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OMB and EPA:

Who Sets Environmental Policy?

By

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At a time when medical research is steadily leading to the frightening conclusion that environmental abuse is jeopardizing the health of individuals across the nation, pollution prevention and abatement efforts are slowing to a dismal, if not deadly pace. As might be expected, the Environmental Protection Agency (EPA), on which the public has placed its ultimate hopes, has been increasingly criticized for a variety of delays and failures.

Half-heartedly, EPA explains that its tasks are too complex to be resolved quickly. Occasionally the blame is laid to the need for additional research or the need for more refined scientific methods. More often, however, EPA complains that the delay is necessitated by inadequate resources to carry out its difficult technical and administrative responsibilities. Many of these duties are imposed on the Agency by statute or by principles of due process.

What the EPA is unwilling to add, presumably because it must answer to the Administration, is that the Administration itself has added an alarming level of difficulty and confoundment to the Agency's efforts to achieve the nation's environmental goals. Through close control of the budget preparation and allocation process and through an unusual regulatory review procedure -- created by the Nixon Administration and ironically dubbed "the quality of life review" -- the Office of Management and Budget (OMB) has managed to stall EPA progress in a number of critical areas. Almost all of EPA's programs have been affected. This discussion, however, presents the bleak effect of OMB control on only one: the Federal Water Pollution Control Amendments of 1972. OMB's tight control over

EPA's attempts to implement that important legislation demonstrates the problem with particular clarity.

The Quality of Life Review

The "quality of life review" was established on October 5, 1971, in a memorandum from George Shultz, who was Director of OMB at the time, to the heads of all Federal departments and agencies. As stated, the purpose is to improve interagency coordination on proposed regulations. Whenever a proposed or final regulation is expected to have a significant impact on the programs of other agencies, or to impose significant costs on the private sector, or to create the need for additional funds, OMB requires that the regulation first be distributed to the other Federal agencies for review and comment and then to OMB for concurrence, all before the regulation is published publicly.

Even at the outset it was very plain that the purpose of the "quality of life review" was not really to accomplish coordination among Federal programs. The review only applies to regulations pertaining to "environmental quality, consumer protection, and occupational and public health and safety." Specifically exempted from the review requirements are the Civil Aeronautics Board, the Federal Communications Commission, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Federal Tariff Commission, the Interstate Commerce Commission, and the Securities and Exchange Commission. These are, of course, the established and typically moribund agencies which pose little threat to business interests. The initial and continuing focus of the review has been to protect the business community from the long

overdue public interest legislation being enacted by Congress.

It is not surprising that OMB singled out environmental legislation as a primary focus. By October 1971, the fledgling EPA had already demonstrated that it would take a tough stance in implementing environmental laws within its responsibility. The promulgation of strong implementation plan regulations and the proposal of strict new source performance standards under the Clean Air Act, as well as the initiation of cancellation hearings for DDT under the Pesticides Act, all occurred in August of that year. At the same time, with EPA's encouragement, Congress was drafting even more extensive environmental legislation for EPA.

On August 6, 1971, President Nixon warned Congress that it was "simplistic to seek ecological perfection at the cost of bankrupting the very taxpaying enterprises which must pay for the social advances the nation seeks." But within weeks, committees of both the Senate and House had adopted new water legislation that would create even greater economic effects on big industry. When the Water Act finally passed in October, 1972, the potential for Administration interference with its goals was well known. The Administration had gone on record opposing many of its provisions in their early stages; ultimately President Nixon had vetoed the bill, only to be overridden by an overwhelming margin in both houses.

Congress was thus particularly sensitive to the potential threat of OMB supervision over EPA and what that could mean to the success of its new legislation. The House and Senate Conferees addressed the problem specifically in their Conference Report on the new Act:

"The Conferees clearly contemplate that the decision-making responsibility, as in the Clean Air Act, on guidelines and regulations to be published under this Act rests, unless otherwise specified, with the Administrator of EPA and not such other agencies as the Office of Management and Budget and the National Industrial Pollution Control Council. EPA regulations and guidelines are not to be reviewed by these and other agencies prior to their promulgation except on the same basis as review and comment by members of the public. OMB comment and review should thus come in the form of comments available to the public, made during the period for public comment."

Experience has shown that Congressional concern was justified; but it also shows that the meagre efforts of the Conferees to prevent OMB control over environmental decisionmaking were to little avail. Persons at EPA speak very gingerly about the problem and are hesitant to mention specific examples; but they freely admit that were it not for the OMB review procedure, environmental regulations would usually be stronger.

One recent example of OMB pressure amply demonstrates the problem. On November 28, 1975, EPA published regulations permitting the States to ignore the highly important "fishable and swimmable" water quality goal of the Act whenever it could be determined that such a goal was not attainable for "social, economic, [or] institutional" reasons. Although persons at EPA indicate that this weakening decision was ultimately Administrator Train's, an EPA memorandum indicates that OMB was the primary proponent. Moreover, another document shows that OMB played a large part in weakening language that appeared in the preamble to the regulations.

The "quality of life" review also takes its toll in delay, and it provides agencies such as the Department of Commerce priority access to criticize and weaken EPA regulations. Typically, other

Federal agencies have taken over several weeks to respond with comments. OMB then often takes several additional weeks to give concurrence. An EPA document shows that the interagency review process for sewage treatment plant regulations and water quality planning regulations both consumed over two months time. OMB is widely credited with responsibility for holding up for a period of years EPA regulations on accidental spills of oil and other hazardous substances. Obviously, such delays and interference undermine the agency's overall effectiveness and make a mockery of both public comment procedures and statutory deadlines. Some persons within EPA have expressed the feeling that unnecessary compromises are often made in advance of submittal to OMB just to keep regulations from becoming stalled.

For OMB to have singled out EPA for this harrassing form of review has, for obvious reasons, not set well with EPA management. Formal requests to OMB have been made on numerous occasions to make reasonable adjustments in the procedures to lessen the strain involved. This has met with some, but not complete, success. The successes achieved, however, have been informal. To date OMB has yet to respond formally to a single formal request by EPA.

A disturbing aspect of this so-called "quality of life" proceeding is that it is utterly unnecessary and inappropriate for the overall management of environmental policymaking. Undoubtedly, the other Federal agencies should be invited to participate in EPA's rulemaking. But in most cases the public participation procedures required by law and observed as a matter of course by EPA should suffice.

Ultimately the problem with the "quality of life" review is that it sets up OMB as a super environmental manager over EPA. Many at EPA assert that this is not the case. It seems clear, however, that the prerogative is there and that the effect is often felt. Moreover, EPA cannot disagree entirely. In a 1975 memorandum from EPA to OMB objecting to problems in the "quality of life" review process, a proposed change is suggested which in EPA's words would "clarify the Administrator's statutory responsibility for the ultimate content of all EPA's standards and regulations." One must ask why such clarification is necessary.

OMB Budgetary Controls

OMB has also used its control over the budget process to keep the Agency in line by keeping EPA underbudgeted and understaffed. New requirements in environmental legislation have in recent years imposed considerable manpower demands on the Agency, yet the Administration and OMB have rarely allocated the necessary resources to carry out the important programs mandated by Congress. This causes well-intentioned but understaffed EPA to limp along, picking and choosing which Congressional requirements it will carry out. The result has been frequent violations of the law in not meeting statutory deadlines, sometimes shoddy work products because of lack of necessary manhours, misaligned priorities to avoid the more difficult tasks (often the most difficult tasks are the most important ones, for instance the complex area of regulation of toxic materials), and an overall weakened environmental program.

Administration budget proposals for water programs provide good examples of the invidious effect of the budget process on an environmental program. For instance, OMB ordered a major reduction in the enforcement capability of EPA in the water pollution control area for Fiscal Year 1976, by ordering the termination of 160 people from the water enforcement section, a reduction of 18 percent. Approximately another eighty enforcement positions were shifted in 1976 to other parts of the Agency to shore up other understaffed programs. This OMB-forced cut in enforcement personnel came at a time when enforcement of water pollution control requirements should have been accelerating. Although OMB allowed EPA to add 100 water enforcement positions for FY 1977, this still is short of FY 1975 level and falls far short of the level of personnel needed properly to enforce water pollution control requirements. The result is a severely crippled water enforcement program. Four years after the Water Act was passed by Congress, approximately 18,000 permits for discharge (the Water Act makes it illegal to discharge without a permit) have yet to be issued to sources which have applied for a permit. This figure does not include the several thousand other sources which have not yet applied for a permit, but are subject to the Water Act's requirements. In addition, enforcement of permit conditions has been quite a bit less than vigorous: out of 28,455 permitted discharges, only 710 administrative enforcement orders were issued and 72 cases referred to U.S. Attorneys for prosecution in 1975, even though a recent survey by GAO indicates that noncompliance is widespread. Such a lackadaisical approach to enforcing water pollution control requirements is clearly not in accordance

with Congress' intent in passing the 1972 Water Act and just as clearly is not in the public interest.

Overall OMB proposed to cut \$60 million out of water programs for FY 1977, including a proposed \$38 million cut (a 72% cut) for a critical new water planning and management program required by Section 208 of the Water Act. This planning effort is just getting underway for over 200 planning agencies (including the 50 states) in FY 1977 and is of critical importance in achieving clean waters. Increased rather than decreased funding is essential if state and local planning agencies are to do a good job. Clearly OMB's intention could not have been other than to decimate the program.

Other evidence of the negative effect of the Administration's budget control on water programs is also available. Lack of manpower is a factor in EPA's pitiful performance in the area of controlling toxic pollutants. The Agency's approach is characterized more by concern over manpower and administrative burden than concern over human health (economic burden on industry has also played a significant role). The Presidential impoundment of \$6 billion of the Congressionally authorized \$11 billion for funding construction of waste treatment facilities for 1973 and 1974 slowed the progress of the construction grants program.

All in all, the budget power of the Administration, working through OMB, has been a potent tool in undermining important water quality programs.