

and the EPA iron and steel industry effluent guideline rulemaking³⁰⁸ indicate that OMB does indeed act as a conduit for the views and data of both industry and other federal agencies. A key OMB

OIRA Regulatory Analyst Brian Mannix took place on October 7, 1982, according to letters revealed to the author in response to his FOIA request (June 13, 1983). (All materials on file with author.)

The Task Force openly stated that review of the gasoline lead regulations resulted from industry pressure. See Remarks of Vice President George Bush at the Presidential Task Force on Regulatory Relief Briefing, Washington, D.C., Attachment: Existing Regulations to be Reviewed 3 (August 12, 1981) (copy on file with author). The shifts in OMB's position throughout this rulemaking, in response to industry pressure, are well detailed in trade press such as *Inside EPA* (*Inside Wash. Pubs.*) between December 1981 and October 1982.

³⁰⁸ Late in the Carter administration EPA proposed effluent guidelines, under the Clean Water Act, for iron and steel plants. See Proposed Rules, 46 Fed. Reg. 1858 (1981). These stringent proposed rules created an outcry in the iron and steel industry, which heavily lobbied both EPA and OMB for changes in the rules. See EPA docket for Iron & Steel Effluent Guidelines (two hundred and four volumes, including massive industry critiques) (located in EPA Library, Washington, D.C.). OMB showed the author a sample of the documents it received on the EPA proposal. Every document came from industry; the file was two inches thick and filled with data, some of which do not appear to be in the EPA docket.

OMB became involved in the final rulemaking prior to EPA's internal review. Interview with EPA, Effluent Guidelines Division (EGD) Official "M" in Washington, D.C. (June 9, 1983). For example, OMB urged EPA to relax the "central treatment" portion of the rules. Interview with EPA, EGD Official "N" in Washington, D.C. (May 24, 1983). During its review, OMB received a thick stack of industry comments and documents, including extensive economic analyses, criticizing EPA's "over-optimistic" economic data. See, e.g., Central Treatment: Addendum (March 11, 1982) (unsigned memo in OMB files for outside comments, recommending that OMB force EPA to complete an RIA prior to promulgation); Effluent Limitation Guidelines (ELG's): Iron and Steel Industry Subcategory (undated, unsigned memo, four pages in length, in OMB files for outside comments, encouraging OMB to "exercise oversight of EPA's finalizing of these regulations to ensure that they will be 'least cost' consistent with" E.O. 12,291); EPA's Proposed Effluent Limitations Guidelines for "Best Available Technology" for the Iron and Steel Industry (*Federal Register*, 1/7/81) (unsigned, undated memo in OMB files for outside comments). This strongly suggests that OMB was acting as a conduit and amplifier of industry comments, as John Daniel has maintained. See testimony cited *supra* note 305.

As a court-ordered deadline approached, several meetings took place, at which industry representatives told OMB that certain "new" data they had gathered showed that EPA's cost estimates should have been in the \$1.7 billion per year neighborhood, rather than \$350-400 million. Interview with EPA, EGD Official "M" in Washington, D.C. (June 9, 1983). The OMB public files include letters from iron and steel industry representatives adverting to industry-OMB telephone conversations and meetings at which the rules were discussed. Though they were submitted well after the close of the comment period, OMB told EPA to consider the data before promulgating the rules. Interview with EPA, EGD Official "N" in Washington, D.C. (June 9, 1983).

Ultimately, EPA Administrator Gorsuch told OMB that EPA would meet the court deadline with or without OMB approval. *Id.* Nonetheless, the cost to industry under the final effluent guidelines was substantially less than that of the proposed rules. *Id.*

For a review of the settlement agreement negotiations that ultimately ended the steel effluent guidelines dispute, see Miller, *Steel Industry Effluent Limitations: Success At the Negotiating Table*, 13 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,094 (1983).

official privately admitted that "on occasion, OMB has played the heavy for industry," but also asserted that OMB's intervention on industry's part generally is required only when EPA staff keep high-level policymakers unaware of certain information.³⁰⁹

The evidence indicates that OMB passes industry arguments and data to EPA without indicating the source of the comments, amplifying industry's voice at EPA.³¹⁰ OMB engages in these contacts after the close of the comment period as well.³¹¹

4. OMB Actions to Quell Criticism of Secret Industry Lobbying

OMB management is fully aware of the criticism of its meetings with outside parties. The Office asserts in response: "[T]he very purpose of . . . Executive Order 12291 is to make regulatory decisions more transparent and accessible,"³¹² and they "emphatically disagree that [OMB's] is a 'secret' role" in the rulemaking process.³¹³

The Office has taken several actions aimed at blunting the charges of behind-closed-doors decisionmaking. First, OMB Director David Stockman issued guidelines stating: "OMB will regularly advise those members of the public with whom they communicate that relevant factual materials submitted to them should also be sent to the agency for inclusion in the rulemaking record."³¹⁴ OMB has no system to monitor whether its recommendations are heeded.³¹⁵ The Stockman guidelines do not call for any docketing or recording of oral contacts, or of written legal or policy arguments. Only "factual materials" are covered, leaving a wide excep-

³⁰⁹ Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983).

³¹⁰ See, e.g., discussion of OMB influence on EPA's effluent guidelines for the iron and steel industry, *supra* note 308, and John Daniel's testimony thereon, *Daniel Testimony*, *supra* note 46, at 5; see also NSPS case study, *infra* text accompanying notes 350-70.

³¹¹ For example, much of the OMB-industry contact during both the iron and steel effluent guideline review, see *supra* note 308, and the beverage can surface coating NSPS review, see *infra* text accompanying notes 359-65, took place after the close of the comment period.

³¹² Statement of Christopher DeMuth, Administrator for Information and Regulatory Affairs, OMB, Before the Subcommittee on Administrative Law & Governmental Relations of the House Judiciary Committee, on H.R. 2327, the Regulatory Reform Act of 1983 (July 28, 1983), reprinted in *Hearings*, *supra* note 83, at 905, 922.

³¹³ OMB Response to House Questionnaire, *supra* note 83 (Question 11), reprinted in *Hearings*, *supra* note 83, at 988-89.

³¹⁴ David A. Stockman, Director, OMB, Certain Communications Pursuant to Executive Order 12291, 'Federal Regulation' (memorandum M-81-9) (June 11, 1981), reprinted in *Hearings*, *supra* note 83, at 2811 [hereinafter cited as Stockman Guidelines].

³¹⁵ GAO Report on 12,291, *supra* note 24, at 53-54. Davis, *supra* note 2, criticizes the Guidelines as inadequate to protect the integrity of informal rulemaking.

tion which allows—perhaps encourages—OMB staff to transmit the arguments they hear from outsiders to agencies.

The Office also cites a second action it has taken to moderate industry influence: OMB spokesmen assert that “only the very top people [at OMB] can have any conversations with industry.”³¹⁶ OMB cites memoranda to the effect that lower-level staff cannot meet with industry representatives to discuss rules.³¹⁷ This prohibition, however, has gone unobserved with the full knowledge of OMB management,³¹⁸ and does not inhibit OMB staff from discussing “paperwork” requirements of rules—requirements which often are so integrally linked with the rules’ substance as to be inseparable.³¹⁹ In addition, OMB staff are “encouraged . . . to review any written material” submitted by outside parties.³²⁰ Finally,

³¹⁶ Wash. Post, Sept. 28, 1983, at A8, col. 4 (quoting Edwin L. Dale).

³¹⁷ See, e.g., Jim J. Tozzi, OMB, OIRA Deputy Adm'r, Memorandum to Desk Officers: Contacts with Non-Federal Employees (undated), reprinted in *Hearings on Role of OMB*, supra note 31, at 195 [hereinafter cited as Tozzi memo to Desk Officers].

³¹⁸ For example, the Desk Officer reviewing the NSPS for the synthetic fiber industry met in February 1983 to discuss the rule with representatives of the Chemical Manufacturers' Association and the Man-Made Fibers Products Association. Follow-up letter from H. Adams, Jr., Man-Made Fiber Producers Ass'n, to Jim Tozzi and Don Arbuckle, OMB, OIRA (Feb. 18, 1983) (copy on file with author).

When asked by a congressional subcommittee why a Desk Officer at OMB had been allowed to meet with industry to discuss a rule, OMB responded that the meeting “concerned only the reporting and record-keeping requirements proposed in EPA’s rule which OMB was required to review under the Paperwork Reduction Act.” OMB Response to House Questionnaire, supra note 83 (Question 7), reprinted in *Hearings*, supra note 83, at 986-87. According to EPA’s Federal Register notice, however, the NSPS for Synthetic Fiber Production Facilities involved no reporting and recordkeeping requirements for OMB to review under the Paperwork Reduction Act. See Standards of Performance for New Stationary Sources; Synthetic Fiber Production Facilities: Proposed Rule and Notice of Public Hearing, 47 Fed. Reg. 52,932, 52,943 (1982) (“This rulemaking does not involve a ‘collection of information’ as defined in the 1980 [Paperwork Reduction] Act. Therefore, the Provisions of the Paperwork Reduction Act. . . do not apply to this rulemaking.”).

³¹⁹ OMB recently has initiated a policy whereby Desk Officers must notify their superiors of any meetings they will have with outsiders regarding paperwork reviews, since a discussion of paperwork “could blend easily into a discussion of the substance of the regulation which contains the information collection.” Gail Coad, OIRA Regulatory Policy Branch Chief, Contacts With the Public Involving Proposed Collection of Information (April 19, 1983 memorandum to Reg. Policy Desk Officers), reprinted in *Hearings*, supra note 83, at 2814. No prohibition of staff-level contacts with industry regarding paperwork is established, however, nor is the policy changed that Desk Officers may freely telephone outsiders regarding paperwork reviews. *Id.*

³²⁰ Tozzi memo to Desk Officers, supra note 317 (emphasis added). The policy’s inefficacy in limiting the influence of outside parties on OMB is manifest; the OIRA Administrator candidly admitted, in fact, that the policy’s *raison d’être* is primarily “a matter of protecting the staff from the deluge of phone calls that come in when you are trying to make a serious judgment on a controversial matter,” rather than an attempt to actually limit

the loose strictures on industry contacts are wholly inapplicable to well over a dozen OMB managers,³²¹ including those who sign off on all OMB rule reviews.³²²

The Office asserts, in response to critics of its secrecy, that it has established a public docket which includes "all material sent to OMB from outside parties about regulations."³²³ The author could locate no such comprehensive docket.³²⁴

D. Case Studies

In this section, three case studies illustrate OMB review of EPA rules under E.O. 12,291. In each case, the limited degree to which OMB's input into the rulemaking is reflected on the public record will give the reader an idea of how difficult it is to comprehend OMB's influence simply by relying on the rulemaking docket. Although the *Home Box Office v. FCC* court spoke in a slightly different context, its fear that secrecy might create "the possibility that there is here one administrative record for the public and this court and another for the [agency] and those in the know"³²⁵ appears to be well founded.

1. High-Level Radioactive Waste Disposal Rule

The disposal of highly radioactive waste from nuclear power plants and nuclear weapons programs has become a key point of

outside influence on OMB. *Hearings on OMB Control of OSHA Rulemaking*, *supra* note 204, at 351 (testimony of Christopher DeMuth).

³²¹ See OMB Response to House Questionnaire, *supra* note 83 (Question 1), reprinted in *Hearings*, *supra* note 83, at 985 (enumerating those at OMB authorized to talk with outside parties interested in rulemaking, including staff as low as deputy associate directors, branch chiefs, a chief statistician, "and other senior staff as may be authorized on [a] case-by-case basis").

³²² *Id.* (noting that the OIRA administrator, deputy administrators and branch chiefs are authorized to meet with outsiders regarding rules).

³²³ See *Hearings on OMB Control of OSHA Rulemaking*, *supra* note 204, at 309-10; see also OMB Response to House Questionnaire, *supra* note 83 (Question 8), reprinted in *Hearings*, *supra* note 83, at 987.

³²⁴ When the author requested access to the docket, he first was told that no such docket existed; when the testimony was pointed out, he was shown a thin set of seven folders containing comments on as many EPA rules. Conversations with OIRA Adm'r DeMuth's Office. OIRA Deputy Adm'r Bedell's Office (June 9 & 10, 1983). Pursuant to the author's FOIA request for any materials OMB had received from outside parties regarding a number of EPA rules under review, the Office produced scores of documents, almost exclusively from industry representatives, none of which had been in the OMB "docket." OMB Response to Author's FOIA Request (June 13, 1983) (on file with author).

³²⁵ 567 F.2d 9, 54 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

public debate.³²⁶ The Nuclear Regulatory Commission (NRC) and the DOE ultimately will implement the high-level nuclear waste disposal program in the United States, while EPA is charged with promulgating environmental protection requirements for this program.³²⁷ Some of these wastes will remain lethally radioactive for ten thousand years.³²⁸

After years of internal debate and redrafting, EPA sent its nineteenth draft of the proposed high-level radioactive waste disposal rule to OMB for review on December 24, 1981.³²⁹ OMB sent the regulatory package to NRC and DOE, each of which objected to the proposal on several grounds. A major squabble ensued between the agencies over the precise jurisdiction of each in adopting and implementing the rules. OMB, as traditional arbiter of interagency jurisdictional disputes³³⁰ and as E.O. 12,291 review authority, extended its review beyond the sixty-day period prescribed in the Executive Order and told EPA that it was required to get both DOE and NRC to sign off on the rule before OMB would even consider releasing it.³³¹

Interagency negotiations ensued, leading to important changes in the rule. For example, EPA finally agreed to a significant relaxation of the definition of "accessible environment"; the EPA draft definition included earth and groundwater one mile from the disposal site or more, while the definition after interagency negotiations included only earth and groundwater "more than ten kilometers" from the site.³³²

³²⁶ See, e.g., F. Shapiro, *Radwaste: A Reporter's Investigation of a Growing Nuclear Menace* (1981).

³²⁷ See Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10,101-10,226 (1982); Environmental Standards for the Management and Disposal of Spent Nuclear Fuel, High-Level and Transuranic Radioactive Wastes: Proposed Rule, 47 Fed. Reg. 58,196, 58,197 (1982) [hereinafter cited as High-Level Radwaste Rule].

³²⁸ See EPA, Draft Environmental Impact Statement for 40 CFR 191: Environmental Standards for Management and Disposal of Spent Nuclear Fuel, High-Level and Transuranic Radioactive Wastes (Dec. 1982) [hereinafter cited as EPA Radwaste DEIS]; see also High-Level Radwaste Rule, *supra* note 327, at 58, 199.

³²⁹ Interview with Official "K", EPA Radiation Programs, in Arlington, Va. (May 24, 1983); accord *Daniel Testimony*, *supra* note 46, at 82.

³³⁰ The Office's wide acceptance as the forum at which interagency disputes are waged stems from a long history of OMB mediation of jurisdictional and policy debates within the executive branch.

³³¹ Interview with Official "K", EPA Radiation Programs, in Arlington, Va. (May 24, 1983).

³³² *Id.* This change came largely at NRC's insistence. *Id.* A copy of the EPA draft rule sent to OMB (in author's files), when compared to the proposed rule as published in the Federal Register, confirms that this change, among others, occurred during OMB review.

After several months of negotiations, and several more changes in the proposal, DOE and NRC finally agreed, in late summer or early fall, to sign on to the rules.³³³ However, after nine months of delay OMB continued to have "philosophical" disagreements with the rule.

OMB staunchly opposed the proposed rule's so-called "assurance requirements" establishing qualitative criteria for choosing a site.³³⁴ OMB also opposed EPA's plan to have the President announce the rules; some EPA staff assume that OMB feared it would be politically unwise to have the President make such a pro-regulatory announcement.³³⁵ Further, OMB and DOE sought to relax a provision limiting reliance on "institutional controls" (such as guards) to one hundred years when calculating the site's theoretical safety. OMB argued for a period of reliance on such controls of several hundred years.³³⁶

At this point, the proposal had been held up for ten months; finally, in an October 1982 meeting of EPA Administrator Gorsuch, OIRA Administrator DeMuth, and others,³³⁷ the EPA Administrator reportedly engaged in a "shouting match"³³⁸ with OMB, ultimately threatening to send the rule out "whether or not OMB liked it."³³⁹

Interagency arguments at the staff and policy levels continued, including discussions among EPA's Administrator and Deputy Administrator, and OMB. Ultimately, resolution was reached; EPA agreed not to have the President announce the rules, to relax the institutional controls standards from one hundred years to "several hundred years," and to ask for public comment on the "assurance requirement" issue.³⁴⁰ On December 29, 1982, over a year after

See High-Level Radwaste Rule, *supra* note 327, at 58, 196. "Accessible environment" is that area beyond the containment site into which radioactive waste release is to be measured when determining containment requirements. See EPA Radwaste DEIS, *supra* note 328, at 112-14.

³³³ Interview with Official "K", EPA Radiation Programs, in Arlington, Va. (May 24, 1983).

³³⁴ *Id.*

³³⁵ *Id.* EPA had been planning to issue "Federal Radiation Protection Guidance," which must be approved by the President; OMB opposed this. *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ Interview with EPA, Office of Standards & Regulations Official "E" in Washington, D.C. (June 6, 1983).

³³⁹ Interview with Official "K", EPA Radiation Programs, in Arlington, Va. (May 24, 1983).

³⁴⁰ *Id.*

EPA submitted the proposed rule for review, the revised proposed rule was issued.³⁴¹

Throughout the debate, asserts one EPA official, OMB's Budget Examiners for DOE and NRC acted as "surrogates" for the agencies, for fear that the standards would impose excessive costs on their respective agencies.³⁴² EPA also received inquiries from industry representatives during the OMB review which revealed that OMB had provided industry with copies of the draft rule (which still had not been made public), and had asked for their comments.³⁴³ According to EPA staff, OMB used the Executive Order as a "ruse" to disguise its political (the presidential announcement) and philosophical (the assurance requirements, the period of institutional controls) objections.³⁴⁴ Indeed, OMB hardly mentioned the EPA Regulatory Impact Analysis (RIA).³⁴⁵ The RIA showed that, to the extent they were quantifiable, the costs of disposal were largely insensitive to variations in the standards' stringency.³⁴⁶ It required the personal intervention and continued vocal support of the EPA Administrator to keep OMB's review moving; even then EPA made important concessions.

OMB's input into this proposed rule is not mentioned in the public record, although many of NRC's and DOE's comments are docketed.³⁴⁷ A note in the EPA docket titled "Briefings Held to Date for other Government Officials" fails to mention any of EPA's meetings with OMB.³⁴⁸ According to EPA officials, none of the meetings were publicly announced or open.³⁴⁹

2. *New Source Performance Standards*

OMB has taken great interest in EPA New Source Performance Standards (NSPS's) for new and modified stationary air pollution

³⁴¹ High-Level Radwaste Rule, *supra* note 327.

³⁴² Interview with Official "K", EPA Radiation Programs, in Arlington, Va. (May 24, 1983).

³⁴³ Daniel Testimony, *supra* note 46, at 80.

³⁴⁴ Interview with Official "K", EPA Radiation Programs, in Arlington, Va. (May 24, 1983).

³⁴⁵ *Id.*

³⁴⁶ See EPA, Draft Regulatory Impact Analysis for 40 CFR 191: Environmental Standards for Management and Disposal of Spent Nuclear Fuel, High-Level and Transuranic Radioactive Wastes 42-59 (Dec. 1982).

³⁴⁷ See EPA Docket R-82-3 (located in EPA Docket Room, Washington, D.C.).

³⁴⁸ *Id.*, Document II-E-1 (March 21, 1983).

³⁴⁹ Interviews with Official "K", EPA Radiation Programs (May 24, 1983) and Official "L", EPA Radiation Programs (April 27, 1983) in Arlington, Va.

sources, vetoing or bottling up many NSPS's sent to it for review. In fact, OMB has "returned" at least eleven NSPS's to EPA since mid-1981.³⁵⁰ An EPA official summarized OMB review of NSPS's this way: "[A]lthough the [Clean Air] Act requires us to issue these rules, OMB doesn't like technology-based standards—they sometimes seem upset when we bring up the statute."³⁵¹

EPA delivered all eleven of these NSPS's well before the statutory promulgation deadline of August 7, 1982.³⁵² OMB held all of them well beyond that deadline; indeed, two NSPS's were held at least ten months past the date.³⁵³ One rule, the stationary internal combustion NSPS, was vetoed twice during more than two years of OMB review.³⁵⁴ Though the statutory deadline has passed, OMB has made clear its intention to continue to review NSPS's cur-

³⁵⁰ NSPS's vetoed include: (1) the NSPS for stationary internal combustion engines (vetoed twice), Letter from James Miller, OIRA Adm'r, to Anne Gorsuch, EPA Adm'r (Aug. 19, 1981) (first veto); Letter from Christopher DeMuth, OIRA Adm'r, to Joseph A. Cannon, EPA Assoc. Adm'r for Policy & Resource Mgmt. (Apr. 28, 1983) (second veto); (2) the volatile organic liquid storage vessel NSPS, see OMB 1981 Report on 12,291, *supra* note 275, at 16; (3) the glass manufacturing plant NSPS; (4) the flexible vinyl coating and printing operations NSPS; (5) the surface coating of metal furniture NSPS; (6) the metal coil surface coating NSPS; (7) the graphic arts industry rotogravure printing NSPS; (8) the surface coating for large appliances NSPS; (9) the beverage can surface coating NSPS; (10) the rubber tire manufacturing NSPS (vetoes of NSPS's (3)-(10) noted in OMB 1982 Report on 12,291, *supra* note 187, at 16); (11) the phosphate rock plant NSPS, Letter from James Miller, OIRA Adm'r, to Anne Gorsuch, EPA Adm'r (Aug. 19, 1981). (All letters on file with author.)

³⁵¹ Interview with EPA, Office of Standards & Regulations Official "E" in Washington, D.C. (June 6, 1983).

³⁵² The Clean Air Act deadline is found at 42 U.S.C. § 7411(f)(1) (1982) (requiring that all of the NSPS's listed in 40 C.F.R. § 60.16 (1983) be promulgated by Aug. 7, 1982). This fact was noted on each copy viewed by the author of *Standard Form 83: Request for OMB Review (Under the Paperwork Reduction Act and Executive Order 12291)*, the form submitted by the agency to OMB with each of the NSPS packages (copies on file with author).

EPA submitted the final internal combustion engine rule on June 29, 1981, the volatile organic liquid storage vessels rule on June 25, 1981, Letter from James Miller, OIRA Adm'r, to Anne Gorsuch, EPA Adm'r (Aug. 19, 1981), the glass manufacturing rule in August 1981, and all of the other NSPS's listed in *supra* note 350 (except the phosphate rock NSPS) in May 1982. OMB 1982 Report on 12,291, *supra* note 187, at 16; Interview with EPA, Office of Standards & Regulations Official "E" in Washington, D.C. (June 6, 1983).

³⁵³ Interviews with EPA, Office of Standards & Regulations (OSR) Official "E" (June 6, 1983) and EPA, OSR Official "F" (June 8, 1983) in Washington, D.C. The internal combustion engine and beverage can surface coating rules were held for a year past the deadline. Memorandum from Harvey Nozack, EPA Office of Air Quality Planning & Standards (OAQPS), to Sheldon Meyers, Director, OAQPS (June 3, 1983) (listing these two and several other NSPS's OMB was holding at that point). The beverage can rule was published on August 25, 1983. 48 Fed. Reg. 38,728 (1983).

³⁵⁴ See *supra* note 350; EPA first delivered the rule to OMB on June 29, 1981. The rule was vetoed on August 19, 1981; a revised rule was vetoed on April 28, 1983.

rently being developed well behind EPA's required schedule.³⁵⁵ This OMB review is in direct conflict with the Executive Order.³⁵⁶

OMB has asserted that the NSPS's are not cost effective at the levels EPA sets, and that the standards are too prescriptive and should be more flexible.³⁵⁷ As a different matter, OMB held the stationary internal combustion engine NSPS for two years, essentially because of disagreement with EPA over what constitutes a "significant" source under the Clean Air Act.³⁵⁸

The beverage can surface coating NSPS review³⁵⁹ illustrates how OMB may act as a conduit from industry to EPA. OMB logged in the final rule from EPA in May 1982; it took well in excess of a year to be reviewed.³⁶⁰ OMB's vigorous resistance was puzzling since the rule involved "basically no net control costs" to the overall industry, although certain operators would be subject to higher

³⁵⁵ See OMB Response to House Questionnaire, *supra* note 83 (Question 15), reprinted in *Hearings, supra* note 83, at 980-81.

³⁵⁶ E.O. 12,291, *supra* note 1, § 8(a)(2) ("The procedures prescribed by this order shall not apply to . . . [a]ny regulation for which consideration . . . under the terms of this Order would conflict with deadlines imposed by statute. . . .").

³⁵⁷ Interviews with EPA, Office of Standards & Regulations (OSR) Official "E" (June 6, 1983) and EPA, OSR Official "F" (June 8, 1983) in Washington, D.C. OMB also expressed its concern that "two-tiered" standards, setting two different allowable emission levels for sources within the same category according to the control technology used, are anticompetitive and undesirable. *Id.*

³⁵⁸ Interviews with EPA, Office of Standards & Regulations (OSR) Official "E" (June 6, 1983) and EPA, OSR Official "F" (June 8, 1983) in Washington, D.C. The internal combustion engine NSPS was proposed July 23, 1979, 44 Fed. Reg. 43,152 (1979); the final rule was rejected twice by OMB, *see supra* note 350. EPA officials complain that OMB has no authority even under the Executive Order's broad mandate to make expert technical judgments such as whether a source is "significant"; they argue that costs and benefits have little to do with OMB's intervention, for the rule is highly cost effective. Interviews with EPA, OSR Official "E" (June 6, 1983) and EPA, OSR Official "F" (June 8, 1983) in Washington, D.C.

As another example of OMB attempts to encroach on decisions clearly appropriate for EPA's expert judgment, see A. Fraas, OIRA Regulatory Analyst, Reasonable Control Costs for Hydrocarbon Emissions (December 1, 1982) (memorandum to OIRA Adm'r DeMuth) (copy on file with author). This memorandum, transmitted to EPA, suggests that "EPA's suggested incremental cost cut-off of \$1,900 per ton" of NSPS hydrocarbon emission reduction is unreasonably high, and strongly hints that OMB should adopt a cut-off of \$1,000 or less per ton. EPA officials suggest that such a cut-off mandate by OMB would be a clear usurpation of the Agency's authority to set standards at the level it determines is reasonable. Interviews with EPA, OSR Official "E" (June 6, 1983) and EPA, OSR Official "F" (June 8, 1983) in Washington, D.C.

³⁵⁹ The proposed NSPS for beverage can surface coating appeared at 45 Fed. Reg. 78,980 (1980). The final rule was published—after receiving congressional attention—on August 25, 1983. 48 Fed. Reg. 38,728 (1983).

³⁶⁰ Interviews with EPA, Office of Standards & Regulations (OSR) Official "E" (June 6, 1983) and EPA, OSR Official "F" (June 8, 1983) in Washington, D.C.

control costs.³⁶¹ EPA officials began to suspect industry influence.³⁶² Their suspicions were confirmed when OMB sent to EPA a detailed six-page memorandum, complete with charts and figures, absent from the docket, criticizing the rule and "mouth[ing] verbatim the industry position."³⁶³ Industry lobbying of OMB on the can coating rule did indeed take place; OMB received a thick package of documents, some not in the EPA docket,³⁶⁴ and some several months after the close of the comment period.³⁶⁵

To summarize OMB review of EPA's NSPS program: (1) OMB has extended review well beyond the statutory deadline;³⁶⁶ (2) OMB has not confined its comments solely to criteria mandated by E.O. 12,291; (3) OMB has exercised de facto veto power over some rules by holding them in "rule review limbo"; and (4) amid indus-

³⁶¹ Interview with EPA, Office of Standards & Regulations Official "E" in Washington, D.C. (June 6, 1983).

³⁶² *Id.*

³⁶³ *Id.* See Memorandum from Jim Tozzi, OMB, OIRA Deputy Adm'r, to Kathleen Bennett, former EPA Ass't Adm'r for Air, Noise & Radiation (Nov. 18, 1982) (on file with author). This memo was docketed on August 26, 1983, after the final rule already had been published in the Federal Register.

³⁶⁴ OMB Response to Author's FOIA Request (June 13, 1983) (requesting all documents received by OMB from outside parties discussing, *inter alia*, the beverage can surface coating NSPS).

One letter from the Can Manufacturers' Institute to OMB's Tozzi, for example, notes: "As requested, we are enclosing the industry's recorded position." It goes on to update the industry data, suggest a proposed rule, and update arguments presented to EPA. Letter from Can Mfrs. Inst. to Jim Tozzi, OMB, OIRA Deputy Adm'r (Dec. 19, 1982) (on file with author).

³⁶⁵ See, e.g., Letter from Can Mfrs. Inst. to Jim Tozzi, OMB, OIRA Deputy Adm'r (Dec. 19, 1982); Handbook: Reasonably Available Control Technology for Beverage Can Surface Coating (Jan. 1983).

³⁶⁶ On July 7, 1982, OMB finally rejected formally seven of the NSPS's. The flexible vinyl coating, metal furniture coating, coil surface coating, rotogravure printing, large appliance coating, beverage can coating, and tire manufacturing NSPS's were vetoed that day, according to OMB 1982 Report on 12,291, *supra* note 187, at 16. After extensive staff-level debate, EPA management met with OMB in October 1982 to hammer out an agreement. Interviews with EPA, Office of Standards & Regulations (OSR) Official "E" (June 6, 1983) and EPA, OSR Official "F" (June 8, 1983) in Washington, D.C. Finally, following much "wordsmithing" by OMB and several relatively minor changes, OMB began to slowly release the rules for promulgation. Most of the originally rejected rules now have been published. Interview with EPA, OSR Official "F" in Washington, D.C. (June 8, 1983). The following final NSPS's have been published: Large Appliance Surface Coating, 47 Fed. Reg. 47,778 (1982); Metal Furniture Surface Coating, 47 Fed. Reg. 49,276 (1982); Metal Coil Surface Coating, 47 Fed. Reg. 49,606 (1982); Rotogravure Printing 47 Fed. Reg. 50,644 (1982); Beverage Can Surface Coating, 48 Fed. Reg. 38,728 (1983). The NSPS proposals for petroleum dry cleaners and rubber tire manufacture were published at 47 Fed. Reg. 56,118 (1982) and at 48 Fed. Reg. 2676 (1983), respectively. As of this writing, the internal combustion engine NSPS has yet to be promulgated. [Federal Regulations] 1 Env't Rep. (BNA) 121:0391 (Nov. 2, 1984).