 19, 1991) (statement of Sen. Kasten). However, Cass R. Sunstein, a prominent constitutional law scholar and proponent of White House review supports sunshine laws as consistent with the intent of the APA, the Clean Air Act, other substantive statutes, and some of the case law. See Implementation Hearings (Part 2), supra note 66, at 292 (statement of Cass R. Sunstein).

247 Olson, supra note 4, at 39.

248 Id. at 30-31.
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Without a record of either White House *ex parte* contacts with industry, or the extent of White House influence over regulations, judicial review becomes less meaningful because "[t]he administrative record delivered to the court by the EPA would be a fictitious account of the actual decisionmaking process." \(^{249}\)

Fourth, the scope of White House review should be limited to coordinating agencies and ensuring they have adequately considered the factors set forth in E.O. 12,291. The White House should not reconsider factors already addressed at the administrative level. For example, the OMB lacks the expertise and authority to determine appropriate standards to protect health, safety, and the environment. These tasks should be left to the agencies, which have the requisite expertise. The scope of review should also be limited by legal constraints, if any. For example, where the agency is required by statute to consider certain factors, the OMB should not try to introduce other factors into the analysis. Although it is acceptable to try to ensure that a regulation is as cost-effective as possible, where a statute is clear on what an agency must do, the OMB should not try to change the agency's actions to conform to its cost-benefit analysis.

In addition, where the White House "mediates" disagreements among agencies, the agency with primary responsibility for implementing the program should have final authority to determine the rule's final provisions. Where it is a pre-proposal review, any unaccepted comments can be written down and placed in the docket so the public can consider and comment on both interpretations.

Finally, the scope of judicial review should be expanded to look beyond the administrative record where it appears that the White House has had considerable, undocumented influence over the content of an agency regulation. \(^{250}\) "Effective judicial review of agency rulemaking protects two central public policy objectives in administrative law: reasoned decisionmaking by agencies and access by all parties to the rulemaking process. By frustrating meaningful judicial review, undocumented OMB involvement in the administrative process endangers these public policy objectives." \(^{251}\) Judicial deference to agency decisionmaking should not occur where the White House has exerted a significant influence over the regulation because the "presumptions of agency expertise, the procedural regularity of the administrative process, and full public discussion and participation in the

\(^{249}\) *Id.* at 32.


\(^{251}\) *Id.* at 1796.
rulemaking"\textsuperscript{252} are not warranted in these instances. Furthermore, deference is inappropriate because the administrative record may not accurately reflect the interactions between the agency and the White House, or reveal the actual reasons for rulemaking changes.

Courts should look for signals of significant White House involvement, such as abrupt shifts in agency policy. The party seeking to obtain broadened record review would have the burden of showing a "strong reason to believe that the agency substantially altered its position as a result of OMB influence."\textsuperscript{253} Once this has been established, courts would be able to look beyond the administrative record to probe for the underlying reasons behind policy decisions. Courts would be permitted to look at records of communications between the agency and the White House, including affidavits. The courts should try to determine the "factors that OMB brought to bear on the rule ultimately adopted by the agency. The courts can compare these factors with the statutorily-mandated factors to determine whether the ultimate agency rule survives the 'arbitrary and capricious' standard of review."\textsuperscript{254}

\textbf{Conclusion}

An examination of White House review of regulations implementing the 1990 Clean Air Act Amendments shows that it does not accomplish its purported purposes. The process is unnecessary, inefficient, and does not contribute positively to the regulatory process. There is, however, a need for a centralized reviewing agency to ensure coordination among agencies and accountability in the regulatory process, and to determine whether regulations are as cost-effective as possible. To achieve these goals, significant reforms to the current review process are needed. Ideally, regulatory review should be vested in a new regulatory review board with no other responsibilities. This board would have the authority to review regulations for cost-effectiveness and make recommendations to the agency. Ultimate authority to accept or reject those recommendations, however, should rest with the agency.

In the alternative, Congress could reform the existing system by removing the multi-tiered review process, establishing strict time limits on review, and passing a "sunshine" bill to require greater public disclosure of White House regulatory review activities. In addition,

\textsuperscript{252} \textit{Id.} at 1795.
\textsuperscript{253} \textit{Id.} at 1806.
\textsuperscript{254} \textit{Id.} at 1795.
the scope of White House review needs to be limited to the criteria set forth in E.O. 12,291, and the scope of judicial review needs to be expanded where evidence shows the White House may have improperly influenced the agency. These changes would help ensure that White House review accomplishes its stated objectives, without imposing on agency authority or circumventing the process of complete public participation that is so essential to administrative rulemaking.