3. *OMB Review: Not Limited by Statutory Criteria or the Terms of the Executive Order*

a. *OMB Review Effectively Ignores Relevant Statutes and the Terms of the Executive Order*

Executive Order 12,291 grants OMB review powers only "to the extent permitted by law."[254] The Order has been vigorously defended by Reagan administration officials, who note that, because it explicitly applies only to the extent permitted by law, it cannot be legally defective.[255] The evidence indicates, however, that OMB sometimes goes beyond the terms of both the Executive Order and the enabling statute in reviewing a rule.

For example, the Order applies only to "regulations" or "rules" defined essentially as in the APA definition of "rule."[256] Nonetheless, OMB often reviews documents which appear to fall outside of this definition—including guidance documents, interpretive statements, policy statements,[257] agency progress reports,[258] and even the settlement agreement in *NRDC v. EPA*[259]—for conformity with presidential policies. The legal basis for such review, given the definition of "rule" provided in the Executive Order, is tenuous.

Perhaps more unsettling is OMB's refusal to waive its review of rules which are to be strictly health based according to applicable statutes. For example, former EPA Chief of Staff Daniel recently testified before Congress that in the case of certain EPA rules required to be based solely upon health considerations, OMB was "trying to shape the standard and kept urging upon us consideration of the costs through certain types of analyses that really were not permitted . . . under the statute."[260] While admitting that

---

[254] *E.g.*, E.O. 12,291, *supra* note 1, §§ 2, 3.

[255] *See, e.g.*, Gray, *Presidential Involvement in Informal Rulemaking*, 56 Tul. L. Rev. 863 (1982); *cf.* Rep. Frank Horton, Executive Order 12291 and the Conflict Between the Legislative and Executive Branches of Government, *reprinted in Hearings on OMB Control of OSHA Rulemaking*, *supra* note 204, at 103, 116-17.

[256] *Compare* E.O. 12,291, *supra* note 1, § 1(a), *with* Administrative Procedure Act, 5 U.S.C. § 551(4) (1982).

[257] Interview with OMB, OIRA Official "C" in Washington, D.C. (May 3, 1983).

[258] *See, e.g.*, N.Y. Times, Oct. 2, 1984, at A28, cols. 4-6 (EPA report titled "Environmental Progress and Challenges: An EPA Perspective," according to EPA sources cited in the *Times*, "might just as easily be called 'an OMB Perspective' " due to heavy editorial revisions of the report by OMB prior to its publication and distribution to Congress and the public).

[259] OMB reviewed this common issues settlement for nearly a month. *See OMB Worksheet*, *supra* note 216, at 3162.

[260] *Daniel Testimony*, *supra* note 46, at 81; *see* NAAQS case study, *infra* notes 371-80

some rules such as EPA's NAAQS and the FDA-administered Delaney Amendment ban on carcinogenic food additives do not permit economic considerations, OMB has publicly stated that it reviews such rules.[261] The legal basis for OMB review, where economic considerations and technical feasibility of compliance with the rules are irrelevant, is here again not clear.[262]

Furthermore, OMB apparently does not feel constrained by the Executive Order explicitly exempting from review any regulation whose consideration by OMB "would conflict with deadlines imposed by statute."[263] For example, it has held several EPA New Source Performance Standards (NSPS's) for more than a year, well beyond the statutory deadline for promulgation.[264] It recently was reported that OMB, even more boldly, "is putting pressure on EPA to significantly weaken a draft rule proposing new truck standards for particulate and nitrogen oxide emissions just days before a district court deadline for action on the rulemaking."[265] The applicable court order had clearly stated that "OMB review is not only unnecessary, but in contravention to applicable law."[266]

Although a cost-benefit analysis consists of weighing costs against benefits, critics have charged that OMB fails to consider rules' benefits. OMB's response to a congressional committee questionnaire does little to rebut this allegation.[267] While the Executive

---

and accompanying text.

[261] *See* OMB Response to House Questionnaire, *supra* note 83 (Question 16), *reprinted in Hearings, supra* note 83, at 981-82 ("Even where economic considerations are entirely precluded as a basis for a rule, an assessment of the economic impacts can be extremely valuable. . . .In situations where an agency is precluded by statute from basing a decision on benefit-cost analysis, OMB reviews the regulation with that constraint in mind.").

[262] *See id.* OMB simply asserts: "[T]he results may be useful later when changes in the authorizing statute are being considered."

This shows a failure to understand the reason for prohibiting economic considerations, namely, that the regulation secures benefits not easily quantified, and therefore prone to deemphasis in a cost-benefit calculation.

[263] E.O. 12,291, *supra* note 1, § 8(a)(2).

[264] *See* NSPS case study, *infra* text accompanying notes 350-70; *accord Daniel Testimony, supra* note 46, at 82-83 (noting that several NSPS's were delayed "interminably" beyond the August 1982 deadline).

[265] *OMB Raises Big Concerns With Heavy-Duty Truck Rule as Court Deadline Nears*, Inside EPA (Inside Wash. Pubs.) 9 (Oct. 12, 1984). The rule ultimately was released by OMB before the deadline. *See EPA Last Week Proposed Particulate and Nitrogen Oxides Standards for Trucks*, Inside EPA (Inside Wash. Pubs.) 9 (Oct. 19, 1984); the rule was published at 49 Fed. Reg. 40,258 (1984).

[266] Natural Resources Defense Council, Inc. v. Ruckelshaus, No. 84-758, at 8-9 (D.D.C. filed Sept. 14, 1984).

[267] *See* OMB Response to House Questionnaire, *supra* note 83 (Question 3), *reprinted in Hearings, supra* note 83, at 974 ("We do not, however, require agencies to calcu-

Order establishes cost-benefit analysis and net benefit maximization as the criteria by which OMB should judge rules, OMB officials admit that their regulatory review can be simply a means of assuring that the rules comply with the "cosmic presidential policies," as OMB staff see them.[268] As one key OMB official notes, "debate of the merits of the economic analysis [of EPA] doesn't help" resolve the real issues; where OMB has budgetary, philosophical, or political problems with a rule, the regulatory analysis is used as "a key" in holding up or changing the EPA action.[269]

OMB staff report that "common sense is an important constituent" of the Office's review,[270] and that the Office dislikes "command and control" regulations, favoring instead "market incentive" approaches.[271] And, as might be expected, a pivotal review criterion is the political impact of the rule; OMB management always has its "political antennae" out.[272] OMB's "political antennae" often pick up strong signals from industry transmitters.[273] Similarly, interagency political disputes are often waged at OMB; for example, if an EPA standard is projected to put the Department of Energy (DOE) to expense, OMB's budget examiners may weigh in for DOE, attempting to minimize the cost of the EPA rule.[274]

---

late. . .'what the benefits are that were lost or never gained due to the Executive Order.' Such calculations would be very difficult, speculative, and of little value to either our process or agency regulatory decision-making.") (quoting from Questionnaire). When an agency formally prepares an estimate of a rule's benefits, OMB review of the rule would include consideration of that estimate. *See generally* GAO Report on Cost-Benefit Analysis, *supra* note 248.

[268] Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983); *accord* Interview with Jim Tozzi, former OMB, OIRA Deputy Adm'r, in Washington, D.C. (June 14, 1983).

[269] Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983); *accord Daniel Testimony*, *supra* note 46, at 6 ("[T]here was immense pressure brought by OMB on the agency to change [a rule] and it was *purely philosophical*, because there was no cost analyses [sic], cost-effectiveness studies or anything else that I think would have borne out any basis for changing that part of the reg.") (emphasis added).

[270] Interview with OMB, OIRA Official "C" in Washington, D.C. (May 3, 1983); *accord* J. Laah, *supra* note 204, at 24 (former OIRA Deputy Adm'r Tozzi "says he could 'tell in about four minutes if a rule made sense' ").

[271] Interview with OMB, OIRA Official "B" in Washington, D.C. (May 3, 1983). Despite OMB's claimed push for market-based or alternative regulatory approaches, GAO investigators found that "OMB appears to make only a modest effort to encourage the use of other regulatory techniques as an alternative to simply establishing less restrictive standards." GAO Report on 12,291, *supra* note 24, at 4.

[272] Interview with OMB, OIRA Official "B" in Washington, D.C. (May 3, 1983).

[273] *See infra* text accompanying notes 282-95.

[274] *See, e.g.*, High Level Radioactive Waste Disposal rule case study, *infra* text accompa-

b. Waivers & Exemptions from E.O. 12,291: OMB Oversight is Not Always a Cost-Benefit Review

A close look at OMB's use of exemptions and waivers demonstrates that if an EPA action *relaxes* a standard, there is likely to be no effort on OMB's part to assess the costs and benefits of the action. In an OMB annual report on progress under E.O. 12,291, OMB openly admitted that it exempts from review rules "which relax or defer regulatory requirements, or which delegate regulatory authority to the states; such exemptions were granted only for nonmajor and noncontroversial regulations."[275] When asked if a rule that is being relaxed to reduce compliance costs would have to go through "the time consuming RIA procedure," OIRA's former Administrator James Miller responded: "[I]f OMB . . . were convinced on the basis of evidence, *however sparse*, that such a reduction [in compliance costs] would occur, a waiver would be granted immediately."[276]

A look at OMB oversight of major rule relaxations bears this out. For example, while OMB engaged in a protracted argument with EPA over whether an RIA is required for the possible tightening of the particulate matter National Ambient Air Quality Standard (NAAQS),[277] it cleared EPA's revocation of the hydrocarbon NAAQS in two days with no formal RIA.[278] When a series of noise pollution rule relaxations and suspensions reached OMB, they

---

nying notes 326-49; *see also Daniel Testimony, supra* note 46, at 5 (citing OMB's adoption *in toto* of DOE position on EPA rule affecting DOE energy facilities).

[275] OMB, Executive Order 12291 on Federal Regulation: Progress during 1981, at 36 (Apr. 1982) [hereinafter cited as OMB 1981 Report on 12,291]. The 1982 OMB annual report on E.O. 12,291, *supra* note 187, at 30-31, dropped this statement, but lists several categories of deregulation among those EPA actions which are automatically exempt from review: (1) "pesticide tolerances [and] tolerance *exemptions*. . .except those which make an existing tolerance *more stringent*"; (2) "carbon monoxide and nitrogen oxide *waivers*. . .and *deletions* from the [NSPS] source categories list"; (3) "hazardous waste *delisting* petitions"; (4) "*deletions* from the 307(a) list of toxic pollutants; and *suspensions* of Toxic Testing Requirements"; and, (5) "TSCA Section 5 test marketing *exemptions*." (emphasis added).

[276] *Deregulation H.Q.., supra* note 214, at 17 (emphasis added).

[277] *See* NAAQS case study, *infra* text accompanying notes 371-80.

[278] The rule was logged at OMB on March 9, 1982, and found consistent on March 11. *OMB Worksheet, supra* note 216, at 3193. Final revocation of the hydrocarbon NAAQS was published at 48 Fed. Reg. 628 (1983). EPA explained that the revocation "is *not* major [rulemaking subject to the RIA requirement] because it involves revocation of a standard or guide, which in itself has required only limited regulatory costs. Revocation will result in no increased regulatory costs." *Id.* at 628 (original emphasis). The Agency, it seems, here adopts the OMB view that *relaxations* are not subject to the RIA and cost-benefit provisions of E.O. 12,291.

were, again, cleared in two days.[279]

This perfunctory review of rule relaxations seems to indicate that if a rule is to be relaxed, OMB often is not concerned with whether the net societal benefits are greater with the rule intact or with the relaxation.[280] Research has not uncovered a single instance of OMB's insistence that EPA maximize net benefits by increasing health or environmental protection.

C. *Secrecy & Ex Parte Contacts at OMB*

OMB long has been criticized for the secrecy with which it operates. The Office does not record or summarize for the public its meetings with outside parties or agency personnel. Secret OMB-agency arm-twisting sessions may be especially troublesome if OMB is passing on information or arguments as a conduit for outside parties, a concern which OMB steadfastly asserts is apocryphal.[281]

1 *OMB-Industry Contacts: Extensive, Secret, Unrecorded*

OMB is a new focus of power in the federal bureaucracy to which many sophisticated attorneys turn if the rulemaking agency is likely to be unreceptive. Joan Bernstein, former EPA General Counsel, has gone so far as to suggest that an attorney representing a client on regulatory matters borders on incompetence if he or

---

[279] *Id.* at 3153.

[280] OMB now vigorously denies that it fails to review deregulatory measures. *See* OMB Response to House Questionnaire, *supra* note 83 (Question 2), *reprinted in Hearings, supra* note 83, at 971-72 ("Virtually all of the Reagan Administration's 'relaxations' of pre-existing rules have been reviewed in detail by OMB before issuance."). Even taken as true, however, this response passes over the nub of the problem: does OMB fully consider the *costs* of regulations being relaxed, or *benefits* of possible increases in a rule's stringency? The Supreme Court's recent decision in the motor vehicles passive restraints case, Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mutual Auto. Ins. Co., 103 S. Ct. 2856 (1983), reversed a National Highway Traffic Safety Administration rule rescission targetted by the Task Force and OMB. The Court demanded that the Administration consider deregulatory measures potentially more cost-beneficial than a total rescission. *See also supra* note 267 (OMB states that agencies are not asked to calculate benefits foregone due to relaxation of regulations).

[281] *See, e.g.*, Wash. Post, Sept. 28, 1983, at A8, col. 4 (quoting Edwin L. Dale, OMB: "As for us being a conduit for industry views I think that's a distortion. It's entirely proper that we receive industry's views, but there are strict procedures [for that]. . . .Only the very top people [at OMB] can have any conversations with industry."); *see also* N.Y. Times, Sept. 28, 1983, at A1, col. 1 ("Mr. DeMuth said the office 'never did anything improper' and never acted as a 'back channel' as some have charged, for industry to get its way.").

she does not use OMB.[282]

OMB encourages such input.[283] The Office sometimes actively solicits industry comments on specific rules. For example, former EPA Chief of Staff Daniel testified that he received industry comments on EPA rules after OMB had sent the rules to industry representatives, while the rules were under review at OMB, but well before their release to the public.[284] OMB admits that on occasion the Office does go to industry to ask for comments on EPA rules.[285]

As a result of this encouragement, OMB management spends much of its time meeting with industry representatives.[286] Written comments from industry come "pouring into" OMB offices;[287] as one staffer said, "what OMB sees is reflective of the lobbying

---

[282] *Hearings on Role of OMB, supra* note 31, at 28 (testimony of Joan Bernstein). Similarly, an article in the National Law Journal suggested that since OMB has gained so much power under the Executive Order,

> the practitioner should make every effort, where appropriate, to communicate with the director [of OMB] to attempt to influence his views on a proposed rule in the direction of the client's preference. In the absence of any ground rules, the possible approaches are limited only to the extent of the practitioner's ingenuity. . . .

Quoted in, Hearings on OMB Control of OSHA Rulemaking, supra note 204, at 12.

[283] For example, Task Force Counsel C. Boyden Gray advised his industry listeners:

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

C. Boyden Gray, Remarks at Transcription of Hall of Flags Reg Reform Briefing (April 10, 1980), *reprinted in Hearings on Role of OMB, supra* note 31, at 92.

OIRA's former Administrator Miller suggested that there are several ways to solicit OMB action on behalf of a business: "Those who are interested will try many ways of making contact. The best way, of course, is to submit written material. Another is to arrange a personal visit. A third is to sit in front of the office door—which I've had some people do." *Deregulation H.Q., supra* note 214, at 19.

[284] Daniel explained that he later determined that the industry representative who had contacted him actually had intended to comment to OMB on the draft EPA rule, but had inadvertantly contacted Daniel at EPA with his comments. *Daniel Testimony, supra* note 46, at 80.

[285] According to OIRA Administrator DeMuth, OMB's reputation is that they "are as tight as a drum." DeMuth admitted, "I can't say we have never gotten any input from industry. . . . There were a few cases in the hundreds of EPA rules coming over here from EPA where we couldn't get an answer from EPA or anybody here. So we got them from industry. There is no secret about it." N.Y. Times, Sept. 28, 1983, at A22, col. 3.

[286] Interview with OMB, OIRA Official "B" in Washington, D.C. (May 3, 1983).

[287] Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983).

power" of the parties involved in rulemaking.[288] OMB openly states that its officials "have met with countless numbers of groups," but will not say with whom these officials have met or what rules have been discussed, assertedly because OMB does "not compile records of meetings or of the subjects discussed."[289]

The Office insists that it meets with interested persons on all sides of regulatory issues.[290] Evidence indicates, however, that industry interests spend a disproportionate amount of time meeting with and passing documents on to OMB, as compared with public interest groups or consumers.[291]

OMB refuses, in general, to record or summarize these meetings with outside parties.[292] As a result, the only available public record of these meetings is that elicited during congressional hearings into OMB's role in rulemaking. In one hearing, OMB provided an admittedly incomplete list of OMB-outside party contacts during a two month period early in the Reagan administration. The list revealed that at least thirty-six such meetings were held, all but three with industry representatives.[293]

This extensive OMB-industry communication has led several critics, including top-level EPA officials, to charge that the Office acts as a "conduit" of information and arguments from industry to EPA.[294] The evidence seems to amply document this charge.[295]

---

[288] *Id.*

[289] *See* OMB Response to House Questionnaire, *supra* note 83 (Question 5), *reprinted in Hearings, supra* note 83, at 985-86.

[290] *Id.*

[291] For example, the author submitted to OMB an FOIA request for all documents sent by outside parties to OMB discussing roughly a dozen EPA rules under OMB review. Of the scores of documents produced, the author counted three from environmental, public health and consumer groups. The overwhelming majority of the documents were from industry representatives; many of these adverted to telephone calls and meetings between OMB and industry, some occurring after the public comment period. OMB Response to Author's FOIA Request (June 13, 1983) (on file with author).

The lack of public interest group input into OMB decisionmaking may be due in part to OMB's unwillingness to actively solicit these groups' views on EPA rules, and, probably in greater part, to the reluctance of public interest groups to allocate their scarce resources to what they view as a futile exercise.

[292] OMB Response to House Questionnaire, *supra* note 83 (Questions 2, 6), *reprinted in Hearings, supra* note 83, at 985, 986.

[293] *Hearings on Role of OMB, supra* note 31, at 58-61.

[294] Former EPA Administrator Costle, who served under President Carter, warns that under the Executive Order, industry representatives are given an "extra inning" in which to attack EPA rules. Interview with former EPA Administrator Douglas Costle in Washington, D.C. (August 17, 1983).

Former EPA Chief of Staff Daniel, a veteran of the Gorsuch-Burford EPA, concurs, stating that OMB frequently intervenes in EPA rulemaking on behalf of industry. *See Daniel*

2. *OMB-EPA Contacts*

OMB's criticisms of EPA rules are rarely written, but instead rendered in unannounced meetings between OMB and agency staff, or by telephone.[296] These oral communications, almost without exception, are neither summarized in writing nor publicly logged for the EPA docket by either agency.[297]

One OMB official explains that the Office doesn't like to "leave fingerprints."[298] The Office is willing to accept a requirement that

---

Testimony, supra note 46, at 82:

> *Mr. Gore.* . . .[S]o the inescapable conclusion is that [OMB] just sat over there and acted as a back-door channel to let the corporations affected hotwire the regulatory process and get the result that they wanted. . . .
>
> *Mr. Daniel.* I think you have correctly characterized it, yes.

See also id. at 5.

[296] *See infra* text accompanying notes 305-11.

[298] *Daniel Testimony, supra* note 46, at 82; *accord* Interview with OMB, OIRA Official "C" in Washington, D.C. (May 3, 1983).

[297] Interview with OMB, OIRA Officials "B" and "C" in Washington, D.C. (May 3, 1983); Interview with Dan Egan, EPA, Radiation Programs Office, in Arlington, Va. (May 24, 1983); Interview with Allan Jennings, EPA, Office of Standards and Regulations, in Washington, D.C. (March 30, 1983); see also Section III.D., Case Studies, for a discussion of docketing practices by EPA in specific rulemakings. Both OMB and EPA report that although many rules have been modified as a result of OMB input, there is no comprehensive or accessible information on these changes. *See* Office of Management and Budget Response, Questionnaire from Congressman Sam Hall, April 25, 1983 (response to Question 1.a.3.), *reprinted in Hearings, supra* note 83, at 2642; EPA Response to House Questionnaire, *supra* note 242 (Question 5(a)(3)), *reprinted in Hearings, supra* note 83, at 1560.

[298] Wash. Post, July 10, 1981, at A21, col. 2 (quoting Jim Tozzi, OMB, OIRA Deputy Adm'r).

OMB officials offer several reasons for this secrecy. First, they argue that because of their extremely heavy workload and because there is only a handful of OMB staff keeping tabs on all of EPA, it is essential that they not waste their time writing down criticisms of EPA rules, or logging and summarizing EPA-OMB meetings. Interviews with OMB, OIRA Officials "B" and "C" in Washington, D.C. (May 3, 1983).

This is unconvincing. If OMB's workload is onerous, this is largely self-inflicted, for it has not requested a significant increase in staff. Agency staff are also very busy, yet they typically are required to log and summarize meetings. Furthermore, the workload problem at OMB certainly cannot be the reason why *EPA* officials do not record and summarize OMB-EPA meetings.

A second reason given by OMB for not recording its criticisms is that by conducting its business orally, it can change its mind at a later date. Interview with OMB, OIRA Official "C" in Washington, D.C. (May 3, 1983). This permits late input by Budget Examiners, White House staff, or OMB management without providing EPA a piece of paper with which to protect itself.

The last reason OMB offers is, "If everything is to be shared [with the public], then advice is not candid and to the point and straightforward." *Hearings on Role of OMB, supra* note 31, at 57 (testimony of James Miller, III, former OIRA Adm'r). This assertion is the refuge of those desiring governmental secrecy. One wonders why OMB would fear to be candid with communications intended solely to increase decisionmaking rationality. Regard-

its *written* comments on agency rules be publicly docketed, provided that its regulatory review powers are statutorily codified;[299] it has, however, vehemently opposed any effort to require it (or an agency) to log, summarize or docket the Office's oral contacts with the agency or outside parties.[300]

On occasion, OMB does record its comments on EPA rules. In many of these cases, however, the comments are not placed in EPA's public rulemaking docket.[301] Further, OMB's oral comments influencing an EPA rule often are not discussed in the rule's preamble; neither are they consistently summarized for the docket—despite the fact that often the rule's substance appears to have been influenced by OMB input.[302]

EPA generally does not place in the docket copies of the draft or proposed rule which is sent to OMB for review.[303] Little of OMB review is reduced to writing. Overall, even less of OMB's input into

---

less, the public's right to meaningful participation in EPA rulemaking must be balanced against OMB's need for candor. If a rule's substance is affected by OMB pressure, that influence should be reflected on the public record.

[299] *See Hearings on OMB Control of OSHA Rulemaking, supra* note 204, at 312, 339; OMB Response to House Questionnaire, *supra* note 83 (Question 9), *reprinted in Hearings, supra* note 83, at 977.

[300] *See, e.g.*, OMB Response to House Questionnaire, *supra* note 83 (Question 10), *reprinted in Hearings, supra* note 83, at 977-78 (logging or docketing requirement "is totally unworkable" and "would certainly lead to a bonanza of new work for administrative lawyers").

OMB disfavors any agency initiative to divulge the full extent of OMB influence on rulemaking. When asked if it would object to an agency publicly docketing summaries of OMB-agency meetings, for example, OMB obliquely responded that the Office "would not favor a policy or practice by an agency which sought to, or acted to inhibit communications concerning informal rulemaking between an agency and the President or, in this instance, his agent, OMB." *Id.* (Question 11), *reprinted in Hearings, supra* note 83, at 979.

[301] *See, e.g.*, Letter from Christopher DeMuth, OMB, OIRA Adm'r, to Joseph Cannon, EPA Assoc. Adm'r for Policy & Resource Mgmt. (July 9, 1982) (returning seven draft NSPS's to EPA; absent from four of seven dockets: A-79-47 (metal furniture surface coating), A-80-05 (metal coils), A-80-06 (large appliances), A-79-50 (rotogravure printing of publications) (dockets located in EPA Docket Room, Washington, D.C.)); Letter from Jim J. Tozzi, OMB, OIRA Deputy Adm'r, to Kathleen Bennett, EPA Ass't Adm'r for Air, Noise & Radiation (Nov. 18, 1982) (arguing against beverage can surface coating NSPS; not docketed for nine months, until after final rule promulgated). (Letters on file with author.)

[302] Of the extensive OMB-EPA debate over the High Level Radioactive Waste Disposal rule, and over several NSPS's, none is summarized for the docket or fully discussed in the rules' preambles. *See* High Level Radioactive Waste Disposal rule case study, *infra* text accompanying notes 326-49; NSPS case study, *infra* text accompanying notes 350-70.

[303] For example, drafts of NSPS's for beverage can surface coating, large appliance surface coating and rotogravure printing of publications sent to OMB for 12,291 review were not placed in the docket. *See* EPA Dockets A-80-04, A-80-06, A-79-50, respectively (located in EPA Docket Room, Washington, D.C.).

EPA rulemaking is ever publicly docketed.[304] This makes it almost impossible for the public or reviewing court to know the extent of OMB involvement in any given rulemaking, or in EPA rulemaking as a whole.

3. *OMB as a Conduit from Industry to EPA*

Former EPA Chief of Staff Daniel has charged that OMB frequently represents industry arguments to EPA as its own.[305] This would not be surprising in light of OMB's active encouragement of industry contacts and its proclivity for undocumented communications with EPA.

OMB vigorously denies that it acts as a "conduit" for industry;[306] nonetheless, the case studies below,[307] Daniel's testimony,

---

[304] A memorandum from former EPA Administrator Ruckelshaus to EPA employees raised the prospect that EPA might begin to more fully document OMB comments. W. Ruckelshaus, EPA Adm'r, Contacts with Persons Outside the Agency (May 19, 1983) (memorandum to all EPA employees), *reprinted in Hearings, supra* note 83, at 1648 [hereinafter cited as Ruckelshaus memorandum]. The memorandum can be read as a change in existing policy, stating in part:

> [A]ll written comments received from *persons outside the Agency* (whether during or after the comment period) are [to be] entered in the rulemaking docket, and. . .a memorandum summarizing any significant new factual information or argument likely to affect the final decision received during a meeting or other conversations is [to be] placed in the rulemaking docket.

Id. at 2 (emphasis added).

The broad phrase "persons outside the Agency" could include OMB staff; however, EPA's Office of General Counsel has stated that no change in EPA's policy regarding docketing of OMB comments is intended. Interviews with EPA, Office of General Counsel (OGC) Officials "G" and "H" in Washington, D.C. (June 8, 1983). One key attorney stated that "the policy will be determined in the first case" to be adjudicated, rather than by EPA staff counsel. Interview with EPA, OGC Official "G" in Washington, D.C. (July 1, 1983). In other words, admitted the attorney, EPA staff are given little direction as to docketing of OMB contacts. *Id.*

[305] *Daniel Testimony, supra* note 46, at 5, 82.

[306] *See supra* note 281.

[307] *See infra* text accompanying notes 325-80. As another example, OMB's position in the gasoline "lead phasedown" debate was reached after OMB secretly met with affected industries at least fourteen times and after OMB had received scores of documents from these industries, some of which are not in the EPA docket. Eight of these meetings were revealed when Congressman Moffett demanded a list of all meetings between Task Force or OMB personnel and interested parties to the lead phasedown. Letter from Christopher DeMuth, OMB, OIRA Adm'r, to Hon. Toby Moffett (Sept. 8, 1982). The Vice President's Office revealed that Task Force staff had met twice with oil industry interests, in June and July 1982, in response to industry demand. Letter from C. Boyden Gray, Counsel to the Vice President, to Hon. Toby Moffett (Aug. 20, 1982); Memorandum from Jane Kelly, Office of the Vice President, to Christopher DeMuth (Aug. 27, 1982) (attached to DeMuth letter to Moffett). Finally, a meeting of the Lead Industries Association with DeMuth took place on September 17, 1982, and a meeting of attorneys representing petroleum blenders with OMB,