ANSWERS TO QUESTIONS IN THE OCTOBER 24 LETTER

Question 1. The OMB Progress Report notes that "the major OMB regulatory responsibility is assuring implementation of the President's Executive Order 12044, 'Improving Government Regulations'." This responsibility includes evaluating:

a. clarity of regulations;
b. opportunities for public comment;
c. consideration of alternative approaches to the design and enforcement of regulations; and
d. preparation of a regulatory analysis as appropriate.

It is our understanding that the Management and Regulatory Policy Division, responsible for the evaluation, had 84 positions in 1979 and will have an estimated 85 positions in 1980.

a. Of the 84 positions, how many are currently employed full time in overseeing agency compliance with E.O. 12044?
b. What are the responsibilities and functions of each of those full-time persons?
c. What guidelines exist for evaluating each one of the four areas of oversight responsibility?

Answer. The Regulatory Policy and Reports Management Division (RPRM) headed by a Deputy Associate Director, is staffed with 24 positions, 21 of which are filled. The staff have varied backgrounds ranging from degrees in economics and law to statistics and public administration and management. For fiscal year 1980, the Division was authorized ten additional slots--for a total of 34.

The Division helps to develop, coordinate and implement Administration initiatives on regulatory reform and reporting burden reduction. In an oversight role, the Division assists departments and agencies to improve regulatory practices, weed out unnecessary regulations and minimize paperwork burdens and other costs levied on the public. In conjunction with other parts of the Executive Office, RPRM identifies initiatives to be included in the Administration's overall regulatory reform program and coordinates the development of legislative and administrative improvements. In addition, the Division advises on regulatory matters within OMB and participates in legislative clearance and budget matters.

The Division also manages the reports clearance process required by the Federal Reports Act of 1942. It works with the agencies to assure that reporting requirements are necessary and that they will impose minimum burdens on the public. The Division also implements the President's Paperwork Burden Reduction Program and the Paperwork Commission's recommendations, reporting progress periodically to the President and Congress. We find that the combined regulatory oversight and reports management functions work to complement each other and come together to help reduce unnecessary redtape.

With regard to the guidance we have provided in connection with evaluating the Order's goals, we published the attached Evaluation criteria for E.O. 12044 in the April 24, 1979 Federal Register. In addition, we sent guidance on the preparation of regulatory analysis to the heads of departments and agencies. Finally, we have provided a preliminary assessment of agency progress on each of the goals in our September, 1979 report to the President. It too contains an explanation of how we evaluate agency performance.

Question 2. Under S. 755, OMB would have responsibility to oversee agency compliance with the regulatory analysis requirements. How does OMB see itself exercising this responsibility with regard to the independent regulatory commissions? What does OMB think its ability will be to work with the independents?

Do you think the Executive Office of the President is objective enough or too political to oversee compliance with the regulatory analysis requirement, especially by the independent regulatory agencies?

Answer. In general, it is our intention to oversee independent agency compliance with regulatory analysis in much the same way we do now for Executive agencies. A regulatory analysis is a statement of the different alternative regulatory approaches considered by an agency and an explanation of the analytic comparison of those alternatives. OMB's job is not to second-guess the agency's substantive, technical judgment but rather to see that the statements are prepared, that they clearly explain agency thinking to the public, and that they are used in the agency's decision making process. These are objective judgments made objectively by OMB.

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We believe the regulatory analysis requirement has helped make agencies more sensitive to the broad range of direct and indirect impacts of their regulations. We have encouraged agencies, with some success, to consider broader regulatory options (performance standards versus detailed design requirements) and alternative compliance or enforcement mechanisms that might reduce burden. In making agency thinking available to the public in a regulatory analysis at the time a rule is proposed, we believe the public is given a better chance to understand the rule and the agency rationale and to provide comments that may help improve the quality of the final rule.

Working with agency staff, OMB communicates any technical or procedural concerns with regulatory analyses and we may submit written comments during the public comment period. With this type of review and oversight, we foresee little problem in working with the independent commissions.

Question 3. Has OMB given the agencies detailed, specific guidance on how to conduct a regulatory analysis? If so, please provide a copy for the record. If not, why not?

Answer. We have given agencies guidance on what should be considered in a regulatory analysis. This is contained in the attached November 21, 1978 memorandum. However, we have not designed a cook-book manual for agencies because we believe that it is better for agencies to think through carefully the effects of their regulations on a case by case basis rather than simply following a standard guideline or format. Given the varying nature of regulatory activities across government, we are not convinced that a standard methodology could be developed.

Question 4. OMB found that "all departments and agencies need to devote more time and attention to improving the quality of their analysis and its usefulness to decision-makers" and that "improvements in existing regulations are just as essential as improvements in the development of new regulations."

a. Given the limited resources available to the agencies--i.e., limited analytical talent, etc., would it be wiser to focus initially on one of these goals instead of on both of them simultaneously?
b. If so, which of these two goals should be given first priority?

Answer. We do not believe it would be wise or necessary to favor one of these goals over the other and we are encouraging agencies to work on both at a pace and in a manner that is most cost effective for their particular circumstances. Many new regulations are modifications of, or additions to, existing regulations. If a regulation is new in that it covers new subject matter, or imposes new standards of conduct, it often relies on the same reporting techniques, enforcement tools, or compliance mechanisms as existing regulations. In fact, many new regulations often reflect a mixture of efforts to revise existing regulations, and to add certain new features.

The requirement to issue a new regulation--generally as a result of a statutory amendment--sometimes becomes the trigger that brings about the "sunset" review of an entire regulatory program. Too often, however, statutory amendments are accommodated by piecemeal changes to existing regulations. Agencies have sometimes focused on implementing totally new regulatory programs while leaving the existing structure in place--no matter how outdated. For these reasons, we believe that agencies should be conducting sunset reviews at the same time they are fulfilling mandated requirements for new rules.

Question 5. One of the factors OMB found contributing to the lack of sufficient government-wide progress in doing regulatory analyses was the limited amount of discretion some agencies felt they had available under their statutes to select from among alternative regulations.

a. On the basis of the survey conducted by OMB, how many agencies responded that they had no discretion available under their statutes to select among alternative regulations?
b. Please identify the agencies and the statutes they cited.

Answer. As a technical, legal matter, unless an agency is explicitly prohibited from considering economic issues, it can consider them. All agencies do consider economic issues, in the sense that they try to develop the least expensive way of accomplishing a given standard of conduct. For that reason, we ask agencies to articulate in a regulatory analysis the range of direct and indirect effects of each regulatory alternative. No agency is prohibited from estimating these effects, in both social and economic terms.

The difficulties arise when an agency begins to choose between alternatives and make a decision. Sometimes an agency is able to balance economic costs against a health, safety, environmental, or social standard, i.e., setting a lower than attainable standard because the economic consequences of a more stringent requirement were too great. Other statutes, arguably, do not permit such weighing of the indirect economic costs in setting health, safety, environmental, or social standards. Two examples agencies have brought to our attention include the OSHA Act and the Clean Air Act.

The regulatory analysis, however, is only one element in an agency's decision which also helps to explain the decision to the public. If a more stringent standard, when compared with a less stringent one, would raise the cost of a product or service by a certain percentage, we believe this should be pointed out. If the statute mandates the higher standard, then at least the Congress, the President, and the public would know the economic effects of that decision.

Question 6. The OMB Progress Report does not contain any recommendations for changing the Executive Order. Why?

Answer. As I stated at the hearing, we do not believe that changes in the Order are required at this time. Much of the improvement that needs to be made can be accomplished by bringing all agencies up to the levels of performance now being demonstrated in a few agencies such as the Department of Transportation. Other changes, such as telling the public if a regulation is classified as significant or major in the Federal Register notice, are of a technical nature and do not warrant changing the Order itself.

E.O. 12044 carries a "sunset" date of June 30, 1980. At that time, based on agency quarterly reports, staff observations, public comments and the status of regulatory reform legislation in Congress, we will make recommendations to the President regarding continuation of the Order and any required changes.

INFORMATION TO BE FURNISHED
FOR THE RECORD
BY MR. GRANQUIST AND MR. MORRIS

In response to Senator Levin's questions during a hearing on October 10, 1979 on agency performance in implementing Executive Order 12044, the agencies were requested to furnish the answers to the following questions.

1) The number of major and significant regulations subject to the Executive Order which have been issued since the Order took effect.

The number of significant regulations issued by agencies - 1,532

The number of major regulations issued by agencies - 34

2) The number and total cost of outside agency regulatory analyses prepared since the Executive Order took effect.

Five agencies had analyses prepared by outside consultants or contractors.

| | Analysis | Cost |
|---|---|---|
| Department of the Interior | 1 | $401,000 |
| Department of Labor | 1 | 250,000 |
| Department of the Treasury | 1 | 82,000 |
| Department of Energy | 3 | 50,000 and over* |
| Equal Employment Opportunity Commission | 1 | 8,000 to 15,000* |

3) An analysis of how many regulatory analyses have been undertaken where there's been a $100 million impact or a specific regional and industrial impact.

21 analyses have been done because of the $100 million criterion; 3 were done due to specific regional or industrial impact.

4) A comprehensive treatment of agency experience, reports and problems concerning the measurement and analysis of indirect costs and benefits.

Three agencies have responded to the problems involved in measuring indirect costs and benefits.

* Exact cost cannot be determined by agency.

HEW mentioned that they had experienced some difficulty in estimating direct costs and benefits, let alone indirect costs. It suggested that legislative language on this subject clarify that cost analysis should be done "to the extent feasible" or as "appropriate for a particular regulation." USDA noted that effective use of public comments--both prenotice and during the comment period--can help to identify indirect costs and either rank their importance or add quantifiable data to a regulatory analysis. In a recent instance, exposure of the importance of secondary cost resulted in USDA's withdrawal of a proposed rule. The Commerce Dpeartment suggested that in view of the difficulty of measuring direct and indirect costs, more emphasis should be devoted to an evaluation process to compare actual costs and benefits of a rule with the anticipated results as stated in the initial analyses of regulations.

From: The Federal Register, April 24, 1979 / Notices

## OFFICE OF MANAGEMENT AND BUDGET

### Evaluation of Executive Order 12044

**AGENCY:** Office of Management and Budget.

**ACTION:** Notice of plans for evaluating the effectiveness of Executive Order 12044, Improving Government Regulations and agency compliance with its provisions.

**SUMMARY:** On March 23, 1978, the President directed each executive agency, by Executive Order 12044, to adopt certain procedures to improve existing and future regulations. The Office of Management and Budget (OMB) is responsible for assuring effective implementation of the Order and will report to the President at least semi-annually on both the effectiveness of the Order and agency compliance with its provisions. In addition to these periodic reports, by May 1980 OMB will report to the President regarding whether or not the Order should be extended and what changes, if any, would improve its effectiveness.

This notice outlines OMB's standards for evaluating both the effectiveness of the Order and agency compliance with it. It is intended to be used as a basis for the semiannual reports to him. We have received comments from several interested agencies on an earlier draft of the evaluation plan that attempted to develop numerous quantitative measures of agency performance.

Several agencies commented that valid quantitative data would be difficult to obtain, not meaningful and a needless paperwork burden. For these reasons, agencies thought it would be contrary to the spirit of the Order. Therefore, the evaluation plan was revised to be more subjective. We will be seeking information and reactions from agencies and the public and will be augmenting them with OMB appraisals and case studies to provide a balance to the subjective nature of the evaluation.

The announcement of this evaluation plan was contained in a memorandum of April 10, 1979, from the Director of OMB, James T. McIntrye, Jr., to department and agency heads. Our purpose in publishing the evaluation plan is to inform interested members of the public. We also hope that members of the public will provide useful contributions to the evaluations by identifying good and bad examples of agency performance in the essential areas we have outlined. We believe such public participation is essential to a successful evaluation of the Order.

**FOR FURTHER INFORMATION CONTACT:** Dr. Robert Raynsford, Chief Economic Analysis and Special Projects Branch, Regulatory Policy and Reports Management Division, Office of Management & Budget, Washington, D.C. 20503, (202/395–3814), *or* Ms. Diane K. Steed, Chief, Regulatory Policy Branch, Regulatory Policy and Reports Management Division, Office of Management & Budget, Washington, D.C. 20503, (202/395–3176).

Dated: April 10, 1979.

**Wayne G. Granquist,**

*Associate Director, Management and Regulatory Policy.*

### Evaluation Criteria for Executive Order 12044

The President has directed OMB to report semiannually on the effectiveness of Executive Order 12044, "Improving Government Regulations," and agency compliance with its provisions. By May 1980, OMB will be recommending to the President whether to extend the Order and, if so, what changes or other actions are needed to achieve its purposes. The evaluation plan outlined here will focus on the five essential goals of the Order:

I. Effective senior-level policy oversight.

II. Increased public participation.

III. Better and more useful analysis.

IV. Periodic review of existing regulations.

V. Increased simplicity and clarity of regulations (plain English).

The evaluation plans outlined here give agencies an opportunity to review and critically assess their own performance in these five areas and to provide OMB with documentation of their accomplishments and shortcomings.

In addition, OMB will conduct case studies, from time to time, of individual regulations to determine whether they were developed according to the letter and spirit of the Executive Order.

We will also seek comments from the public on specific agency practices and the effectiveness of the Order in general.

In the first report, agencies will be expected to provide critical self-appraisals in each of five areas of concern for two periods:

1. From January 1, 1978, to implementation of the agency's plan, or approval of the plan by OMB, whichever was earlier; and

2. From implementation or OMB approval, whichever was earlier, to April 1, 1979.

Information for the first period will provide an indication of agency regulatory practices before implementation of the Executive Order. Without such a base period, changes in agency practices cannot be adequately analyzed.

The second period will give us the first real indication of agency performance under the Executive Order.

The first report should be sent to Wayne Granquist, Associate Director, Management and Regulatory Policy, OMB, by May 1, 1979. Subsequent reports should be sent to Mr. Granquist by August 1, 1979; November 1, 1979; February 1, 1980; and April 1, 1980.

1. *Effective Policy Oversight.*—The Order requires heads of agencies and policy officials to exercise effective oversight of the development and implementation of agency regulations. This requirement is intended to raise the level of regulatory decisionmaking within agencies so that policy officials with broader perspectives and responsibilities can balance the other more parochial interests of technical staff. We believe that more effective policy oversight is the key to the implementation of many of the other provisoins of the Executive Order, such as regulatory analysis, public involvement, and clarity. Without it, realization of the other objectives may be impossible.

There are three stages at which the Executive Order requires policy-level oversight for significant and existing regulations:

1. Approval of the semi-annual agenda of regulatory actions;

2. Review, before development begins, of the issues, the alternatives to be explored, plans for obtaining public comment, and target dates for completion of each step in the development process; and

3. Approval before final publication.

The most useful appraisal of agency compliance with this provision should come from case studies of selected regulations, from frank appraisals by the agency staff, and from information supplied by members of the public. Agencies are required to describe in detail several examples of how they carried out this provision of the Executive Order for their significant regulations. Agencies should also tell us, using examples, the effects of this provision of the Order: What major recommendations were disapproved at the policy level? What improvements, if any, were made as a result of better policy oversight? If delay was a problem, agencies should describe those cases in detail, including the reasons for delay and whether or not the quality of the regulation was affected.

Over the next 14 months, OMB will conduct case studies of the development of selected new regulations and the review of existing ones as a supplement to these agency reports. These case studies will enable us to make objective, informed judgments on the effect of the Order and individual agency performance.

II. *Public Participation.*—The Executive Order requires that the public be offered an early and meaningful opportunity to participate in the development of agency regulations. In the past, regulatory proposals have not always reached the public in a timely, informative manner. The requirements of the Executive Order are intended to ensure that the people who are affected by the regulation—those who pay the costs or receive the benefits—have an opportunity to alert federal regulators to the effects and potential problems of the proposed regulation.

To give the public adequate notice, the Order requires agencies to publish at least semiannually, an agenda of significant regulations under development or review. In addition, the Executive Order encourages agencies to achieve greater public participation in several ways: (1) by publishing an advance notice of proposed rulemaking; (2) by holding open conferences or public hearings; (3) by sending notices of proposed regulations to publications likely to be read by those affected; and (4) by notifying parties directly. Agencies are to give the public at least 60 days to comment on proposed significant regulations, except in certain rare instances. This requirement is intended to improve agency decisions by giving the public more time to prepare informed comments.

In their progress reports, agencies will describe, using specific examples, what methods have been used to publicize proposed agency actions and to solicit public comments. Agencies should further describe: (1) which approaches (e.g., hearings, public notices, etc.) resulted in the most useful comments, (2) which were largely unsuccessful, and (3) why.

Agencies should also describe whether expanded opportunities for public participation were given as a general rule, only occasionally, or just in certain cases, such as for proposals with major economic effects. Have efforts to increase public participation resulted in a wider variety of respondents (e.g., more individuals, businesses, State and local governments)? If public comment has increased, has this helped or hindered the agency? How? Where possible, agencies should give examples of significant actions taken in response to public comments, such as withdrawal of a proposed regulation, major changes in the number of people or businesses affected, or significant reduction in cost.

III. *Regulatory Analysis.*—Regulatory analysis is intended to focus agency attention on the economic consequences of regulatory decisions and to ensure that intended regulatory goals are achieved effectively at the least cost. The Executive Order requires agencies to prepare a regulatory analysis for significant regulations which are expected to have major economic consequences for the general economy, individual industries, geographic regions or levels of government. These analyses are to be made available to the public.

While we will be tracking the agencies' regulatory analyses, each agency should provide its own assessment of how this provision worked. Were the analyses, as a rule, completed early in the formulation stages of a regulation? Was the least burdensome of the acceptable alternatives chosen? If not, were reasons provided to the public? Agencies should discuss and provide examples of how the analyses did or did not contribute to the formulation and design of the regulation. For example, where in the agency were the analyses prepared, by program people or by a special analytical staff? If this varied, which approach was most useful and why? Who in the agency found the analysis to be most useful—program managers? Management analysis staffs? Policy-level decisionmakers?

IV. *Existing Regulations.*—Agencies are required to review periodically their existing regulations to see whether each is achieving the policy goals of the

Order. These reviews are subject to the same procedural steps outlined for proposed new regulations. They are intended to help weed out unnecessary regulations and to improve essential ones. Agencies should report how effective their reviews of existing regulations were. We would like to know what difference their reviews made. For example, were unnecessary paperwork requirements eliminated? Was the meaning of the regulation clarified? Were better, less burdensome regulatory approaches discovered and implemented? Were any regulations recommended for outright elimination?

V. *Plain English.*—So that individuals who must comply with regulations understand them, the President has directed agencies to write regulations as clearly and simply as possible. Although this is an extremely important requirement of the Order, plain English is difficult to define and measure. Some regulations must be written in technical language, but at a minimum, the preamble should be clear and understandable to the lay reader. We would appreciate help from the public and the agencies in identifying especially good and especially poor regulations. We will report to the President which agencies continue to issue confusing regulations as well as identify those agencies that issue exceptionally clear and well written regulations.

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

ASSISTANT SECRETARY FOR
POLICY DEVELOPMENT AND RESEARCH

DEC 12 '79

12 DEC 1979

IN REPLY REFER TO:
TEHR

Honorable Carl Levin
Chairman, Subcommittee on Oversight
of Government Management
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Levin:

I am pleased to submit the following answers to the questions contained in your letter of October 24, 1979. I have already provided answers to the questions posed during my testimony.

1. As I mentioned, we tentatively identified seven rules for regulatory analysis. These are as follows:

   a. Floodplains and Wetlands. As originally drafted, these rules had the potential for significant economic impacts, and a regulatory analysis was anticipated. Part of the reason for the potential economic impact was due to a heavy reliance on the Water Resources Council Guidelines, which were felt to be more stringent than the Executive Orders which required these regulations. In any event, largely due to the potential economic costs, the regulations were re-written, and in our judgment did not significantly alter existing HUD policy as far as economic costs and benefits were concerned. Therefore, we felt a regulatory analysis was not required, and would not be a useful exercise.

   b. Lead Based Paint (Part 35). The proposal calls for changing the lead based paint standards to include removal of lead based paint from all chewable surfaces in applicable dwelling units. For the time being, the regulation is not moving forward, but when it does, we fully anticipate it will be accompanied by a regulatory analysis.

c. Energy Audits and Energy Conservation (Part 865). These regulations deal with conducting audits and expending funds for the purpose of conserving energy in housing projects. The Office of Policy Development and Research has recommended the preparation of a regulatory analysis, and we anticipate that one will be prepared.

d. Flexible Subsidy Program (Part 219). This rule was published as an interim rule prior to the setting up of our review process, but we have still recommended the preparation of a regulatory analysis to accompany the final rule.

e. Building Energy Performance Standards (Part 3800). HUD has responsibility for issuing regulations which implement Building Energy Standards which are to be promulgated by the Department of Energy. Through a memorandum of understanding between the two Departments, a regulatory analysis is being prepared by an outside contractor. While this has been somewhat delayed, we will have a preliminary regulatory analysis available for inspection when the regulations are published.

f. Areawide Housing Opportunity Plans. The Office which issued these regulations originally identified this as a regulation for which a regulatory analysis would be prepared, but we felt that this initial assessment was incorrect, in that the regulation did not involve changes in funding and the potential for significant economic impacts seemed very slight. The regulation is important in that it urges areawide planning for housing needs, by areawide agencies, but this is not of great economic impact.

g. State Housing Finance Agency Coinsurance (Part 250). This regulation seemed to have the potential for considerable economic effects, and therefore we requested further information from the Office of Housing in order to better assess the economic impact. Even with a very high assumption of claims under the program, the annual claims to HUD would be at most $1.5 million. The economic impact is limited in that this program is not expected to increase the total number of units produced and financed by State Housing Finance Agencies.

2. We are currently identifying various rules for sunset review. We hope to publish the timetable for review of these rules at the time the next calendar of upcoming regulations is published, on February 1, 1980.

3. In our May 25, 1979 response to the questionnaire, we indicated that the Department had identified approximately 15 parts of CFR Title 24 as candidates for modification or elimination. This response was based on a preliminary check by the General Counsel's office for obsolete material. Since that time, HUD has established a task force on Sunset Review which has undertaken a more detailed study in conjunction with program offices. To date, the study has included the offices of New Communities Development Corporation, Government National Mortgage Association, the Board of Contract Appeals and the Assistant Secretaries for Administration, Community Planning and Development, and Housing. The largest HUD office in terms of rulemaking activity is Housing which is canvassing its components and has agreed to submit certain information by mid-December. This data should uncover a number of Housing rules that need review and will give us a better idea of the task ahead. Based on the studies, for program areas other than Housing, we are tentatively scheduling review on CFR Parts 3, 20, 24, 58, 76, 300, 320 through 390, 500, 510, 511, 540, 541, 551, 556, 580, 590 and 600.

4. As I indicated in my testimony, the area where progress has been most disappointing has been the regulatory analysis requirement. Initially, regulation issuing offices tend to regard such requirements as new unnecessary hurdles in the path of the new regulation. However, we have made substantial progress in this area, and there is an increasing understanding that regulatory analyses can be a valuable aid to the drafter of a regulation. In terms of the objectives of the Executive Order, we now have in place a fully operational system of attaining all phases of those objectives.

5. There has been some redirection of resources, but mainly in setting up the new procedures rather than in a long term diversion of staff time and funds. As I indicated in my submission for the record, we have had a continuing effort directed toward improving regulations through in-house analysis and outside contract research.

6. a. The analytic capability of the regulation issuing offices within HUD has been improved, and this has aided the understanding of the regulatory analysis requirement. Within my office, analytic capability existed prior to the Executive Order, so we have been ahead of certain other agencies in that regard.

   b. We agree with OMB's new emphasis on performing regulatory analyses for all rules with important economic effects, and we have taken steps to downplay the $100 million threshold. However, while we may have placed too much reliance on this criterion, we did not exempt any rules on the basis that they fell just below $100 million in economic cost.

c. The argument has been made and will continue to be made as to the lack of discretion on the part of regulation drafters as to the option chosen in a particular regulation. My office has made it clear that such arguments are not persuasive, because nearly any rule that is issued has the potential for alteration in some way or another. Even if it does not, a regulatory analysis should consider options not possible under current legislation, so that there is the potential for selecting the most effective solution to a problem even if it requires new legislation. I do not consider the fact that we will continue to hear arguments based on lack of discretion to be a significant deterrent to conducting meaningful regulatory analyses.

d. We have already taken steps to allow regulatory analyses and environmental impact statements to serve the same purpose, or reference one another so as to minimize overlap. When both urban and community impact statements and regulatory analyses are prepared for the same regulation, the urban impact statement is embodied in the regulatory analysis.

e. There will always be some trepidation that regulatory analyses will be the basis for focussing criticism on oneself, but I do not consider this to be a major problem. Regulatory analyses should lead to better, more defensible regulations, and to the extent they do so, criticism should be mitigated.

7. Each office must make an initial determination as to whether a regulatory analysis is required, and my office reviews these determinations. Then, each time the regulation is to be published in the Federal Register, a further assessment is made, so that an initial decision not to conduct a regulatory analysis does not rule out conducting one later. It is our hope that most rules can be identified very early in the process, so that the regulatory analysis can have a maximum impact on the rule itself.

8. The regulatory analysis has not led to significant delays, other than the case of the Floodplains and Wetlands regulations mentioned above.

9. The data needed for regulatory analyses and other economic assessments comes primarily from program information generated for administrative purposes, from industry sources when appropriate, from PD & R research, and from published sources. In substantially all cases, we can check the accuracy of data sources by means of consulting experts among HUD staff, from authorities in other parts of the Federal Government or by

direct verification by our staff. The data problem is not usually that the quality of data is bad, but that the required data may be non-existent, in which case the regulatory analysis must generate the required information.

10. We are moving toward ways of improving the process of identifying regulations for regulatory analysis and conducting the analysis. There may be some reallocation of our research funds from other kinds of studies of regulations to formal regulatory analyses, but I do not foresee the need for considerable additional resources. We are moving ahead on our review of our existing regulations, and we intend to conduct more regulatory analyses in the future. I do not agree with the view that regulatory analyses should be conducted for almost every rule published by HUD. Very few of our regulations involve major economic effects, since most of them involve minor procedural changes relating to our Housing and Community Development programs. If regulatory analyses become perfunctory, their value would be diminished. Our review of existing regulations is proceeding on a separate track, and does not interfere with our screening of new regulations. I do not believe that the goals of improving the number and quality of regulatory analyses conflicts with the goal of reviewing our existing regulations.

11. This department has not experienced a "power shift" of this type because we have had Secretarial involvement in key decisions since before the issuance of the Executive Order. Policy questions are reviewed by all interested Assistant Secretaries and most nonconcurrences are resolved prior to Secretarial approval or disapproval. Unresolved nonconcurrences within the Department are settled by Secretarial decision.

Sincerely yours,

Donna E. Shalala

U. S. DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY

WASHINGTON

NOV 28 1979

Honorable Carl Levin
Chairman
Subcommittee on Oversight of
Government Management
Committee on Govenmental
Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for affording me the opportunity to appear before your Subcommittee to discuss the Department of Labor's efforts to implement Executive Order 12044. What follows are our responses to the specific questions asked in your October 24, 1979 letter and the additional information requested by you, for the record, in that same letter:

1. As you know the Department strongly supports the purposes and intent of the Executive Order and, on the whole, we have had little difficulty implementing its requirements.

We have generally found the executive order helpful in improving the quality of our regulatory activities. Certainly the spirit behind it - of increased public participation and more thoughtful analysis of public policy options - is a spirit to which we subscribe. There have been, however, a few outcomes as a result of the executive order, which have been problematic.

(a) We have yet, as a department or in conjunction with OMB, to come up with appropriately sensitive and effective measures of what constitutes achievement under 12044. In some cases, a greater quantity of material in the Federal Register represents more effective regulation. In other cases, less is best. In some cases, completing a review of a regulation quickly is appropriate. In other

cases a more lengthy review is a better guarantee of improvement. In some cases the elimination of unnecessary regulations is appropriate to the goals of 12044, while in other instances developing new regulations where none previously existed may well be consistent with the goals of 12044. In sum, evaluation of 12044 needs to more intelligently include a wide range of possible victories. Current evaluation rests too completely on counting regulations eliminated, checking deadlines met, listing reviews completed on time, and counting pages in the Federal Register. Quality may in some instances mean more not less in the Federal Register and slower rather than faster review.

(b) The publication of an Agenda of Regulations as well as a Calendar of Regulations is confusing to both the federal employees who contribute to both publications and the public which reads both. These two documents should be merged, thus eliminating the false dichotomy between major and non-major regulations. This would considerably increase the usefulness of the document as a policy tool.

(c) A final problem is a lack of in-house resources with sufficient expertise within each program to prepare regulatory analyses without unduly delaying needed regulation. As noted later in our responses we are attempting to address this difficulty.

2. Of course, the requirements of 12044 have made it necessary to redirect resources to new areas - to increase public hearings, to prepare more extensive regulatory analyses, to develop larger numbers of initial analyses. All these government activities have a cost. Yet we find the activities are producing more thoughtful, effective, dependable regulations and that the investment of resources is generally worthwhile.

3. The Department of Labor has taken a variety of steps to impact on the problems cited by OMB.

We have strengthened our in-house analytical talent available to work on regulatory analysis. In some of our agencies, economists have been brought on board to handle this work as well as to supervise outside contractors working on analyses. In other agencies, existing staff resources have been redirected to focus analytical capabilities on the regulatory area. In all cases our policy operation (ASPER) consults regularly with the agencies on the process and resources necessary to the development of credible regulatory analyses.

The Executive Order highlights certain criteria which serve as triggers to the requirement for a regulatory analysis. However, we see the analytical process as one of a continuum from the most basic to the most complex kinds of analyses. There should always be ongoing analysis of a sort appropriate to the regulation in question. The Department requires early thoughtful analysis of planned regulatory activities, beginning with a concept paper on each regulation and continuing with increasingly rigorous analysis as the regulation is developed and as it becomes clear that the regulation has important impacts.

We do not experience agency "uncertainty" on how much flexibility each agency has to select among alternatives But we do find differences from agency to agency in what discretion is appropriate and possible. The Secretary's Office continues to work with the agencies to ensure that apropriate flexibility is exercised while still maintaining important worker protections. The agencies have generally sought opportunities to explore appropriate flexibility.

There is always some confusion as our name for analysis, and the exact form of that analysis, change over the years. Of course, some staff are more familiar

with the old economic impact statement than the new regulatory analysis. Time will reduce that confusion. The important goal of the process remains, however, to enable policy makers to focus on fundamentally useful questions early in the process, and to tailor the shape of those questions in a way appropriate to the regulation in question. Thus whatever current format the analysis takes, it should provide sufficient flexibility to enable the policy makers to shape that analysis to the issues in question.

Secretary Marshall continues to say both to his staff and the public, that if we can't make a convincing case for the necessity and appropriateness of our regulatory action, then we should reconsider our actions. This public commitment has provided a framework within which the agencies can be forthcoming with the best possible analysis. That is not to say, however, that there will not be instances where regulation is necessary and where precise analysis is not possible given the quality of the data or the nonquantatative nature of the problems involved. In such cases it is important that other, non numerical assessment be applied as appropriate to the problem.

4. An agency makes an intial determination of whether or not the regulation is major. That decision is reviewed by the Solicitor, the other Assistant Secretaries and the Secretary's staff. As the regulation continues under development and the analysis of impacts and alternatives continues, the judgment of whether or not the regulation is major remains subject to review at either the Assistant Secretary, Solictor, Under Secretary or Secretary's level. Realistically, a regulation may move in and out of "major" status. The important thing is that thoughtful analysis continue irrespective of whether or not the regulation is deemed major or only significant. Again the complexity of the analyses should be tailored to the complexity of the problem, the state of the data and the art of analyses, and to the nature of the questions which are relevant to the regulation, as well as the comments received from the public.

Doing a regulatory analysis takes more time than not doing one. The analysis is, moreover, only one of several elements contributing to the increasingly lengthy process of regulation development. Many of those elements clearly lead to more effective, more thoughtful regulation. We feel that is generally true of the regulatory analysis. It should be noted that ordinarily the people doing regulatory analyses are not the regulation drafters and so both activities can go on simultaneously.

6. The data comes from a variety of sources: external and internal studies, BLS and other statistical agencies, industry data, public interest groups. In some cases the data are credible because of the statistical agency. In some cases we control the data. In other cases we do not.

Of course all three goals (improved quality of analysis, expedited review, more regulatory analyses) are worthy. These are goals toward which we strive and will continue to strive. However we balance priorities in these three areas - sometimes determining that the expedited review of regulation "X" is more important than the completion of a regulatory analysis on regulation "Y" first. It is a matter of setting priorities and queuing up products. It is obvious that we cannot do everything at once, immediately, all the time. So our goal is to do as much as we can, to set appropriate priorities and to increase our capacity to meet these goals.

7(a). Attached you will find a status report on the 55 regulations selected for review in the department's first Agenda. We have found that we were overly ambitious in listing 55 for review on that first Agenda. A review well done takes at least as long as the development of a new regulation.

(b) OSHA anticipates publication of the fire protection regulations sometime next month.

Information Furnished For The Record

1. It is impossible to intelligently say how many regulations the department has, since there are so many ways that one might count regulations, and so many items which might or might not be excluded from the count. For example, the CETA regulations which are hundreds of pages long might be counted as one regulation since they are required by one statute, or they might be counted as several hundred regulations which correspond to the different statutory requirements. Mine Safety and Health recently made its advisory standards mandatory, while revoking 89 of those standards. Do we count that action as 100 new regulations, or 89 fewer regulations, or one regulation? The Employment Standards Administration is in the process of consolidating and rewriting its OFCCP regulations. If they come out in three separate packages of regulation, is that three regulations, or is it several hundred counting each provision which is implemented, and each subpart as a separate regulation? This is a lengthy way of saying that to count the number of regulations gives one a false sense of numerical precision which is simply not reflected in the complex reality of the variety and size of the regulations which are a part of the Code of Federal Regulations. To be honest, we might as easily say that the Department has as few as 25 regulations or as many as 2500. Each answer is equally close to, or distant, from the reality.

2. The regulatory analyses and other economic analyses published by agencies in the Department attempt to examine the indirect consequences of regulatory activities in addition to the direct costs and benefits. Discussions of indirect costs include factors such as job losses, increased energy consumption, and price increases that may occur as a result of implementing the proposed regulation. To a lesser extent, agencies have begun to examine secondary beneficial by-products of their regulations. Many of the indirect costs and benefits of regulations have proven difficult to quantify.

3. We estimate that the cost of a regulatory analysis at DOL ranges from $2,000 for an initial, in-house exploratory assessment of economic impacts of a simple regulation, to $250,000 for a full-blown extensive regulatory analysis of an extremely complex regulation such as the lead or cotton dust standards. Regulatory analyses have increasingly been utilized to assist agencies in developing more cost-effective standards. The Mine Safety and Health Administration (MSHA) used their economic analysis in converting the Advisory Metal/Nonmetal standards into mandatory regulations to reduce the total costs of the standards from $250 million to $91.6 million. MSHA also used the economic analysis on coal training standards to make the regulations more effective. The Occupational Safety and Health Administration (OSHA) used its inflationary impact statement on lead to exempt certain industries such as construction and to set different compliance periods, thereby significantly lowering the costs of compliance with the lead standard.

4. OSHA's proposed regulation concerning the "Identification Classification, and Regulations of Toxic Substances Posing a Potential Carcinogenic Risk" was issued October 4, 1977 and thus predated Executive Order 12044 requirements that draft regulatory analyses accompany major regulatory proposals when published in the Federal Register. An economic impact statement was not prepared because OSHA had determined that the procedural nature of the regulation which was designed to speed up and streamline the promulgation of standards for cancer-causing chemicals would not directly impose significant cost burdens on industry. In addition, the total cost impact of future standards issues pursuant to OSHA's cancer regulatory policy could not be estimated because of the uncertainty surrounding the set of specific chemical substances (many of which are unknown) and exposure levels to be established in ensuing substance-by-substance regulation. Regulatory analyses would accompany specific chemicals.

The subsequent decision to undertake a regulatory analysis evolves from a request by Organization Resource Counselors, Inc. in a letter to OMB that OSHA adhere to all E.O. 12044 requirements on the generic carcinogen regulation despite the advanced stages of rulemaking. This request led to an inquiry by the Council on Wage and Price Stability (CWPS) on July 11, 1978 followed by a meeting on July 20, between the Department of Labor and representatives of OMB, CEA, CWPS, and the Domestic Policy Staff.

During this meeting, it was suggested that a regulatory analysis be prepared defining the total costs and benefits of OSHA's cancer policy on a substance by substance basis. OSHA reiterated the difficulties attendant with developing even a crude estimate of total impacts, but agreed to compare proposed and alternative approaches and to examine alternative classification schemes and parameters used to determine feasibility. OSHA further agreed to complete the regulatory analysis by October 1, 1978. This would allow sufficient time for the Regulatory Analysis Review Group (RARG) to comment on the regulatory analyss before the scheduled close of the comment period on October 10, if RARG selected the carcinogens regulation for review.

The RARG did decide to review OSHA's carcinogen policy on August 28, 1978 and submitted a notice to this effect in the agency's public record on August 30. Normally, RARG reviews are based directly on regulatory analyses. In view of the scheduled completion date of OSHA's regulatory analysis only nine days prior to the close of the public comment period, the RARG with OSHA's concurrence elected to center its review on issues raised by the proposal and public record to date. CWPS prepared a draft list of concerns raised by the proposal which was placed in OSHA's public record September 22, followed by a draft report to the Review Group on September 29.

The Review Group met to discuss the draft report on October 4, at which time OSHA presented the RARG with a draft of its regulatory analysis. CWPS then revised its draft report, incorporating several issues raised in the regulatory analysis and written and oral comments submitted by Review Group members. The RARG report was further revised following a second meeting of October 19. Both the final RARG report and OSHA's regulatory analysis were submitted into the rulemaking record on the last day of the public comment period which had been extended until October 24, 1978.

5. The Department's initial Agenda indicated that 55 items had been selected for review (as opposed to having review required). These were selected for a variety of reasons:

--court decisions

--changes in technology

--the public had complained about the regulation

--the staff had found the regulation difficult to administer.

These seem appropriate ways to select regulations for review, although these criteria produce a long list for review and do not help the Department set priorities among the items on that list. In addition to these criteria the department, in its latest Agenda, has asked the public to suggest regulations for review which are considered difficult to read or understand. We continue to look for more effective ways to select regulations for review and to set priorities among those regulations so selected.

Sincerely,

Judy Sorum
Special Assistant
to the Secretary

Status of the 55 Regs Selected for Review
On the January 26, 1979 DOL Agenda

Summary

| | | | |
|---|---|---|---|
| I. | Advance notice of rulemaking under development | Total | 3 |
| II. | Publication of proposed regulation under development | Total | 37 |
| | Published | Total | 5 |
| III. | Publication of final regulation under development | Total | 4 |
| | Published | Total | 2 |
| IV. | Decision being made whether to revise or develop regulation | Total | 2 |
| V. | Regulation removed from Agenda | | 1 |
| | Transfer to other Department | | |
| | Issue not in context of Department responsibility | | 1 |
| | | Total | 55 |

Status of the 55 Regs Selected for Review by Agency

| | | |
|---|---|---|
| **ETA** | | |
| Publication of proposed regulation under development | | 5 |
| Decision of whether to revise or develop regulation | | 1 |
| Publication of proposed regulation published | | 1 |
| | Total | 7 |
| **OSHA** | | |
| Publication of final regulation under development | | 3 |
| Advance notice of rulemaking under development | | 2 |
| Publication of proposed regulation under development | | 2 |
| Publication of proposed regulation | | 7 |
| a) under development | | 1 |
| b) Published | | |
| | Total | 13 |
| **OASAM** | | |
| Publication of proposed regulation under development | | 2 |
| Publication of final regulation | | 1 |
| | Total | 3 |
| **ESA** | | |
| Publication of proposed regulation under development | | 18 |
| Regulation removed from Agenda Transferred to another Department | | 1 |
| | Total | 19 |

LMSA

| | | |
|---|---|---|
| Publication of proposed regulation | | |
| a) under development | | 3 |
| b) Published | | 3 |
| Decision of whether to revise or develop regulation under development | | 1 |
| | Total | 7 |

MSHA

| | | |
|---|---|---|
| Publication of final regulation | | |
| a) under development | | 1 |
| b) Published | | 1 |
| Advance notice of rulemaking under development | | 1 |
| Publication of proposed regulation under development | | 2 |
| Regulation removed from the agenda | | 1 |
| | Total | 6 |

U. S. Department of Labor

Mine Safety and Health Administration
4015 Wilson Boulevard
Arlington, Virginia 22203

NOV 13 '79

Honorable Carl Levin
United States Senate
Washington, D.C. 20510

Dear Senator Levin:

This is in response to your request of October 24, 1979, that I provide your Subcommittee with additional information so that the record for the regulatory reform hearing which was held on October 10, 1979, can be completed.

I will separately answer each question which you raised.

1. In the Mine Regulation and Productivity Report of June 15, 1979, there is an article entitled "MSHA revises training reg costs." The article reports on one safety and health standard applicable to metal and nonmetallic mines which requires a miner to inspect any piece of self-propelled equipment he will operate at the start of the shift.

MSHA's original estimate of the cost of this standard was $550,000 for the first year. The calculation was based on the number of such pieces of equipment in the nation (138,000), times one half hour per inspection, times an average hourly wage of the nation's miners ($8). The $550,000, however, was only the daily cost of the standard, not the yearly cost.

Thereafter, the agency modified the estimate. Instead of 138,000 pieces of equipment, the agency estimated 125,000 pieces. Instead of one half an hour to inspect the equipment, the agency estimated two and one-half minutes. MSHA recalculatd the cost of this standard at $12 million per year. Had the original figures been retained, the annual cost of this standard would have been $100 million.

Doesn't this example illustrate the need for MSHA to reevaluate its whole economic analysis procedure?

I do not think that the example which you cite illustrates the need for MSHA to reevaluate its whole economic analysis procedure. What I do think it illustrates is the need for us to continuously reexamine and reevaluate our estimates, at each step in the rulemaking process. The economic analysis to

which you refer concerns a standard found at 30 CFR 55/56/57.9-1, which requires equipment operators in metal and nonmetal mines to inspect self-propelled equipment that is to be used during a shift before placing the equipment in operation. As background information, this standard was undergoing rulemaking at the time of the transfer of MESA (now MSHA) from the Department of Interior to the Department of Labor. The administrative law judge who presided over the hearing on this standard had made his recommendation to the Secretary of Interior, which we basically adopted in the final rule. In developing the initial cost estimates for this standard, we inadvertantly used one equipment inspection per year as the basis for the estimates. This standard, in both its proposed and final form, requires equipment inspections during each shift that the equipment is to be used, and we revised our estimates accordingly. However, since several existing standards require varying workplace inspections, in our revised estimates we projected that the inspections required by this standard would be done in tandem with other workplace inspections and that, in many instances, a visual check of equipment would suffice. This was our basis for reducing the estimated time necessary to make the inspection.

We made a copy of the revised estimate available to interested members of the mining industry.

2. On September 11, 1979, the Secretary of Labor published in the Federal Register a final rule pertaining to Mine Accident, Injury and Illness Reports which expanded the existing rule to cover reporting in many instances which the Mine Safety and Health Review Commission had ruled were not covered under the original rule.

It is our understanding that this final rule was promulgated without any advance notice to the industry, without any previous proposed rule and without any opportunity for industry comment or any opportunity for public hearings. In the Supplementary Information section of the Final Rule announcement, the Secretary cited his authority to do this under Section 508 of the Federal Mine Safety and Health Act of 1977. Further, the Secretary also stated, in the September 11, 1979 Federal Register that public participation was unnecessary and contrary to the public interest.

Within the Department of Labor or in the Mine Safety and Health Administration, are there existing guidelines and criteria established to determine when Section 508 should be exercised in rulemaking?

If no criteria exist, is there a checklist of factors or items to consider in making such determinations?

Is there an established procedure for such determination that public comment and hearings are not in the public interest?

Doesn't MSHA use of Section 508 in this instance run counter to Executive Order 12044 which requires that 60 days be allowed for public comment when regulations are issued by an agency?

Section 508 of the Federal Mine Safety and Health Act of 1977 (Mine Act) authorizes the Secretary to issue regulations he deems appropriate to carry out any provision of the Mine Act. This general rulemaking authorization is used in all MSHA rulemaking except for the promulgation of mandatory safety and health standards which are authorized by section 101 of the Act. Rules authorized by section 508 of the Act are promulgated under the informal rulemaking procedures of section 553 of the Administrative Procedure Act (APA). Normally, we follow the notice and comment procedures of section 553. In this case, we found that good cause existed to invoke the exemption provided by section 553(b)(B) of the APA from the notice and comment procedures. Our reasons for invoking the exemption are stated in the Supplementary Information published with the rule.

For each regulation issued under section 508 of the Mine Act, we do comply with the procedures contained in Executive Order 12044 and the DOL guidelines which implement the Executive Order as we proceed in our rulemakings. The DOL guidelines state that regulations or amendments to regulations involving minor technical or clarifying changes shall not usually be considered significant and, in such instance, no economic analysis will be necessary to determine if the regulation is major. As we stated, in the Supplementary Information published with the final rule on September 11, 1979, an administrative law judge of the Federal Mine Safety and Health Review Commission held that the existing reporting requirements only required mine operators to provide accident information and not injury and illness data. We stated that the purpose of the amendment was solely to clarify MSHA's intent that operators provide accident, injury and illness information. In addition, we stated that the collection of accident information only would render the submission of the Mine Accident, Injury and Illness Report partially useless and frustrate the purpose of MSHA's accident, injury and illness analysis program. A survey of industry practice revealed that mine operators were in fact providing all three types of information, so we projected that the amendment would have a

minimal economic impact on the mining industry. We also believe that the approach we took will best help us achieve our goal, and best serve the interests of the nation's miners.

For all of the above reasons, we do not believe that MSHA's use of section 508 is counter to the Executive Order's requirement for a 60 day comment period.

3. Was any regulatory analysis made on the final rule published in the September 11, 1979 Federal Register?

If not, what economic analysis, if any, was undertaken? Please provide a copy for the record.

There was no regulatory analysis prepared for the final rule published on September 11, 1979. As I stated earlier, we follow the requirements outlined in Executive Order 12044 and the DOL guidelines for implementing the Excutive Order. These requirements state that regulations or amendments involving minor technical or clarifying changes shall not usually be considered significant and, in such instance, no economic analysis will be necessary. However, prior to the promulgation of the rule, consideration was given to what economic impact the amendment would have on the mining industry. As stated in the Supplementary Information, "The manner in which the regulation has been construed is well known to members of the mining industry and the vast majority of mine operators have been complying with §50.20-6(a) accordingly." The survey mentioned in my answer to your earlier question supports this conclusion that the actual economic impact on the mining industry would be minimal.

4. Don't you think that the Executive Order 12044 places an obligation upon the Secretary to examine possible costs, particularly since recordkeeping and reports consume great quantities of human effort and are constantly being cited by various private and public authorities as one of the major costs of regulation and one of the contributing factors to declining productivity?

The Executive Order does place an obligation upon the Secretary to examine possible costs of recordkeeping. We have consistently tried to do this and have revised some of our standards to either eliminate or reduce recordkeeping requirements. We will continuously review our recordkeeping requirements with an eye towards keeping them to a minimum.

5. MSHA is presently engaged in developing regulations requiring mine rescue teams for all underground mines. As proposed, the regulations would apply to all underground mines regardless of size or mineral product.

There apparently has been a great deal of criticism aimed at the regulations because they were too inflexible and because some of the equipment requirements are inapplicable to non-coal mines. When the 1977 Act was passed, Congress emphasized that regulations should be developed vertically, that is, certain regulations should apply to coal and certain regulations should apply to non-coal.

a. Why werent't the mine rescue team regulations - developed in this manner?

b. When MSHA proposes industry-wide regulations such as these, shouldn't there be sufficient flexibility to accommodate the various types of mining within the industry?

In accordance with section 115(e) of the Mine Act, the mine rescue team regulations will be applicable to all underground mines. However, we will, to the maximum extent feasible, keep the regulations flexible enough to accommodate all types and sizes of underground mines. For example, in the proposed rule, we included a provision which would allow operators of small and remote mines to submit alternate plans for compliance. In the notice announcing the public hearings which were held on the mine rescue team regulations, we specifically solicited testimony on a definition for small and remote. Several commenters on the proposed rule suggested that the small and remote criteria should be expanded to include other conditions or situations which might justify an alternative to the mine rescue requirements contained in the proposed rule. These commenters also suggested some possible methods of alternate compliance. In the notice of public hearings, we noted that we would like to explore further this possibility and solicited testimony from all segments of the mining industry. We received testimony with respect to this issue and, at this point, we are seriously considering expanding the criteria for alternative compliance to include certain mining conditions. In addition, we are looking particularly at the proposed equipment and training requirements and may make changes in those which allow for greater industry flexibility. In the final analysis, although we have a congressional mandate to publish rules which are applicable to all underground mines, we will, to the greatest extent possible, do so in a manner which both addresses and is responsive to the differing needs and concerns of the entire mining industry. We will gladly provide you with a copy of our mine rescue team regulations when thy are finalized.

In accordance with your request, I am enclosing a copy of MSHA's economic analysis prepared in connection with conversion of the advisory standards to mandatory standards.

If I can be of further assistance, please let me know.

Sincerely,

Robert B. Lagather
Assistant Secretary for
Mine Safety and Health

Enclosure

WILLIAM S. COHEN
MAINE

United States Senate
WASHINGTON, D.C. 20510

October 17, 1979

Mr. Robert B. Lagather
Mine Safety and Health Administration
Ballston Towers, 4015 Wilson Blvd.
Arlington, Virnginia 22203

Dear Mr. Lagather:

I was pleased that you were able to testify last week before our Subcommittee on Oversight of Government Management. I believe we engaged in a frank discussion of some of the more pressing issues accompanying regulatory reform.

I do have some additional questions, however, that I would appreciate having answered for the record.

At the hearing you mentioned that there was a full regulatory analysis performed with respect to the training regulations of the Mine Safety and Health Act. Yet in the written statement you provided to the Subcommittee, you noted, "the Executive Order requires the preparation of a 'regulatory analysis for all major regulations. I have been with MSHA almost two years now, and although we have not proposed or published a major regulation within the meaning of the Executive Order, we have prepared basic economic analyses for all of our regulations. I believe that this is consistent with the Executive Order's goal. . ." It appears to me that there is somewhat of an inconsistency here. I would be highly appreciative if you could furnish, for the hearing record, a copy of the regulatory analysis that was performed or a response noting that no full regulatory analysis was performed with regard to the training regulations.

In addition, at the hearing you said that neither OSHA nor MSHA had jurisdiction over the so-called "borrow pits." Yet a Department of Labor press release dated April 17, 1979, declares, "'Borrow pits' --- areas where surface material is extracted to be used as fill material -- come under OSHA jurisdiction except when located on mine property or related to mining." The Subcommittee would be appreciative if you could inform us as to whether your statement at the hearing or the item in the press release is the current basis for agency enforcement of the federal labor law.

Your expeditious cooperation will be helpful to us on the Subcommittee.

With best wishes, I am,

Sincerely,

William S. Cohen
Ranking Minority Member

WSC:ssm

**U. S. Department of Labor**

Mine Safety and Health Administration
4015 Wilson Boulevard
Arlington, Virginia 22203

NOV 13

Honorable William S. Cohen
United States Senate
Washington, D.C. 20510

Dear Senator Cohen:

This is in response to your request for clarification of certain statements made in my testimony of October 10, 1979, before your Subcommittee on Oversight of Government Management.

First, with regard to MSHA's training regulations, a full regulatory analysis under Executive Order 12044 was not prepared. My written statement correctly noted that we did prepare an economic analysis of the training requirements (copy enclosed). As you are aware, the purpose of a full regulatory analysis is to provide decision makers with useful data to enable them to look at acceptable alternatives and make meaningful regulatory choices. However, with respect to the training regulations, Section 115 of the Federal Mine Safety and Health Act of 1977 (Mine Act) was very specific as to the types and amounts of training required for various categories of miners. The Mine Act, therefore, did not permit a reduction in training and did not allow MSHA the flexibility to choose among alternatives in implementing the statutory objectives.

With respect to borrow pits, I regret the confusion that may have resulted from my inadvertent statement that neither OSHA nor MSHA have jurisdiction over borrow pits. Both the OSHA-MSHA Interagency Agreement and the April 17, 1979, press release announcing the Secretary of Labor's approval of the Agreement clearly state that "borrow pits come under OSHA jurisdiction except when located on mine property or related to mining." Copies of the Agreement were sent to all metal and nonmetal mine operators.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

Robert B. Lagather
Assistant Secretary for
Mine Safety and Health

Enclosure

U.S. DEPARTMENT OF LABOR

MINE SAFETY AND HEALTH ADMINISTRATION

# Analysis of Economic Consequences of Mandatory Safety and Health Training Standards

## I. Statement of Problem and Regulatory objectives.

Section 115 of the Federal Mine Safety and Health Act of 1977 (Mine Act) requires each mine operator to have a health and safety training program, approved by the Secretary of Labor, for miners, and requires the Secretary to publish rules governing such programs. In enacting this provision, the Congress recognized that there are an increasing number of new miners being employed in an expanding mining industry and that health and safety training of the nation's 511,000 miners is essential to a strengthened mine safety and health program.

## II. Description of the Parties.

Those most affected by this regulation will be the operators of the nation's approximately 22,000 metal, nonmetal and coal mines and their miners, for whom the training plans are required. Additionally, the major trade associations who represent the operators, union groups who represent the miners and state and local governments who conduct mining activities will also be affected.

## III. Discussion of major alternatives.

Because section 115(a), (b) and (c) of the Mine Act sets forth minimum requirements for the safety and health training and retraining of miners, including hours of training, there are no major acceptable alternatives to a regulatory action which implements the specific statutory provisions.

In order to implement such provisions, MSHA regulations must require, at a minimum, 40 hours of training for all new miners, 24 hours of training for all new surface miners, 8 hours of annual refresher training for all miners and training for miners reassigned to new tasks. However, the MSHA regulations do impose significant requirements beyond those necessary to comply with the statutory mandate, namely, the training of newly-employed

experienced miners and the obtaining of MSHA approval in order to be qualified as an instructor. The alternatives would be to eliminate or modify one or both of these MSHA-imposed requirements.

1. Eliminate or modify newly-employed experienced miner training.

MSHA could have eliminated this requirement altogether. However, the legislative history to the Mine Act and MSHA experience lead to the conclusion that even experienced miners should be thoroughly familiarized with their particular mining environment and the attendant hazards before they begin their new job duties. Another alternative would have been to require abbreviated "hazard training" for newly-employed experienced miners. However, MSHA believes that hazard training, as described in the final rules, is adequate only for persons who are only occasionally exposed to a limited range of mining hazards.

2. Modify requirement for MSHA - approved instructors.

The regulation requires that operators obtain MSHA approval of instructors who will teach new miner training, newly-employed experienced miner training and annual refresher training. It should be noted that the training of miners assigned a new task and hazard training do not have to be conducted by MSHA approved instructors. MSHA could have eliminated the requirement for approval of instructors and required only that a "competent" person provide instruction for all categories of miners. However, MSHA believes that it is essential for a person who is going to be responsible for instructing miners in the health and safety aspects of their jobs to be highly qualified, not only in the particular subject matter such instructors will teach, but also in the skills that instructors must have in order to teach that subject effectively.

The testimony and comments have not persuaded MSHA that there is an acceptable alternative method of ensuring that these goals are met and, therefore, MSHA rejected this alternative. In order to ensure the timely approval of instructors, the regulation does provide general alternative methods for obtaining MSHA approval.

IV. Estimate of economic consequences.

Because the only course of regulatory action available to the Secretary is to promulgate a rule which implements the specific provisions of the Mine Act, estimates will be provided for this rule only. As noted previously, the MSHA regulation does impose requirements which are beyond the statutory mandate, and estimates for these requirements will be discussed separately. While agency estimates were based upon the latest available employment data, amounts included for salary and other costs may, for certain segments of the mining industry and for certain geographical areas, be somewhat inflated.

A. Statutory Requirements: The costs associated with the training of all new surface and underground miners, training of miners assigned a new task and annual refresher training are estimated to total over 102 million dollars. There are no alternatives which would lower the cost of these requirements, since the statute sets forth minimum hours of training and the regulation adopts the minimum levels. The following is a detailed analysis of the costs.

First Year Estimates - $'s in 000's

| Training Category | Cost per miner | # Miners to be trained | # Days | Total |
|---|---|---|---|---|
| New Miner underground | $140 | 18,127 | 5 | $12,688 |
| New Miners Surface | $140 | 31,715 | 3 | $13,320 |

| Training Category | Cost per miner | # Miners to be trained | # Days | Total |
|---|---|---|---|---|
| New Task Training | $ 50 | 124,605 | 1 | $6,231 |
| Annual Refresher | $140 | 498,421 | 1 | $69,779 |

This analysis is based on the following assumptions:

-- an average daily cost per miner of $140, which includes the miner's wages, meals, transportation and lodging, where appropriate, and a proportionate share of the cost for training facilities, materials and wages of an instructor.

-- a 30% annual employee turnover rate, with one-third of the replacement employees being new miners and the remaining two-thirds being experienced miners. Based on Bureau of Labor Statistics data for coal and metal mining industries, this 30 percent turnover rate appears considerable inflated Statistics are not yet being kept by BLS for nonmetal mining employee turnover and testimony from this segment of the mining community indicated a frequently high turnover. MSHA believes that the 30% figure is an absolute maximum average.

-- 25% of all miners will be required to undergo new task training annually.

B. Significant MSHA-imposed requirements: Training of newly-employed experienced miners and obtaining MSHA approval of instructors. As noted previously, MSHA could have eliminated both of these requirements but determined that there was no acceptable alternative to their inclusion. Estimate for both these requirements total approximately $28.8 million. The following is a detailed analysis of the costs of these requirements.

First Year Estimates - $'s in 000's

| | Cost per miner | # Miners be trained | # Days training | Total |
|---|---|---|---|---|
| (1) Newly-employee experienced miner training | $140 | 99,684 | 1 | $13,95( |

The costs associated with newly-employed experienced miner training are based on the same assumptions used with respect to the statutory requirements, and in addition, that an average of 8 hours will be required for such training.

(2) MSHA approval of instructors.

| | | |
|---|---|---|
| (a) | 14,000 Instructor Trainees -- 3 days training @ $2,191,840 per day | = $6,576 |
| (b) | 14,000 Replacement Employees -- 3 days @ $2,126,880 per day | = 6,381 |
| (c) | Travel - 200 miles @ 17¢ mile X 14,000 | = 476 |
| (d) | Per diem and lodging - 3 days @ $35 per day X 14,000 | = 1,470 |
| | Total | $14,903 |

To derive the above costs, it was projected that approximately 17,500 new approved instructors would be required and that 80 percent of these, or 14,000, would be operator-employed persons for whom replacement personnel would be required for the 3 - day period of instructor training. Costs for travel, food and lodging were also included.

OFFICE OF THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

GENERAL COUNSEL

NOV 21 1979

NOV 26 '7

Honorable Carl Levin
Chairman
Subcommittee on Oversight of
Government Management
United States Senate
Washington, D.C. 20510

Dear Senator Levin:

This is in response to your letter of October 24, 1979, which requests certain information and responses to a number of questions concerning compliance with Executive Order 12044 within the Department of Transportation (DOT). I also would like to take this opportunity to thank you for giving Neil Eisner and me the opportunity to appear before your Subcommittee to discuss the Department's efforts to improve its regulations.

As I indicated at the hearing, the Department of Transportation has had great success in complying with Executive Order 12044. In fact, the Office of Management and Budget has named us a leader in implementing the Order. We have had few problems in complying with its provisions. High level involvement by policy making officials and rigorous internal procedures have served us well in implementing the Executive Order.

The following numbered paragraphs cover the questions in your letter.

1. The Federal Highway Administation's rulemaking on hours of service limitations for truck drivers:

   The first hours of service regulation was issued by the Interstate Commerce Commission in 1937. For safety reasons, the regulation specifies the number of hours a commercial motor vehicle driver may drive following a specified period of time when the driver is off-duty. The present basic driving limitation is a 10-hour maximum following 8 consecutive hours off-duty, and the driver may not remain on duty more than 70 hours in any 8 consecutive days (49 CFR 395.3). This regulation is an accident prevention measure intended to eliminate the risks of having fatigued drivers operating heavy commercial vehicles on public roadways in the general traffic stream.

Many facets of motor carrier operations have changed in recent years as the result of technological and other changes. Arguments have been made that because of these changes, the present hours of service rules are not totally satisfactory and may need revision.

The Federal Highway Administration's (FHWA) Bureau of Motor Carrier Safety (BMCS) has had analytical research conducted by outside contractors to study the relationship of fatigue, hours of service, and commercial vehicle operations. This research was completed in 1978. FHWA also conducted other research to compile data on highway accidents and the environment in which drivers operate trucks. This research has also been completed.

In July 1973, a petition was filed by PROD, a professional drivers organization, with the BMCS to institute immediate rulemaking to amend the hours of service regulation. This petition was denied in August 1973. PROD, joined by several Members of Congress, filed suit in November 1973, in the U.S. Court of Appeals for the District of Columbia, for a court order for FHWA to institute immediate rulemaking to revise the hours of service regulation. The court denied the request to institute immediate rulemaking action and granted the Government's motion for summary judgment, but "without prejudice to plaintiff's filing a subsequent action if within 18 months from August 21, 1974, the Department of Transportation shall not have published a Notice of Proposed Rulemaking in the Federal Register to amend Part 395, Title 49 of the Code of Federal Regulations ...."

Following the court's action, an Advance Notice of Proposed Rulemaking was issued in February 1976 (41 FR 6275). FHWA has informed us that the comments to the public docket, received in response to this notice, provided insufficient data to proceed with further rulemaking at that time.

The rulemaking on hours of service could involve significant changes to the existing rule which may cause significant economic dislocations in terms of driver wages and carrier compensation practices, highway transportation pricing, the cost of goods and services consumed and motor carrier operating costs on a nationwide basis. Pursuant to Executive Order 12044 and the Department of Transportation's Regulatory Policies and Procedures implementing the Executive Order, a Regulatory Analysis is required. To conduct this analysis, comprehensive cost data are needed in order to assess the potential impact of these changes within the interstate motor carrier industry and on the national economy.

A second Advance Notice of Proposed Rulemaking was issued on May 22, 1978, and a Draft Regulatory Analysis was prepared, under the Department's regulatory procedures, to provide economic information early in the rulemaking proceeding. With respect to the interest you expressed in your letter concerning the Regulatory Analysis, it should be noted that Executive Order 12044 does not require an analysis for Advance Notices. FHWA has indicated to us that this preliminary analysis did not include the results of the research efforts mentioned above because they were still being conducted and there was insufficent cost information available to prepare an extensive analysis.

At about this time, the Regulatory Analysis Review Group (RARG) and the Council on Wage and Price Stability (COWPS) established formal procedures to review selected regulations initiated by executive agencies. As indicated in your letter, RARG and COWPS raised certain objections to the analysis prepared in connection with the second Advance Notice. On November 20, 1978, COWPS filed comments on the Advance Notice (BMCS Docket No. MC 70-1, Federal Motor Carrier Safety Regulations, Hours of Service) stating: "Before proceeding with further rulemaking, BMCS should obtain thorough estimates of the costs to carriers and their employees."

Based in part on the COWPS comment, a further research effort was initiated by FHWA, on January 5, 1979, for an economic impact assessment to be conducted by an independent contractor. This research has not been completed as yet. In addition, the BMCS conducted public hearings during September, October, and November of 1978 at seven locations involving 28 days of testimony. The hearings resulted in more than 9,000 pages of transcripts and submissions from 1,200 interested parties. FHWA will make this data available to the contractor conducting the economic impact assessment.

The objectives of this economic study are to: (1) identify and assess the economic consequences resulting from proposed revisions to the present hours of service regulations; (2) ensure that the direct and indirect effects of the proposed regulations have been adequately considered; and (3) ensure that the least burdensome of the acceptable alternatives has been chosen. The results of the study would be used as the basis for any Notice of Proposed Rulemaking and related Regulatory Analysis that would be required to be issued for public comment before a final rule could be adopted.

This rulemaking has been designated Departmentally as a "major" regulation, and any related regulatory document will have to be developed and issued in conformance with established procedures which require clearance within the Federal Highway Administration and the Office of the Secretary. RARG and COWPS will be able to review and comment on any Notice of Proposed Rulemaking and related Regulatory Analysis issued on this subject.

2. What specific problems or frustrations has your agency encountered in trying to implement the Executive Order and how has your agency dealt with them or how does it propose to deal with them?

One problem area we have confronted concerns the number of report requests and inquiries that the Department receives from outside organizations concerning compliance with the Executive Order. The same persons who review significant regulations and associated Regulatory Analyses and develop innovative techniques and approaches to improve the regulatory process and resulting regulations must compile the information needed for the reports and responses and draft them. This has placed a strain on the Departmental rulemaking workforce. We foresee this problem ending soon. It is our belief that many of the inquiries received on this subject will cease or diminish as final action on the administrative procedure improvement legislation approaches and more experience is gained with the Executive Order.

3. To what extent has your agency had to redirect scarce resources from its primary functions in order to carry out the provisions of the Executive Order?

The Department has not had to redirect scarce resources away from the Department's primary functions to carry out the provisions of the Executive Order. Improving its regulatory programs is a major goal within the Department of Transportation and has not interfered with its other essential functions or operations. It is possible that the minimal staffing changes that have been made to implement the Executive Order could reduce, in the long term and in certain areas, overall personnel requirements by improving the quality of DOT regulations, thereby making them easier to interpret and enforce.

A new office, staffed by six attorneys, has been created within the Office of the General Counsel. Part of its job is to facilitate the review of significant regulations and to perform other functions required by the Executive Order. Within the Department's operating administrations, there also has been some reassignment

of duties among offices and the addition of responsibilities to certain personnel. We believe an increase in efficiency and productivity has precluded the need, to date, to draw essential resources from other functions of primary importance. We have not seen any significant increase in staffing to comply with the Executive Order.

4. What is your agency doing to address the five factors cited by the Office of Management and Budget as contributing to the lack of government-wide progress on doing regulatory analysis?

(a) Within DOT, when adequate full time DOT staff with necessary expertise was not available, the Department has contracted for outside studies and could utilize temporary employees. In any event, whenever a Regulatory Analysis is required within DOT, one is prepared.

(b) We do not see the $100 million Regulatory Analysis trigger criteria of the Executive Order or the understating of compliance costs as a problem within DOT. Regulatory Analyses or equally detailed economic evaluations have been conducted for regulations with less than a $100 million impact and estimated compliance costs are reviewed closely by top-level policy officials. It should be noted that, within DOT, an economic evaluation is required for each regulation not requiring a Regulatory Analysis. Therefore, no office initiating rulemaking could avoid developing an economic statement merely by understating the compliance costs.

(c) There is little uncertainty on how much flexibility or discretion is available under the statutes giving the Department its regulatory authority. Some of the statutes provide a great deal of flexibility; others are very specific and the regulator is provided little discretion in choosing alternatives. Such specificity has not hindered our preparation of Regulatory Analyses; however, it necessarily reduces the number of alternatives that can be chosen.

(d) and (e) We do not believe that the proliferation of impact analysis requirements or the existence of other disincentives in any way act to inhibit the Department in complying with the Regulatory Analysis requirements of the Executive Order. The Department provides a great degree of high level policy oversight to ensure that the requirements of the Executive Order are carried out. The response to the following question goes into more detail on this oversight.

5. Please describe what procedures, if any, your agency has to review an initial decision that a regulation is not "major" under the Executive Order and therefore does not require a regulatory analysis?

In order to ensure adequate oversight of the decision on preparing a Regulatory Analysis, each rulemaking initiating office is required by the Department's Regulatory Policies and Procedures to prepare a Work Plan at the earliest stages in the development of a significant regulation. In part, the Work Plan indicates the objectives of the regulation and whether a Regulatory Analysis is likely to be required. This Work Plan is then reviewed within the operating administration by program and legal personnel and must be approved by the agency head. The Work Plan is then submitted to the Department's Office of the General Counsel where it is, in turn, circulated for review by high level officials in the Office of the Secretary. The decision on whether a Regulatory Analysis will be required is reviewed closely by each person in the process.

A review similar to that used for Work Plans also is used in the development and approval of the Department's Semi-Annual Regulations Agenda, which is published in the Federal Register, and the quarterly updates to that report. The need for a Regulatory Analysis is noted in the Agenda.

If questions are raised within the Office of the Secretary concerning the need for a Regulatory Analysis based on representations made in the Work Plan or information in the Agenda, they are relayed to the operating administration quickly. In this way, the development of the regulation and the related Regulatory Analysis can proceed without the delay which might occur if a Regulatory Analysis were found to be needed late in the regulatory process.

Admittedly, it is possible that in certain cases insufficient information will be available when a Work Plan or the Agenda is developed to base an accurate decision on whether a Regulatory Analysis is needed. Conditions may also change in the middle of a rulemaking proceeding and may necessitate the preparation of a Regulatory Analysis even though one might not have appeared to be needed when the proceeding began. For this reason, and to ensure that the decisionmakers within the Department are aware of the economic costs of each regulation, the Departmental Regulatory Policies and Procedures require the preparation of a Regulatory Evaluation for each Notice and Advance Notice of Proposed Rulemaking and final rule where a Regulatory Analysis is

not required. These evaluations must describe the economic costs of the regulation. Their detail often equals or approaches that of a Regulatory Analysis. Regulatory Evaluations for significant regulations are reviewed in a manner similar to Work Plans. However, since each Notice of Proposed Rulemaking and final rule relating to a significant regulation must be concurred in by the Secretary and since the economic data in the related evaluation is often extensive, the review afforded Regulatory Evaluations is generally more detailed than that provided for Work Plans. During the review of Regulatory Evaluations, the need to reclassify a regulation as "major" and, thereby, require a Regulatory Analysis is usually readily apparent. We are convinced that our procedures minimize to the greatest extent possible the likelihood of a regulation warranting a Regulatory Analysis being issued by the Department without one.

6. Has the regulatory analysis procedure delayed or forced a cutback in any of your regulations required by statute? If so, please describe in detail.

The need to prepare a Regulatory Analysis has not forced a cutback in any of the Department's regulations required by statute. Neither has it resulted in the Department failing to comply with a statutorily imposed deadline for issuing regulations.

7. Where do you get the data you need to do regulatory analysis and what controls do you have on its quality?

The Department obtains data needed to prepare Regulatory Analyses from a number of different sources. These include: industry economic statements, contract studies, information solicited (e.g., auto defects report) or required (e.g., aircraft malfunction and defect reports) from the public, public field surveys, accident investigation reports, statistical studies performed in-house, and information submitted in responses to Advance Notices of Proposed Rulemaking and Notices of Proposed Rulemaking by the public. An attempt is made to assure the quality of the data by cross-checking data from different sources and by making the data available to the public for comment in the form of draft Regulatory Analyses or reports. In this way, the public can point out inaccuracies.

8. OMB has recommended that:

   a. agencies devote more time and attention to improving the quality of their regulatory analysis;

   b. agencies review more existing regulations and expedite that review; and

   c. agencies conduct more regulatory analyses with regulatory analysis to be considered "more the rule than the exception".

Given your resources at the present time, can you effectively and efficiently implement all three recommendations simultaneously?

We believe it to be important for the Department to devote more time and attention to improving the quality of its Regulatory Analyses. For the most part, this objective can be accomplished with existing resources. However, it is our opinion that the OMB recommendations concerning all the listed objectives were perhaps based on their experience with other government agencies, and were not directed at this Department. The Department's accomplishments in these areas have been substantial and they will continue to improve.

We place a lower priority on the second and third objectives recommended by OMB. As discussed more fully in our response on the second item in the attachment to your letter, the Department has reviewed, is reviewing or is planning to review a large number of its regulations. We believe our efforts have been commendable in this area. Concerning the third objective, the Department of Transportation issues large numbers of rulemaking documents in the Federal Register each year. The vast majority of these documents have no economic impact or have an economic impact that is relatively miniscule. Examples are the Federal Aviation Administration's rules that change instrument approach procedures at airports. Only approximately 400 of the Department's upcoming rulemaking proceedings warrant listing in the Department's Semi-Annual Regulations Agenda. Of these, only about 70 are significant regulations. Based on this, it is doubtful that the preparation of Regulatory Analyses ever will be the rule rather than the exception within the Department. However, as indicated in a previous response, a Regulatory Evaluation is prepared for each regulation not requiring a Regulatory Analysis. The development of high quality important Government regulations will suffer if too much time is devoted to preparing Regulatory Analyses for economically inconsequential regulations.

9. The OMB report noted that one major effect of the Executive Order has been "a significant power shift within agencies from the assistant secretary level to agency heads." Is this a correct statement at your agency and what sort of resources is your agency head putting into oversight of the rulemaking process?

Within certain of the Department's operating administrations, the Executive Order has increased agency head participation greatly while other administrations had a high degree of agency head participation even before issuance of the Executive Order. This depended, for the most part, on the size of the agency and the interest of the agency head in the particular rulemaking. However, under the Executive Order, agency head participation is required and has become more systematic.

As indicated in our response to your fifth question, each Work Plan must be approved by the agency head. Also, each Advance Notice of Proposed Rulemaking, Notice of Proposed Rulemaking and final rule concerning a significant regulation must be reviewed by the head of the operating administration to ensure that the document meets the objectives of the Executive Order.

Review by the Secretary has also increased greatly. Each significant rulemaking notice and final rule is now submitted to the Secretary for concurrence. Moreover, the Secretary issues the Department's Semi-Annual Regulations Agenda which lists non-significant regulations as well as significant regulations that the Department plans to issue. To assist the Secretary in providing adequate review, a new office, now staffed by six attorneys, was established within the Office of the General Counsel to oversee the Department's compliance with the Executive Order and to coordinate the review of significant regulations within the Office of the Secretary. In addition, each of the Assistant Secretaries and the Director of the Office of Civil Rights have named liaison officers to facilitate the review of significant regulations within their offices. These personnel have as one of their primary job functions the work involved in carrying out the Executive Order; however, since the issuance of the Order, there has been an increased involvement by all members of the Secretary's staff including the Assistant Secretaries and General Counsel in improving the Department's regulations by reviewing significant regulations. Moreover, a Regulations Council has been established within the Department. The Council is made up of the Department's highest level policy officials and deals with the most controversial regulatory issues faced by the Department.

The following information is provided for the hearing record and covers the items listed in the attachment to your letter:

1. A description of the NHTSA Public Participation Program, including a list of participants to date, is requested.

A program for DOT's National Highway Traffic Safety Administration (NHTSA) was initiated in January 1977 by the Secretary to provide financial assistance to groups and individuals who could not otherwise bear the cost of effective participation in the administrative rulemaking proceedings of the agency. Established as a one-year test program, favorable evaluation and comment within the Department and by the public resulted in extension of the program until further notice.

Individuals or groups applying for funds must demonstrate that the applicant's participation would contribute substantially to a full and fair determination of the issues involved. Applicants must describe their economic and social interest in the proceedings, their expertise in the issues, explain the positions they propose to present and supply financial statements proving need for assistance.

The public is informed of the availability of funding for a given proceeding by announcements in the Federal Register and the general press, and by letters and telephone calls directed to individuals and groups, listed by the Department's consumer offices, which have expressed a special interest in particular areas of rulemaking.

An independent Evaluation Board reviews all applications for financial assistance and makes the final decisions on granting awards. The three-member panel is composed of the Assistant Director for Consumer Affairs, within the Office of the Secretary, and the Chief Counsel and Associate Administrator for Plans and Programs within NHTSA. The NHTSA Office of Consumer Participation administers the program.

NHTSA rulemaking has been improved by the Public Participation Program because it has -

-- ensured participation of informed and interested citizens and prevented organizations with high economic interest in the outcome of the proceedings from dominating the flow of information to the agency;

-- provided for consideration of unrepresented and under-represented views and interests on individual issues; and

-- broadened the available information, enabling more complete assessment of competing arguments, thereby increasing the validity and fairness of agency regulations.

In accordance with your request, an attachment to this letter lists those persons and organizations who have been provided financial assistance under the funding program.

2. A specific, numerical estimate as to how many rules and regulations your agency currently has in the Code of Federal Regulations. Of these, how many have been sunseted, how many have been reviewed and how many are scheduled for review under the Executive Order?

The terms "rule" and "regulation" are not clearly defined. The terms could be interpreted to mean a single requirement as well as a group of related requirements on a single subject. The

term "regulation" is not defined in the Administrative Procedure Act; however, a CFR Subchapter as well as a subparagraph could be a "rule" as that term is defined in the Act (See 5 U.S.C. § 551). As an example, Subchapter G of Title 14 of the CFR is a rule applicable to air carriers, air taxis and commercial operators of aircraft; Part 121 of that Subchapter is a certification and operating rule specifically applicable to air carriers and commercial operators of large aircraft; Subpart L of that Part is a rule setting forth applicable maintenance requirements; section 121.369 of that Subpart is a rule covering applicable maintenance manual requirements; paragraph (b) of that section is a rule requiring that certain kinds of materials be included in the maintenance manual; and subparagraphs (1) through (9) of that paragraph are rules requiring specific information to be included in the manual. Because of this, the count provided below reflects the number of regulatory Parts contained in the CFR that were issued by DOT, its operating administrations or predecessor agencies. The number of regulatory Parts reflects the areas and breadth of Departmental rulemaking.

We would also want to caution you with respect to estimating the number of rules reviewed as a part of the Department's review programs. Using the Federal Aviation Administration's (FAA) Airworthiness Review Program as an example, that Program provided for the review of fourteen regulatory Parts. One of those Parts, Part 121, which is mentioned above, contains over 300 sections with one to 12 paragraphs; those paragraphs have up to 24 subparagraphs; those subparagraphs have as many as 12 subdivisions. When an entire regulatory Part is made the subject of a review program (and many have been more than once), each requirement in the Part is reviewed.

There are 458 regulatory Parts in the CFR which have been issued by DOT, its operating administrations or their predecessor agencies. Of these, approximately 200 Parts or portions thereof are being reviewed or have been reviewed at least once since the issuance of the Executive Order. The Federal Highway Administration has reviewed or is reviewing all its rules; the Federal Railroad Administration is reviewing all its safety rules. In the coming year, the Department plans to begin review of approximately 25 Parts or portions thereof. There are longer range plans to review many more. Although no review has resulted in the deletion of an entire regulatory Part as yet, many of the reviews have resulted in the "sunseting" of regulatory requirements.

3. A description of your agency's experience in measuring the indirect costs and benefits of regulations: your agency's successes, failures, and frustrations, the possibilities and impossibilities of measuring indirect costs and benefits are requested.

It is also extremely difficult to measure the indirect costs and indirect benefits of a regulation. Indirect costs, as reflected in consumer price impacts, are complex functions of the market characteristics of the industries involved (i.e., whether they are more or less monopolistic, competitive, oligopolistic, etc.) and the economic regulatory environments under which the industries operate (e.g., their tax and price structure). Indirect benefits, in terms of, for example, hindering or fostering technological innovation with resultant productivity increases are also extremely difficult to estimate. Moreover, there is much room for confusion and error in attempting to measure these impacts (as for example by double counting benefits or costs). However, we make every reasonable effort to measure these factors.

Examples of indirect benefits that have proven difficult to quantify have arisen in the Department's regulations concerning nondiscrimination on the basis of handicap and concerning inert gas systems for tank vessels. The ramps and pavement cuts mandated by the handicap regulation may give rise to the indirect benefit of reducing the number of bicycle accidents and rider injuries and make buildings and walkways more accessible to the aged. The inert gas rule directed at reducing the fire and explosion hazards on tanker vessels has the indirect effect of reducing corrosion and, thereby, reducing tanker maintenance costs. Although the indirect effects often appear to be of some importance as noted above, it is often extremely difficult to quantify them.

Even in the area of quantifying direct benefits, the Department has been faced with serious problems. How does one quantify the benefit associated with making a subway line accessible to persons in wheelchairs? What value does one place on the reduction in the risk of an airliner accident from one in one billion flights to one in 10 billion flights by requiring a specific item of equipment to be installed? What value does one place on the lives that might be saved, injuries eliminated and suffering avoided by a rule? Because of the nature of the Department's regulatory authority, these kinds of questions are confronted regularly in the preparation of Regulatory Analyses and Evaluations. Often the value of benefits can only be estimated in terms of broad ranges. Sometimes we can only estimate the number of persons that would be benefited by a rule (such as wheelchair users by a pavement cut rule). On other occasions a risk reduction is the best quantification of a benefit possible. The Department approaches these problems on a case-by-case basis, applying the most appropriate and up-to-date analytical techniques available commensurate with the overall costs associated with the regulation.

4. Estimates of the cost of undertaking regulatory analysis at your agency, of the money saved as a result of regulatory analyses and of the paperwork expense and staffing requirements necessary for these analyses are requested.

We are unable, with the limited experience we have had to date, to estimate accurately the costs of undertaking Regulatory Analyses within the Department and the money saved as a result of the Regulatory Analyses that have been prepared. As a general matter, we can state that the costs of conducting these analyses have been small in comparison with the benefits gained. Several examples will help to illustrate this point. The Department's Research and Special Programs Administration estimates that it spends approximately $300,000 per year to conduct Regulatory Evaluations and Analyses. In one of their rulemaking proceedings (and they conduct many) concerning the transport of liquified natural gas, the alternatives being considered range in cost from $335,000 to $12 million. If one of the less costly but effective alternatives is chosen, it is apparent that the cost reduction will far exceed the cost of an evaluation.

Another example concerns the FAA's rulemaking on air taxi and commuter operating rules. An economic study was contracted for in that proceeding at a cost of $172,800. That study was used as the foundation for the Regulatory Evaluation required for the proceeding. The FAA estimates that the evaluation resulted in a saving in costs of at least $50 million due to changes made to the original proposal. Considering that the FAA's entire contract research fund for Regulatory Analysis and Evaluation during FY 1978 and 1979 amounts to no more than approximately $1.2 million, the cost effectiveness of the Regulatory Analysis and Evaluation programs is apparent.

With respect to staffing requirements, the need to perform Regulatory Analyses has not had a substantial effect. The Federal Railroad Administration has hired one additional staff person and the FAA has devoted more of their economic analysts' time to Regulatory Analysis and economic evaluation work. There is a pattern of having more people with greater analytical expertise become involved in the regulatory process; however, to date we believe this involvement can be handled, for the most part, with existing resources. Over the long term, this early involvement should result in better regulations that are less costly to comply with and require fewer persons to interpret and enforce.

5. A decision on whether or not the Department will issue a general notice to its regulated industries soliciting suggestions for reviewing DOT's existing regulations is requested.

As you may be aware, the Administrative Procedure Act provides the public with an opportunity to petition for rulemaking whenever they should so desire. Whenever such a petition is received within the Department it is given full consideration and it often leads to the review of the rule in question. In addition, each of the Department's operating administrations and the Office of the Secretary are always open to suggestions from the public on which DOT rules should be reviewed. These suggestions are taken into account in deciding upon the rules to be reviewed. To make it clear to the public that the Department is receptive to their views, we will include in the Semi-Annual Regulations Agenda, which is published in the Federal Register and lists the reviews being conducted or considered by the Department, a statement indicating our interest in the public's suggestions concerning rules that should be reviewed.

We have attached for your information a copy of our recently prepared November report to OMB concerning our compliance with Executive Order 12044. If we can be of any further assistance to you, do not hesitate to contact us.

Sincerely,

Linda Heller Kamm

Enclosures

PARTICIPANTS IN RULEMAKING PROCEEDINGS UNDER NHTSA PUBLIC PARTICIPATION PROGRAM

1979

Applicant

Action for Child Transportation Safety
Arizona Consumers Council
Automobile Owners Action Council
Center for Auto Safety
Center for Independent Living
John O. Hayward, Esq.
Institute for Safety in Transportation
Jean Hewett
Mary Meland, M.D.
Joy Moon
Carol Mumford & Phyllis Cornell
Seattle Consumer Action Network
Donna M. Agness
Charles Aprahamian, M.D.
Patricia A. Bartoshesky
Mary Beth Berkoff
Brian D. Blackbourne, M.D.
Kenneth B. Brown
Austin Chidester
Katharine K. Christoffel, M.D.
Raphael Cohen
Shelia DeFrancesco
Daniel Della-Guistina
Jean Devereaux
Maragaret A. Dowling
Bobbi Farrell
Carol Fast
Sally Franks
Jon Fusselman, M.D.
Jana D. Hletko
Carolyn M. Iacovone
Leonard Krassner, M.D.
Margaret Lang
Morton L. Levy, M.D.
Walter Lunsford
Claire C. Macy
Jean M. Martin
Marilee Mielke
Agnes R. Mills
Loretta Nistler
Mrs. Gordon Oates
Margaret Orlich
Raymond M. Pecuch
Robert Sanders, M.D.
Robert Scherz, M.D.
Mrs. James Shipe
Roselyn Silverman
Sandra Kay Sparks
Maude Stackhouse
Peggy Lou Stolte
J.R. Toledo, M.D.
Stephanie M. Tombrello, L.C.S.W.
Pat Vicas
Robert S. Vinetz, M.D.
Heinrich F. Von Wimmersperg
Lynne Williams
Clare Worthing
Arthus Yeager, D.D.S.

James Askew
Alton Brisker
William M. Cessna
Richard Dey
Don Dulko
Courtny A. Gaiter
Frank Greco
Martin T. Hosford
James W. Huggins, Sr.
Clyde Johnson, Jr.
Earl A. Klinger
Leo G. Kohls
Thomas E. Madrzykowski
Robert F. Maxwell, Sr.
Roy McKinney
Milton A. McLartz, Jr.
Lincoln Merrill
Jerry G. Miles
Robert Gary Miller
Morris L. Mott
National Association of Legal Investigators (Julius Bombet)
Gerald K. Nelson
John A. Pawlak
Dominic Perfine
Charles R. Pickrell
Professional Drivers Council
Matthew Pung

PARTICIPANTS IN RULEMAKING PROCEEDINGS UNDER NHTSA PUBLIC PARTICIPATION PROGRAM

1979

Applicant

James A. Ramey
Ray Reeves
Harold Eugene Rollins
Clayton L. Rook
Rex C. Sagle
E. Paul Schroeder
Raymond W. Sieck
Kenneth H. Slick
George W. Smith
Pleasant Stephens
Teamsters Local Union 741
Charles F. Teas
Jack C. Thomas
Hubert R. Thompson
Donna Dittey
Roy A. Traster
Lawrence J. Vallone
Orlow G. Weeks
John R. Wrights, Sr.

1977-78

Center for Auto Safety
Citizens for Clean Air Inc.
Environmental Defense Fund
Public Interest Economic Foundation
Public Interest Campaign
Pearl Irene Birchard
Center for Independent Living
Economic and Science Planning
Automobile Owners Action Council
John Chika
Electric Passenger Car Inc.
Mark Skinner
Warranty News, Inc.
California Citizens Action Group
PROD, Inc.
Action for Child Transportation Safety

Department of Transportation

Report on Implementation of Executive Order 12044

Third Quarterly Report

November 1, 1979

TABLE OF CONTENTS

## INTRODUCTION

This report describes the Department of Transportation's (DOT) recent activities to comply with Executive Order 12044. It covers policy oversight, public participation, reviews of regulations, Regulatory Analyses and Evaluations and plain English. The information supplements the Department's previous reports to the Office of Management and Budget (OMB) in May and August 1979. In addition to the actions described in this report, we are currently reviewing the recent OMB report to the President to see what techniques other agencies are using that we could adopt to further improve our regulatory program.

As general background information to aid in reviewing the report, the Department is divided into eight operating administrations, each of which is headed by an Administrator (or, in the case of the United States Coast Guard, the Commandant). The Administrations are: The United States Coast Guard, the Federal Aviation Administration (FAA), the Federal Highway Administration (FHWA), the Federal Railroad Administration (FRA), the National Highway Traffic Safety Administration (NHTSA), the Urban Mass Transportation Administration (UMTA), the Research and Special Programs Administration (RSPA), and the Saint Lawrence Seaway Development Corporation (SLSDC). In addition to the operating administrations, there is the Office of the Secretary (OST) which is headed by the Secretary and the Deputy Secretary and includes the Assistant Secretaries for Budget and Programs, for Policy and International Affairs, for Administration, and for Governmental Affairs; the Director of the Office of Civil Rights; and the General Counsel. Regulations are usually initiated in the operating administrations and issued by them. A few regulations are initiated in OST and are issued by the Secretary. The Secretary exercises oversight for the regulations issued by the operating administrations and must concur in significant proposed and final rules before they are issued.