17 JAN 1979

MEMORANDUM FOR HONORABLE CECIL D. ANDRUS
Secretary of the Interior

Re: Consultation with Council of Economic Advisers Concerning Rulemaking under Surface Mining Control and Reclamation Act

On September 13, 1978, the Office of Surface Mining Reclamation and Enforcement (OSM), acting pursuant to a delegation of authority from you as Secretary of the Interior under the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 445, 30 U.S.C.A. §§ 1201 et seq. (the 1977 Act), published in the Federal Register a notice of a proposed rulemaking. The notice (1) stated that the rulemaking was intended to establish "a nationwide permanent program for the regulation of surface and underground mining operations by the States and the Federal Government as required by" the 1977 Act; (2) set forth proposed rules; (3) announced that public hearings on the proposed rules would be held at certain designated places during October 1978; and (4) invited written or oral comments from the public on the rulemaking for the 60-day period ending November 17, 1978.

During the comment period the Regulatory Analysis Review Group (RARG), at the direction of the President, reviewed the proposed rule at issue here and submitted a report containing a number of comments on those proposed rules. The Council of Economic Advisers (CEA) serves as an active member of RARG, and participated in the preparation of the Report. After the close of the comment period, the Chairman of CEA, Charles Schultze, and the Assistant to the President for Domestic Affairs and Policy, Stuart Eizenstat, were asked to pursue further several questions related to the proposed rules. In light of the need for additional consultation between the President's economic advisers and your Department, this Office has been asked to consider whether -- and pursuant to what limitations -- CEA members and staffers might meet with you and members of your OSM Staff to discuss in more detail their concerns about several portions of the proposed regulations.

Specifically, we have been asked, first, whether there is any statutory or constitutional prohibition against meetings of this sort between your Department and the President's economic advisers. Secondly, we have been asked -- if meetings of this type within the Executive Branch are appropriate -- to work with the interested persons to develop and implement whatever procedures are necessary to assure compliance with the requirements imposed by recent decisions of the United States Court of Appeals for the District of Columbia Circuit.

For the reasons that follow, it is our conclusion that there is no prohibition against communications within the Executive Branch after the close of the comment period on these proposed rules. Nothing in the relevant statutes or in the decisions of the D. C. Circuit suggest the existence of a bar against full and detailed consultations between those charged with promulgating the rules and the President's advisers. The rulings of the D. C. Circuit, however, do suggest that it might be inappropriate for interested persons outside the Executive Branch to have so-called ex parte communicatons with you and your staff. If that is so, we think it logical to conclude that the D.C. Circuit would disapprove of CEA or other advisers to the President serving as a conduit for those same ex parte communicatons. In order to prevent CEA from serving as such a conduit, we recommended a procedure which is outlined in detail in the letter from this Office to CEA dated December 29, 1978 (a copy of which is attached). We have concluded that by adhering to these several procedural steps, as we understand your Department and CEA have done, there has been proper compliance with the law as it has developed in the D.C. Circuit.

I. PROCEDURE

We will begin by summarizing the several procedural steps discussed in our letter of December 29. These steps were fashioned in consultation with your Solicitor's Office and with the aid of the staffs at OSM and CEA. It is our understanding that each of the following items has now been implemented in accord with our suggestions.

(1) The CEA staff compiled a record of all of the oral and written communications they may have had with private persons interested in the proposed regulations. This catalog sets forth the content of all of these communications as accurately and fully as is possible. For the sake of completeness, it also includes re-collections of CEA conversations with other Executive branch offices.

(2) Following receipt and review of this material, OSM made it available to the public in the document room at the Department of Interior. At the same time OSM published in the Federal Register for Thursday, January 4, 1979, a statement acknowledging, and explaining the reason for, this addition to the administrative record. The statement also announced the reopening of the record to allow comments on factual material contained in the submission. A period of eighteen days will be permitted in which appropriate comments may be submitted by the public. At the close of that comment period OSM will review and analyze these comments generally in the same manner in which it analyzed comments received during the original comment period. As an additional precaution to assure the widest public availability of these CEA documents, we understand that copies of the complete packet have been delivered to every Regional Office of your Department and that an effort was made to contact directly State governments that were likely to have an interest in reviewing this material.

(3) Once the compilation was made publicly available and the notice was transmitted to the Federal Register for publication, the Chairman and/or his staff conferred with OSM on particular portions of the proposed rules. It is our understanding that this first meeting occurred on Friday, January 5, 1979, and that there were a few, brief subsequent communications.

(4) Although we have been advised that no changes were made in the proposed rules as a result of these consultations, we did counsel that if any communications made during this consultation process did become in part the basis for the Secretary's final decision concerning the rulemaking, their relationship to that decision would be fully spelled out with the promulgation of the final rule.

There would, however, be no need to reopen the record again prior to the final decision unless you propose to rely on other information that was not included in the record at some stage and subjected to reasonable public comment in advance of your final decision.

(5) During the period of consultation, the participants were instructed to refrain from having any communications with other persons interested in the rulemaking, including other Executive branch officials, if those officials have either directly or indirectly had contacts with non-Government persons having an interest in this rulemaking.

II. PARTICIPATION BY CEA IN THE DECISIONMAKING PROCESS

The first issue can be simply framed: is there anything in either the Constitution or in the relevant statutes that prevents the President's economic advisers from conferring with you on these proposed rules? We think it plain that the basic constitutional presumption is one that favors communication and consultation within the Executive Branch in the course of developing rules and procedures. While there may be some matters of a quasi-adjudicatory nature as to which communication with the decisionmaker might be seen as improper, in the much larger category of executive actions barriers to free communication between and among the President's advisers should not be lightly assumed. The President is charged under Article II, Section 3 of the Constitution to ensure that the law are faithfully executed. In Myers v. United States, 272 U.S. 52, 135 (1926), the Supreme Court stated:

> The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone. Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President

must consider and supervise in his administrative control. 1/

We believe that this language from Myers, although dictum, is a correct statement of the principle that Congress, in assigning rulemaking functions to Department Heads who are clearly subject to the President's removal power under Art. II, § 2, cl. 2 of the Constitution, must be assumed to have recognized the inherent power of the President to supervise the exercise of that power. We also believe that this supervisory power, which additionally finds support in your duty to report to the President concerning the discharge of your office, 2/ carries with it the constitutionally based right of the Executive to receive and give advice to his subordinates related to the discharge of their duties. See, e.g., United States v. Nixon, 418 U.S. 683 (1974).

The only substantial issue raised by the participation of the Chairman in the decisionmaking process is, in our view, whether Congress has attempted, by statute, to limit or otherwise regulate the participation by the Chairman or any other federal official not within your Department, in the decisionmaking process. We think the answer to this question is an unqualified "no."

Before discussing the statutes that might arguably place some limits on the Chairman's participation, we would observe that Congress has demonstrated a full awareness of the means by which it might attempt to regulate the interagency review of proposed rules. For example, in § 305(a) of the Clean Air Act Amendments of 1977, 42 U.S.C.A. § 2607 (d)(4)(B)(ii), Congress specifically required written comments made by agencies participating in the interagency review of rules to be placed on the record of the rulemaking conducted by Administrator of the Environmental Protection Agency. That provision also recognized that such written comments might be made at any point in the process, both prior to the publication of the notice of proposed rulemaking and after the close of the public comment period.

1/ We note that other language in Myers makes unclear whether the mode of supervision contemplated by the Court in the language quoted in the text above was limited to the power of removal or whether that supervision could take less drastic forms such as consultation. See 272 U.S., at 135.

2/ U. S. Const. art. II, § 2, Cl. 1.

We think it particularly significant that neither the language of § 305(a) of the Clean Air Act Amendments nor the legislative history of that provision suggests in any way that Congress was extending, or needed to extend, an affirmative power to the President (or the Office of Management and Budget acting at the President's direction) to conduct such interagency review. 3/ Furthermore, we believe that Congress' refusal to extend the regulations imposed in § 305(a) to oral communications was a recognition of the right of the President and his subordinates to communicate in confidence their views on issues raised by the rulemakings governed by that statute.

The question whether the relevant statutes, here § 4 of the Administrative Procedure Act, 5 U.S.C. § 553, and § 501 of the 1977 Act, 30 U.S.C.A. § 1251, in any way limit the authority to conduct interagency review of the rule in question may be dispensed with easily. Nothing in their text or their legislative history suggests an intent to limit or otherwise regulate the interagency review that has been accorded to this rule. Furthermore, we believe that the Supreme Court's recent decision in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 547 (1978), indicates that § 553 is itself an affirmative grant of power to the agencies to devise procedures that will be most congenial to the rulemaking conducted by them. Thus, we think it could not be questioned that a procedure adopted by an agency to secure the views of other interested agencies on specific rules is within the ambit of the power conferred by § 553. We therefore turn to the question whether the procedures set forth in part I above are a reasonable exercise of that power in this case. 4/

3/ See H.R. Rep. No. 294, 95th Cong., 1st. Sess. 319-20 (1977); H.R. Rep. No. 564, 95th Cong., 1st Sess. 177-78 (1977).

4/ Your Department has informed us that there have not been any departmental regulations in effect from September 18, 1978, to the present which would in any way conflict with the procedures set forth in part I above. We note that on August 10, 1978, a document entitled "Public Participation in Decision making -- Interim Guidelines and Invitation for Comment," was published in the Federal Register, 43 F.R. 35754-57, which generally sets forth your proposed Departmental policy regarding public participation in rulemaking. It would appear to us that nothing in those guidelines would be inconsistent with the procedures set forth in part I above. Nor would (footnote continued on page 7)

III. The D. C. Circuit Cases

In two cases, Home Box Office, Inc., v. FCC, 567 F. 2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977), and U.S. Lines, Inc. v. Federal Maritime Commission, 584 F. 2d 519 (D.C. Cir. 1978), panels of the D. C. Circuit have indicated that so-called "ex parte"communications between persons interested in an "informal" rulemaking and the rulemaking agency must be generally disclosed on the record of the rulemaking. Those cases also indicate that, at least where such contacts may have substantially influenced or provided a basis for the rule finally adopted, their substance must have been subjected to adversary comment by other interested persons.

Although the Supreme Court's decision in Vermont Yankee, as well as decisions by other panels of the D. C. Circuit, 5/ cast considerable doubt on the correctness and applicability of these court-fashioned "ex parte"rules to the present circumstances, we believe that the procedures in part I above satisfy Home Box Office and U.S. Lines. The procedures were worked out with these two cases clearly in mind and reflect our best efforts to satisfy their several requirements. Specifically, these procedures accomplish two things. First, they place in the administrative record the substance of all so-called ex parte communications between private persons and the Chairman and his staff that have occurred since the notice of proposed rulemaking was published. Every document that CEA received and reviewed has been transmitted to OSM and the substantive details of every phone conversation have been disclosed to the full extent of the memories of those staffers who may have had such communications. Thus, in our view, there is no longer any reasonable likelihood that in meeting and discussing these proposed rules CEA will be transmitting any off-the-record ex parte information. Secondly, the procedures devised here give to any interested person the right to comment on those communica-

4/ (footnote continued) this procedure appear to be in conflict with the notice of procedures for public participation issued by your Department on June 12, 1978 to establish policy regarding public participation in the pre-notice of proposed rulemaking stage of this rule, 43 Fed. Reg. 25881-82 (June 15, 1978), or the proposal of the rule itself, 43 Fed. Reg. 41 661 et seq. (Sep. 18, 1978).

5/ See Action for Children's Television v. FCC, 564 F. 2d 458 (D.C. Cir. 1977); Hercules, Inc. v. EPA, No. 77-1248 (D.C. Cir. Nov. 3, 1978).

tions for a reasonable period of time. The reopening of the record for this limited purpose 6/ has been undertaken to assure that any information communicated by CEA and made a part of the record has been subjected to the fullest and fairest scrutiny. In fact, we have been advised both by the people at CEA and by your OSM staff that the predominance of material contained in these disclosures was already on the record developed during the comment period. Indeed, most of the information, insofar as CEA found it to be relevant to these proposed rules, was included in the RARG Report which, as you know, was made a part of the record during the comment period and was itself subjected to considerable public scrutiny.

The only question that remains under Home Box Office and U.S. Lines is whether it is required that the meetings and communications between your staff and the CEA representatives must themselves be placed on the public record. Neither case dealt with intra-Executive Branch communications; in both cases the ex parte contacts were from interested persons outside the decisionmaking process. Moreover, we think the purposes underlying the holdings in these two cases are fully served by a requirement that all contacts with persons outside the Government be disclosed. It was not the purpose of the D. C. Circuit to alter the ordinary way in which decisions are made by those charged with promulgating rules. Just as there is no bar in those cases against consultation between the Secretary and

6/ It might be contended that reopening the record for the restricted purpose of allowing comment on the CEA disclosure document is somehow unfair to other interested persons who might wish to make additional comments after the 60-day formal comment period closed. Indeed, we understand that a number of comments have been received by OSM after the close of the comment period but that the Office has declined to review and consider them. It is our judgment -- as stated in our letter of December 29 -- that a limited reopening is appropriate in this case. The purpose of the reopening is quite simply to assure closest compliance with these D. C. Circuit decisions while allowing Executive Branch officials to fulfill their responsibilities. As the disclosure documents prepared by CEA demonstrate, this procedure was not intended to provide -- nor will it have the effect of providing--a means of funnelling tardy industry or other interested persons' comments to the agency decisionmaker. Virtually all the comments received by CEA were ones made during the public comment period, and virtually all of them are ones already in the record. Given these facts, we think it reasonable to reopen without launching anew the rulemaking process.

his Assistants in confidence, we find no bar to communications from others within the Executive Branch so long, of course, as those communications are not the vehicle for the indirect transmission of some off-the-record, ex parte information from interested persons outside the Government. For the reasons outlined in our earlier discussion of the role of the Chief Executive in overseeing the rulemaking process, we would be very reluctant to infer a prohibition or other restraint against a full exchange of views between the President's advisers. To the contrary, Congress has frequently demonstrated a sensitivity to the need to preserve open lines of communication for the exchange of views and to improve the deliberative process within the Executive Branch. Exemption (b)(5) in the Freedom of Information Act, 5 U.S.C. § 552 (b)(5), stands as the clearest evidence of Congress' continuing acknowlegement of the need for such confidential communications.

Finally, we should reiterate our conclusion that to permit confidential communications between your Department and the President's economic advisers will not frustrate the basic requirements of the Administrative Procedure Act and of the 1977 Surface Mining Act that the foundation and rationale for your ultimate rulemaking determinations be spelled out and be subject to close public and judicial scrutiny. To whatever extent your views are premised upon economic or other considerations arising in the course of your discussions with CEA, those considerations must (1) have their origin somewhere in the record you have developed over the last few months, and (2) be articulated in your final rule. These requirements having been met, and the other procedures outlined in our letter of December 29 having been satisfied, we see no substantial basis for a claim that the rules themselves are arbitrary or capricious, or that the rulemaking process was otherwise flawed.

Larry A. Hammond
Acting Assistant Attorney General
Office of Legal Counsel

Attachment

Assistant Attorney General
Office of Legal Counsel

Department of Justice
Washington, D.C. 20530

12-29

Mr. Peter G. Gould
Special Assistant to the Chairman
Council of Economic Advisers
Executive Office Building
Washington, D.C. 20506

Dear Peter:

This letter is to confirm the conversations we have had over the last several days with respect to the Council of Economic Advisers' (CEA's) participation in the Office of Surface Mining's (OSM's) regulations. The following items have been discussed fully with Leo Krulitz and, more recently, with Bill Eichbaum, at the Department of Interior. We have also reviewed this matter carefully with Jim Moorman and his staff in our Land and Natural Resources Division. It is our view that the following procedures are fully compatible with the relevant statutes and case law with respect to the informal rulemaking process:

(1) CEA staff members are in the process of preparing a catalogue of all oral and written communications they may have had with parties interested in OSM's proposed strip mining regulations. It is understood that the compilation of these contacts will reflect, as completely as reasonably possible, the content of all such communications. This Office will assist you in assuring that this material is set forth in as complete and accurate a form as reasonably possible. Hopefully, we will be able to transmit this material to OSM on Tuesday morning, January 2, 1979.

(2) Knowledgeable people at OSM will review this compilation as soon as it is received and will ascertain

what portions, if any, of the material constitute new matter not already set forth on the record of this rulemaking proceeding. Of course, staff people at CEA should be able materially to assist in this process, since you also have a comprehensive knowledge of the record.

(3) As soon as reasonably possible following the receipt and review of this material, OSM will make it available to the public in the document room at the Department of Interior. At the same time OSM will have published in the Federal Register a statement acknowledging and explaining the reason for the supplementation of the record in this respect. The statement will also announce the reopening of the record to allow comments on whatever new factual material may be contained in this submission. A period of ten days will be permitted in which appropriate comments may be submitted by interested parties. At the close of that comment period OSM will review and analyze these comments in the same manner in which it has in the past analyzed comments accumulated during the public notice and comment period.

(4) It is the judgment of this Office that once this compilation of third-party communications has been made publicly available and the notice has been transmitted to the Federal Register for publication it will then be appropriate for the Chairman and staff personnel at CEA to participate in the decision-making process in whatever fashion is most productive. We understand that you envision one or more meetings to discuss particular portions of the proposed rules. Those meetings need not be conducted on the record. I have advised, however, that you maintain a record of the agenda items discussed with OSM so that, if necessary, we can identify at a later time those portions of the regulations that were the subject of your communications.

(5) To the extent that your meetings and communications become in part the basis for the Secretary of

Interior's final decision, of course, the substantive basis for that decision will be spelled out on the record. It will not be necessary for the Secretary to allow any additional reopening of the record at this later stage unless, through some failing in the procedure we have developed, the Secretary's ultimate judgment is based indirectly on third-party communications that were not included in the record and subjected to reasonable comment.

(6) During this period of consultation between CEA and OSM the Chairman and CEA staff members will refrain from having any further communications with parties interested in these proposed regulations. In order most carefully to assure the propriety of this process we have also advised you to refrain from having communications with other Executive branch officials if those officials have, themselves, had contacts with outside parties with respect to these regulations.

As I have stated above, it is our view that these several steps carefully pursued will assure the legality of the informal rulemaking proceeding. We have begun the drafting of and will complete early next week a legal opinion discussing the several bases for this conclusion.

Sincerely,

Larry A. Hammond

Larry A. Hammond
Acting Assistant Attorney General
Office of Legal Counsel

cc: Mr. William Eichbaum
Office of the Solicitor
Department of the Interior