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Report to the Chairman, Subcommittee on Health and the Environment, Committee on Energy and Commerce, House of Representatives

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AIR POLLUTION

Impact of White House Entities on Two Clean Air Rules

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Resources, Community, and
Economic Development Division

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May 6, 1993

The Honorable Henry A. Waxman
Chairman, Subcommittee on Health
and the Environment
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

Your request letter expressed concern about the participation of White House entities in the rulemaking process for certain rules issued pursuant to the Clean Air Act Amendments of 1990. Specifically, you named the Council on Competitiveness (Council), the Office of Management and Budget (OMB), and the Council of Economic Advisors (CEA).[1] As agreed with your office, we reviewed 2 of about 55 clean air rules which the act required the Environmental Protection Agency (EPA) to issue by December 1992, with emphasis on whether White House entities involved in these rules disclosed their communications with persons or groups outside the government. The two rules selected were ones that had extensive White House entity involvement: (1) the Municipal Waste Combustor (MWC) rule, issued February 11, 1991, which established emission standards for new and guidelines for existing incinerators, and (2) the Operating Permit Program (OPP) rule, issued July 21, 1992, which requires about 35,000 major sources of air pollution to apply for operating permits by November 15, 1996.

For these two rules, we undertook, at your request, to examine (1) White House entities' participation in the rulemaking process, (2) changes that occurred after such participation, and (3) compliance with the act's public docket requirements.[2]

Results in Brief

Courts have upheld the authority of White House entities to comment on proposed Clean Air Act (CAA) rulemakings. With regard to the MWC and OPP rules, such involvement did occur.

[1]In subsequent discussions with the Chairman's office, we were asked to examine the involvement of any other White House entities in the two rules.

[2]The docket is the collection of documents that form the record for judicial review of EPA's rulemaking actions. It generally consists of scientific and technical reports and data, transcripts of public hearings, drafts of proposed and final rules, and the correspondence, memorandums, and comments used or considered by EPA in making rules.

While White House entities can comment on proposed rules, the EPA Administrator has ultimate responsibility for decisions regarding the content of the promulgated rules. The former EPA Administrator told us that he made the final decisions on both rules. The content of both rules was changed after the involvement of White House entities. For example, the Council recommended, among other things, the removal of the MWC rule's waste separation provisions, which EPA did. Regarding the OPP rule, the Council and other White House entities recommended allowing sources to increase their emissions above permit limits without public notice and comment or prior approval by regulatory agencies. This change was also adopted by EPA.

The law requires agencies to establish public dockets that include certain information relevant to a rulemaking. However, it does not require EPA to docket communications between White House entities and outside parties, even if the White House entities later communicate with EPA on the same topic. Although OMB has agreed to provide EPA with the substance of its communications with outside parties on proposed clean air rules, it did not consistently honor its agreement with EPA on the OPP rule.

The adequacy of support for both rules has been questioned. For example, while a 1992 court opinion found the record supported the Administrator's deletion of the MWC rule's waste separation provision, it also found that he had not adequately supported his decision to delete a lead-acid vehicle battery provision. As of April 15, 1993, a decision on the OPP rule was still pending before the court.

Irrespective of the effect of White House entities' communications on EPA's final rules, full disclosure of discussions with outside parties would lead to a more complete record, a better explanation of EPA's rulemaking decisions, and an increase in public confidence in the integrity of the rulmaking process.

Background

Among its many responsibilities EPA is charged, under the Clean Air Act, with promulgating rules and regulations to protect and enhance the quality of the nation's air. By 1977, however, the Congress had become concerned that the procedures used in informal rulemakings were inadequate, impairing both the development of rules within the agency and their subsequent review by the courts. Consequently, the Congress, in amending the act in 1977, mandated the development of specific safeguards over the

rulemaking process for many clean air rules. Among the safeguards added were requirements for

- the establishment of a rulemaking docket that includes all the data, information, and documents of central relevance to the rulemaking (section 307(d)(4)(B)(i));
- a published written explanation of significant comments, criticisms, and new data submitted (whether oral or written) during the comment period (section 307(d)(6)(B)); and
- inclusion in the public docket of written comments by OMB and other agencies on drafts of proposed and final rules (section 307(d)(4)(B)(ii)).

Additionally, the 1977 act specified that EPA's rules may not be based, in whole or in part, on information that has not been placed in the docket. The Clean Air Act Amendments of 1990 left unchanged these long-standing clean air rulemaking requirements.

EPA must follow the rulemaking procedures contained in the Clean Air Act when it develops or revises any of more than 20 types of clean air rules. However, the act provides EPA with the discretion to decide whether other clean air rules will be developed under the Clean Air Act or the Administrative Procedure Act (APA). Both acts impose certain conditions on the rulemaking process, but the APA has no requirement that the written comments of OMB or other executive branch agencies be placed in the public docket. EPA's MWC rule was one of the rules EPA had to develop under the CAA rulemaking requirements, while the OPP rule was not. The OPP rule was developed under the APA. Neither the CAA nor the APA addresses the issue of communications between nongovernmental persons or organizations and White House entities that review the rules.

Docket Requirements for Federal Rulemakings

To facilitate effective public participation in and judicial review of final rules, EPA maintains a rulemaking docket on each clean air rule it proposes. The CAA requires EPA to maintain such dockets, and as a matter of policy EPA maintains such dockets on other rules it issues. In rulemakings pursuant to section 307(d) of the CAA, the docket must contain all written comments submitted for inclusion in the record and all documents of central relevance to the rulemaking. Additionally, EPA must keep the docket open for 30 days after completion of the comment period to allow interested and affected parties the opportunity to submit rebuttal comments and supplementary information.

EPA must also place in the docket its reasons for any major changes between the proposed and final rules. This explanation, combined with other docket information, should provide a reviewing court with the factual justification and reasoning for EPA's rules. A reviewing court is thus able to determine, on the basis of the available record, whether EPA's rule is rational, that is, not arbitrary and capricious. When the record is incomplete, or does not support the rule, the court can require the agency to provide justification for its position. For example, the court of appeals in N.Y. v. Reilly, 969 F.2d 1147 (D.C. Cir. 1992), remanded the MWC rulemaking to the agency because EPA had inadequately explained its reasons for not imposing a ban on the burning of lead-acid vehicle batteries.

Executive Branch Participation in Federal Rulemakings

Passage of the APA in 1946 allowed agencies to use informal rulemaking—also known as notice and comment rulemaking—to transform broad congressional mandates into comprehensive, workable regulations. Over time, informal rulemaking largely replaced the time-consuming, resource-intensive, adjudicatory formal process with one that provided greater public participation and insight into agency rulemaking.

By the late 1960s, however, as the Congress expanded the scope of the government's reach and power, the costs to the regulated community of implementing regulations began to rise. Concern about these increased costs prompted the White House, in 1971, to enter the rulemaking process, primarily in an effort to ensure that new regulations were cost-effective and did not duplicate existing ones. Since that time all administrations, to varying degrees, have involved White House entities in systematically reviewing agency rules.

The concern surrounding White House involvement in agency rulemakings escalated in 1981 with the issuance of Executive Order 12291, which greatly expanded OMB's role in reviewing and approving proposed rules, and again in 1985 with the issuance of Executive Order 12498. This 1985 executive order further increased White House entities' participation in federal rulemakings by involving OMB in the review and approval of agencies' regulatory agendas prior to rule development—a much earlier stage than ever before.

Only OMB Has Procedures for Disclosing Communications With Outside Parties

In the 1980s, as more became known about the nature and extent of OMB involvement in the rulemaking process, some Members of Congress became concerned about the undisclosed influences of private interests on agencies' rulemaking processes. In 1984 proposed legislation (S. 2433) called for restrictions on OMB's reviews of draft rules, including public disclosure of selected written materials pertaining to the rulemaking. Although this proposed legislation did not pass, in 1985 OMB agreed to internal operating procedures requiring OMB staff to (1) provide EPA with copies of all documents pertinent to the rulemaking received from persons outside the federal government and (2) docket oral contacts with persons outside the government when factual information is provided that OMB is not confident has also been provided to EPA.

In 1986, as the Congress again began to consider legislation to restrict OMB's involvement in agency rulemaking, OMB agreed to strengthen its internal operating procedures governing its communications with nongovernmental persons. Specifically, with respect to EPA rulemakings, OMB agreed to

- send EPA copies of all written materials concerning EPA rules that OMB receives from persons outside the government;
- advise EPA of all oral communications, such as telephone calls, with persons outside the government on any EPA rules under review; and
- invite EPA to all scheduled meetings with persons outside the government on any EPA rules under review.

From 1988 to 1992, however, OMB was only one of several White House entities that reviewed federal rulemakings. For example, in addition to OMB, the Council on Competitiveness, the Council of Economic Advisors, and the Office of Policy Development (OPD), among others, participated in reviewing one or both of the two clean air rules selected. According to the White House Deputy Director for Management,

> While the President has not directed senior White House staff to review agency regulations in the systematic way that OIRA,[3] and, on occasion, the Council on Competitiveness do, senior White House staff do become involved, on an ad hoc basis, with individual regulatory issues that may come to their attention.[4]

[3]OMB's Office of Information and Regulatory Affairs.

[4]In the Deputy Director's memorandum of February 25, 1992.

However, no agreements have been reached with these other White House entities with respect to disclosing their communications with persons or organizations outside the government.

White House Entities' Participation in Clean Air Rules

The courts have upheld White House participation in the clean air rulemaking process. For example, the courts have recognized the President's right to supervise the executive branch and to coordinate agency rulemaking by means of an interagency review process. Additionally, section 307(d) of the Clean Air Act envisions review of and comment on clean air rules by OMB, one of several White House entities that have participated in reviewing clean air rules.

In addition to meeting other legal requirements, EPA's Administrator must make the final decision on the content of clean air rules he promulgates. The Administrator is on record as saying that he made the final decisions on both the MWC and OPP rules. He has already testified that he made the final decision on the MWC rule. Additionally, we contacted the former EPA Administrator to discuss White House participation in the OPP rule, as well as to affirm that he made the final decision on the OPP rule's content. The former Administrator told us that while he had numerous discussions with White House entities on the content of the OPP rule, both the President and Vice-President understood that he would make the final decision on the rule, which he said he did. (App. I provides an outline of executive branch authority to review agencies' rulemakings.)

Changes in Clean Air Rules After White House Entities' Participation

The following sections describe how some of the more significant provisions of the two rules were changed after White House entities' participation in the rulemaking process.

Municipal Waste Combustor Rulemaking

In addition to emissions limits for municipal incinerators, EPA's MWC notice of proposed rulemaking (NPRM) also (1) required 25 percent of municipal wastes to be separated out of the waste stream prior to incineration and (2) prohibited the incineration of lead-acid vehicle batteries. After responding to over 400 comments on the proposed rule—some for and others against these provisions—EPA maintained that both provisions were still warranted when it submitted the draft final rule to OMB on November 29, 1990. According to the EPA project officer, the draft final rule

is the rule that the EPA air office recommended be issued. Although OMB had long-standing cost concerns about the waste separation proposal, EPA had systematically responded to these concerns with more docketed data and information indicating that, although there was some uncertainty as to whether this provision would produce net savings or costs for individual plants, the overall national costs, if any, would be negligible. This continued to be EPA's position when the agency addressed the specific comments of OMB, CEA, and the Department of Energy (DOE) in the docket on December 13, 1990; according to the MWC project officer, this was still EPA's position before the Administrator's meeting with the Council on December 19, 1990. However, EPA deleted both provisions in December 1990 after the Council meeting.

Before this meeting White House entities discussed the MWC rule with persons outside the government, including representatives of the National Association of Counties (NACo) and the National League of Cities (NLC), which were opposed to the waste separation provision. The docket contains a brief statement of the Council's reasons for opposing the MWC rule's waste separation provision, but it does not contain a record or summary of the Council's communications with nongovernmental interests. In its July 1992 decision, the U.S. Court of Appeals (hereinafter referred to as the court), found that, while the Council's views were important in EPA's formulation of its final decision to remove the waste separation provision from the MWC rule, EPA exercised its expertise in promulgating the rule.[5] EPA's former General Counsel told us that, in his opinion, the Council's comments on the MWC rule needed to be included in the docket because the Council presented new factual information in the form of questioning the cost-benefit figures that EPA had used and relied on. With such questioning, he said, the Council went beyond a simple policy discussion by introducing doubt about the validity of material central to the rulemaking. Whether the Council's views were influenced by undocketed communications with persons or organizations outside the government is not known.

In contrast to the waste separation provision, EPA's docket contains no information indicating that the Council or other White House entities opposed the lead-acid battery provision, and the circumstances and reasons for EPA's deleting this provision from the final MWC rule are

[5]In September 1991 the states of New York and Florida, as well as the Natural Resources Defense Council, sued EPA over its decision to delete from its final rule the provisions calling for waste separation and prohibiting incineration of lead-acid batteries, claiming, in part, that EPA acted improperly by relying on the Council's opinion rather than on its own expertise. The extent to which the Council's views were influenced by nongovernmental interests is not known.

somewhat confusing. The MWC Project Officer told us that, when he learned of the Administrator's decision to delete the 25-percent waste separation provision, he did not know whether the ban on lead-acid batteries remained or was also removed. He said that senior EPA air program officials acknowledged that, at the time, they too were unsure and would need to check on this. According to the Chief of OMB's Natural Resources Branch, EPA's Deputy Assistant Administrator for the Office of Air and Radiation contacted him after the December 19, 1990, Council meeting to clarify whether this lead-acid battery provision would remain or be deleted. The OMB Natural Resources Branch Chief told us that, after discussing this with staff of several White House entities, he called the Deputy Assistant Administrator and said that they would support an EPA decision to delete this lead-acid battery provision from EPA's final rule, which EPA did. He said nothing was put in writing regarding this communication.

EPA's promulgated rule and its accompanying record do not contain an adequate explanation of why EPA decided to delete this provision. In its July 1992 decision, the Court of Appeals found that EPA had not adequately explained its reasons for removing this provision from the final rule and remanded the rule to the agency. (App. II provides more on White House entities' participation in EPA's MWC rule.)

Operating Permit Program Rulemaking

White House entities' participation in the OPP rule occurred before EPA published its proposed rule in May 1991 and continued through final rule issuance in July 1992. From the earliest roundtable discussions, one of the most significant and controversial issues, according to EPA officials, involved the permit rule's provisions for allowing air pollution sources to make changes to their facilities or manufacturing processes in order to accommodate changing business conditions. Key disagreements centered on whether the statute entitled EPA to authorize state promulgation of rules that allowed sources to increase emissions above permit limits without (1) prior approval and (2) public notice.

EPA's draft rule submitted to OMB in January 1991 did not authorize states to allow sources to increase emissions above permit levels without prior notice to EPA, the state, and the public. After discussions with White House entities, however, EPA formally proposed in May 1991 to allow such increases with 7 days notice to EPA and the state but no public notice. Commenters during the open public comment period (May 10 through July 9, 1991) questioned, among other things, the legality of allowing

sources to unilaterally increase their emissions above permitted levels. For example, the Executive Director of STAPPA/ALAPCO[6] testified in June 1991 that the changes made to the draft rule caused the rule to be illegal and inconsistent with the intent of the act. Similarly, the Director of the Vermont air pollution control program, in his role as representative of eight northeastern states,[7] testified that EPA's May 1991 proposed OPP rule was exactly the opposite of the way the permit revision process should work. In NESCAUM's opinion, public comment should be required for sources desiring to make operating changes resulting in increased emissions. Similar concerns were also expressed by EPA's own legal advisor. In August 1991 EPA's General Counsel issued a legal opinion to the EPA Assistant Administrator for Air and Radiation stating that it was

> highly unlikely that the courts would uphold as 'reasonable' an interpretation of the statute that would authorize environmentally-significant changes to be made in emissions without appropriate opportunities for public notice and opportunities to participate.

Accordingly, EPA's draft final rule submitted to OMB in October 1991—the rule that EPA officials proposed to issue after considering public comments—limited the types of changes that could be accomplished without opportunity for public notice and comment. EPA should have issued this rule by November 15, 1991, but did not issue it until July 21, 1992, because of the participation of White House entities. In November 1991 the Executive Director of the White House Council on Competitiveness challenged EPA's legal opinion and sought a ruling from the Department of Justice (DOJ). In May 1992 DOJ concluded that the act provided EPA with the discretion to implement a permitting program that provided states with the authority to allow what it characterized as minor permit amendments without public notice and comment. EPA's July 1992 final rule authorized states to allow sources to make operational changes resulting in increased emissions (above permitted levels) without public notice and without prior approval by EPA or the state. The rule does provide for penalties to be imposed if improper changes are made. The National Resources Defense Council and others filed suit in August 1992 asking the court, among other things, to invalidate EPA's final rule because it allows sources to increase emissions without public notice.

During the OPP rulemaking process, White House entities' participation was extensive. For example, just weeks before EPA's issuance of the

[6]State and Territorial Air Pollution Program Administrators and Association of Local Air Pollution Control Officials.

[7]Northeast States for Coordinated Air Use Management (NESCAUM), comprising the air program directors of eight northeastern states—Connecticut, Maine, Massachusetts, New Jersey, New Hampshire, New York, Rhode Island, and Vermont.

proposed OPP rule in May 1991, Council and other White House entities' staff met with EPA staff five times in 11 days to discuss the proposed permit rule. After close of the public comment period, staff of the Council and other White House entities met with EPA 23 times in about 4 months (from July 15 to November 21, 1991); about half of these meetings were solely to discuss EPA's permit rule. However, according to senior EPA air program officials, these were the more formal meetings between EPA and White House entities' staff. According to these senior EPA officials, staff of White House entities discussed the contents of the OPP rule with EPA staff almost daily from December 1991 until the rule's issuance; face-to-face meetings with White House entities occurred at least weekly.

During this post-comment period, communications concerning the permit rule occurred between persons outside the government and White House entities. After the close of the OPP rule's public comment period in July 1991, White House entities met and discussed these rules with representatives of industries likely to be affected by the final rules and accepted undocketed comments from at least 10 industries or industry associations in the first 4 months of 1992. For example, a March 1992 letter from the American Textile Manufacturers Institute to the OMB Director stated that the draft OPP rule, if unchanged, would adversely affect the competitiveness of the domestic textile industry and that the operational flexibility provision in EPA's latest draft would deny textile companies as much as half of the lead time they need to gear up and alter their operations to compete successfully. EPA's docket does not contain this letter. However, the absence of this and other communications from the docket illustrates the potential for White House entities to become conduits for the unrecorded views or opinions of, or purported facts asserted by, persons outside the government—persons with a vested interest in the outcome of a rule.

We talked with some industry representatives who said they had provided comments to one or more White House entities on EPA's permit rule after the close of the public comment period. These communications were not reflected in the docket. Some of these nongovernmental commenters said they had discussed, with White House entities' staff, the revised drafts of the permit rule that had not been disseminated for public comment. The procedures and circumstances under which operational changes would require permit revisions, prior approval, and public notice were nearly always discussed. Some who provided comments to White House entities after the close of the public comment period did so because they were concerned that EPA was going to adopt provisions unfavorable to them.

These commenters further explained that their job is to favorably influence the outcome of agency rules to the extent possible. (App. III provides more on White House entities' participation in this rule.)

Compliance With Docket Requirements

The records we reviewed did not disclose violations of the Clean Air Act public docket requirements. Under the Clean Air Act, White House entities are not required to docket their communications with persons outside the government; and with the exception of OMB, no entity forwards such communications to EPA for inclusion in the rulemaking docket. However, as outlined below, not incorporating these comments in the docket may undermine some of the purposes of maintaining a public record.

White House entities' participation in the regulatory review of EPA rules can provide outside parties with a nonpublic forum in which to present their points of view. When White House entities entertain such off-the-record communications and later attempt to influence a specific rule—as they did for these two rules—the question arises as to whether these communications should be forwarded to EPA for inclusion in the docket. Not docketing such communications has the potential to undermine three key reasons for maintaining a docket: (1) encouraging effective public participation, (2) ensuring complete records for judicial review, and (3) promoting public confidence in the integrity of the rulemaking process.

Encouraging Public Participation

According to the Administrative Conference of the United States (ACUS)—an independent federal agency established in 1964 to study and recommend improvements in the efficiency, adequacy, and fairness of federal rulemaking processes—the rulemaking record is critical to making public participation meaningful. ACUS also noted that the exchange of views and new information brought about by public participation in the rulemaking process can benefit the agency, the public, and ultimately the reviewing courts. Similarly, the need for an open, public, and balanced exchange of views and ideas in EPA rulemakings was underscored in 1989 when the EPA Administrator wrote, in a memorandum to all staff, that all EPA employees

- must strive for the fullest possible participation by the public in EPA rulemaking decisions;
- must maintain openness and fairness in their regulatory decisions; and
- must not accord privileged status to any special interest.

Emphasizing that EPA's success depends directly on the trust of the public it serves, the EPA Administrator stressed that EPA has established procedures with OMB "to ensure that relevant material received by OMB from outside parties will be placed in the EPA public record." However, we found that OMB has not always adhered to the 1986 disclosure procedures it established with EPA. For example, in addition to the March 1992 letter from the American Textile Manufacturers Institute to the OMB Director opposing the draft OPP rule, OMB accepted written communications from nine other industries or industry associations opposing the OPP rule but did not docket these communications. With respect to the OPP rule, OMB's Natural Resources Branch Chief said that, due to the sensitivity of the OPP rulemaking, OMB did not always adhere to its disclosure procedures for this rule. Full disclosure of such communications with White House reviewing entities would encourage more effective public participation in the rulemaking process.

Ensuring Complete Records

EPA's proposed rules state that the docket is an organized and complete file of all the information submitted to or otherwise considered by EPA in the development of a rulemaking. One of the principal purposes for maintaining such a docket is to serve as the record in case of judicial review. According to ACUS, agencies must anticipate that courts will conduct a thorough, probing, and in-depth review of the agency's reasoning and factual justification for rulemakings. Agencies should also anticipate close judicial scrutiny of agency reliance on data obtained after the public stage of the rulemaking process. Inadequate disclosure of outside parties' communications with White House reviewing entities could lead to incomplete explanations of EPA's rulemaking decisions.

Promoting Public Confidence

Undocketed communications between outside parties and White House reviewing entities also have the potential to decrease public confidence in the integrity of the rulemaking process. For example, ACUS has long recognized that White House entities can have considerable influence over agency rulemakings and, in its 1991 Guide to Federal Agency Rulemaking, wrote that

> There is concern that behind the scenes intervention by a president or his advisors may frustrate congressional mandates, reduce incentives for regulators to act independently, undermine the APA's rulemaking process, and serve as undisclosed conduits for information supplied by interested private groups.

Accordingly, ACUS has recommended that White House entities disclose every communication that contains or reflects comments from persons outside the government, regardless of the content, to ensure that the review process does not serve as a conduit for the unrecorded communications of persons outside the government.

This issue has also been raised by several congressional committees, individual Members of Congress, and some representatives of industry and environmental groups we contacted. For example, in November 1991 the Senate Committee on Governmental Affairs proposed the Regulatory Review Sunshine Act of 1991 (S. 1942), which would establish procedures requiring, among other things, disclosure of all written and oral communications between nongovernmental persons and White House entities on federal rulemakings. More recently, in July 1992 the House Committee on Government Operations proposed the Government in the Sunshine Act (H.R. 5702), which would ensure that all oral and written communications concerning a regulatory action are publicly disclosed. Among the factors persuading the House Committee to take action is its finding that persons who are not employees of the federal government have discussed proposed regulations in secret meetings with the Council. In the Committee's opinion, these occurrences have undermined public confidence in the integrity of the federal rulemaking process.

Conclusions

White House entities have the authority to comment on clean air rules before promulgation. For the two rules we reviewed, this process permitted outside parties to present their points of view in a nonpublic forum—one in which there are no public docket requirements.

Although the President recently abolished the Council on Competitiveness, some White House regulatory review process is likely to continue. In our opinion, full disclosure of outside parties' communications with White House reviewing entities would promote more effective public participation, lead to a more complete explanation of EPA's rulemaking decisions, and increase public confidence in the integrity of the rulemaking process.

Recommendation to the Administrator, EPA

We recommend that the Administrator, EPA, forge agreements with all White House reviewing entities that would promote effective public participation, ensure complete records for judicial review, and enhance public confidence in the integrity of the clean air rulemaking process. At a

minimum, these agreements should provide for (1) White House entities' disclosure to EPA and subsequent docketing by EPA of all communications to the White House entities from persons or organizations outside the government about EPA rules, whether such communications are oral or written, and (2) opportunity for EPA staff to attend any meetings with such nongovernmental persons or organizations where EPA rules will be discussed.

Matters for Congressional Consideration

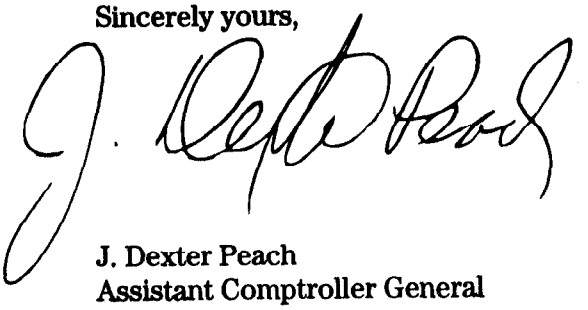
As the Congress deliberates new legislative proposals to establish disclosure requirements for White House entities involved in reviewing agency rules, it may wish to monitor EPA's experiences in negotiating agreements with these entities to disclose all communications on EPA rules from persons or organizations outside the government.

To obtain information on the issues you raised, we reviewed EPA's air docket for the two rules in question and discussed the advantages and disadvantages, impact, and disclosure of such involvement with representatives of industry associations, environmental groups, state and local regulators, advisors in administrative rulemaking, and the White House entities that participated in one or more of the two rules in question. Additionally, we reviewed the files and records, correspondence, and other supporting documentation of these groups, where available, regarding the two rules. We discussed the facts contained in this report with EPA officials, including the Director, Office of Air Quality Planning and Standards, EPA headquarters Office of Air and Radiation, who generally agreed with the facts presented but suggested clarification of some information to ensure proper context. Their comments are included where appropriate. We conducted our review in accordance with generally accepted government auditing standards. Our work was performed from January to November 1992.

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time we will send copies to the Administrator, EPA; the Director, OMB; and other interested parties. We will also make copies available upon request.

This work was performed under the direction of Richard L. Hembra, Director, Environmental Protection Issues, who can be reached at (202) 512-6111. Other major contributors to this report are listed in appendix V.

Sincerely yours,



J. Dexter Peach
Assistant Comptroller General

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Abbreviations

ACUS	Administrative Conference of the United States
APA	Administrative Procedure Act
CAA	Clean Air Act
CEA	Council of Economic Advisors
DOE	Department of Energy
DOJ	Department of Justice
EPA	Environmental Protection Agency
GAO	General Accounting Office
MWC	Municipal Waste Combustor
NACo	National Association of Counties
NAM	National Association of Manufacturers
NESCAUM	Northeast States for Coordinated Air Use Management
NLC	National League of Cities
NPRM	notice of proposed rulemaking
NRDC	Natural Resources Defense Council
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OPD	Office of Policy Development
OPP	Operating Permit Program
STAPPA/ALAPCO	State and Territorial Air Pollution Program Administrators/Association of Local Air Pollution Control Officials

Outline of Executive Branch Authority to Engage in Review of Agency Rulemakings

For the two rules we reviewed, White House entities' participation appears to have been legally permissible. The courts have recognized the right of executive branch agencies to receive advice from White House entities in the rulemaking process.

However, there are limits on the extent of such involvement. For example, White House entities cannot legally dictate or prescribe the specifics of rules where the statute requires the agency to make the final decision. According to the Department of Justice, even the President's power of consultation would not include authority to reject an agency's ultimate judgment.[1] Nonetheless, the influence that White House entities can have over agency rulemakings is considerable, because agency heads can be discharged if they fail to follow the President's policies.

The following is an outline of the executive branch's legal authority to review agency rules.

Section 307(d) of the Clean Air Act explicitly acknowledges that EPA rules may be subject to review by other parts of the executive branch. In general, the President's authority, and by extension, the authority of White House entities, to supervise the executive branch has been recognized by the courts. (Myers v. U.S., 272 U.S. 52 (1926); Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981); Environmental Defense Fund v. Thomas, 627 F. Supp. 566 (D.D.C. 1986); see also New York v. Reilly, 969 F.2d 1147 (D.C. Cir. 1992).) However, such supervision must conform with statutory restrictions placed on the executive by the Congress. (Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952); see, Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973).)

Advice provided by White House entities to EPA during an informal rulemaking would appear to fall into the category of supervision that was discussed in the Myers case. In that case the Supreme Court recognized the President's authority to supervise and guide his subordinates' 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 . . . ." Myers at 135.

The authority to provide advice to EPA during an informal rulemaking under the Clean Air Act was discussed in Sierra Club v. Costle, supra. The court said:

[1]As noted in a February 1981 Department of Justice legal opinion regarding presidential authorities under E.O. 12291.

The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking. Regulations such as those involved here demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic policy. Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Sierra Club at 406.

To the extent the Congress vested discretion in EPA's Administrator to issue a particular rule, then that decision would have to be made by the Administrator, not the President. "But even in such a case he [the President] may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised." Myers at 135.

In rulemakings governed by section 307(d) of the CAA, the Congress has recognized that clean air rules may be reviewed and commented on by other parts of the executive branch. Section 307(d) requires that drafts of rules and proposed rules submitted to "any interagency review process" be placed in the docket.

Thus, in the context of Clean Air Act rulemakings, both the courts and the Congress have recognized that White House entities can provide advice to EPA. Therefore, it appears that the President has the authority to provide advice to EPA with respect to an ongoing Clean Air Act rulemaking.

White House Entities' Participation in EPA's Municipal Waste Combustor (MWC) Rule

Background

Municipal Waste Combustors, or MWCs, are devices used to burn municipal wastes, including such things as household and commercial garbage, yard wastes, paper, plastics, metals, and other discarded materials. Depending on the types of waste materials burned, MWCs may emit a wide variety of harmful pollutants, including acid gases, metals, and organics. As of November 1990 EPA reported that 213 MWC facilities were in operation or expected to be in operation by 1991, with 67 more expected in 5 years or less. Emissions of both new and existing MWCs are a concern to public health.

EPA's Proposed Rule

The MWC rule, as proposed by EPA on December 20, 1989, would have established emissions standards for new and guidelines for existing MWCs with daily capacity to burn 40 tons or more of trash,[1] covering more than 85 percent of current U.S. incineration capacity. In addition, EPA's proposed MWC rule would have (1) established programs to divert household batteries from municipalities' waste streams, (2) required at least 25 percent of reusable wastes to be separated before incineration, and (3) prohibited the incineration of lead-acid vehicle batteries.

From December 20, 1989, to March 1, 1990, EPA received oral comments from 118 persons at six EPA-sponsored public hearings and over 300 letters commenting on its proposed MWC rules, including comments from industry representatives, environmental groups, governmental entities, and private citizens. Some commenters were for, and others against, each of the above three provisions in EPA's proposed rule. For example, some commenters favored the 25-percent waste materials separation requirement—with some calling for an even higher percentage—while others said this provision was unworkable and too costly.

Household Battery Provision Deleted by EPA Without White House Entities' Involvement

On the basis of public comments, EPA decided to delete one of the provisions—the household battery separation provision—prior to submitting its draft final rule to OMB for interagency review. According to EPA officials, there was no White House entity involvement in EPA's decision to delete this provision from its draft final rule. In addition to the adverse public comments, other reasons cited by EPA for deleting this provision were the significant strides made by battery manufacturers to eliminate mercury from household batteries and EPA's growing recognition that past household battery separation programs had not worked well.

[1]The Clean Air Act Amendments of 1990 required that standards for MWCs with 250 tons or more of daily capacity be promulgated by November 15, 1991, and standards for MWCs with capacities below 250 tons per day by November 15, 1992.

Having considered and addressed the public's comments—both pro and con—EPA decided to go forward with the remaining provisions, including the requirements for 25-percent waste separation and the prohibition on incinerating lead-acid vehicle batteries. These provisions remained relatively unchanged when EPA submitted its draft final rule to OMB on November 29, 1990.

Waste Separation Provision Deleted After White House Entities' Participation

OMB had long-standing concerns with EPA's 25-percent waste separation provision, dating back to its reviews of EPA's pre-proposal drafts prior to December 1989. For example, OMB's cost concerns with the waste separation provision were surfaced as early as October 1989. Nonetheless, EPA officials said the agency continued to believe that the waste separation provision should be retained in the final rule, and the agency's December 1990 analysis of two recent EPA-conducted studies of costs and benefits supported this view. However, OMB did not change its position, and in December 1990 the Council of Economic Advisors and the Department of Energy (DOE) joined OMB in opposing this provision in EPA's MWC rule. Nonetheless, EPA maintained its view that this provision was cost-beneficial, and addressed the specific comments of OMB, CEA, and DOE in the docket on December 13, 1990.

In an attempt to resolve the disagreement, the Council on Competitiveness held a formal meeting with the EPA Administrator on December 19, 1990. Prior to this meeting the Council discussed the MWC rule with persons outside the government, including representatives of the National Association of Counties and the National League of Cities, who opposed the waste separation provision. The docket does not contain any evidence of these meetings, but our meeting with the National League of Cities' representative confirmed that this group did discuss its opposition to this provision with the White House's Office of Policy Development staff after the close of the public comment period. The National Association of Counties' representative confirmed that she met with staff of the Council on Competitiveness, but she declined to discuss the substance of her organization's involvement with the Council. The National Resources Defense Council (NRDC) testified that the National Association of Counties had expressed its opposition to this provision in an undocketed December 1990 meeting with Council staff after the close of the comment period.

In its December 19, 1990, meeting, the Council opposed EPA's proposed rule on waste separation and subsequently stated in writing that this

provision (1) failed to meet the White House's cost/benefit policies enumerated in Executive Order 12291, (2) did not constitute a performance standard, another White House policy, and (3) violated the principles of federalism enumerated in another executive order. Although EPA had previously considered and refuted these viewpoints in the December 13, 1990, memorandum cited above, the Administrator decided to remove the waste separation requirement from the final rule.

The states of New York and Florida, as well as NRDC, sued EPA over its decision to delete the waste separation provision from its final rule, claiming, in part, that EPA acted improperly by relying on the Council's opinion rather than its own expertise. EPA explained that the waste separation provision was not mandated by statute—as were the requirements that EPA establish emission standards for MWCs—and, as such, fell within the Administrator's discretionary authority to delete, as long as his decision was adequately supported in the record. In its July 1992 decision, the U.S. Court of Appeals (hereinafter referred to as the court), decided that EPA had adequately supported its decision to drop the waste separation provision. The court concluded that, while the Council's views were important in formulating EPA's final decision, EPA had exercised its own expertise in promulgating the final rule.

Lead-Acid Battery Provision Deleted After White House Entities' Involvement

In contrast to the much discussed waste separation provision, EPA's docket contains no information that the Council or other White House entities opposed the lead-acid vehicle battery provision. This provision was still included in EPA's draft final rule at the time of EPA's December 19, 1990, meeting with the Council, but it was deleted by EPA after this meeting. The MWC Project Officer told us that, when he learned of the Administrator's decision to delete the 25-percent waste separation provision, he did not know whether the ban on lead-acid batteries remained or had also been removed. He said that senior EPA air program officials acknowledged that, at the time, they too were unsure and would need to check on this.

According to the Chief of OMB's Natural Resources Branch, EPA's Deputy Assistant Administrator for the Office of Air and Radiation contacted him after the December 19, 1990, Council meeting to clarify whether this lead-acid battery provision would remain or be deleted. The OMB Natural Resources Branch Chief told us that, after discussing this with staff of several White House entities, he called the Deputy Assistant Administrator and said that they would support an EPA decision to delete this lead-acid

battery provision from EPA's final rule, which EPA did. He said nothing was put in writing regarding this communication.

The docket does not contain any additional explanations of White House entities' views on the lead-acid battery provision, nor does it adequately explain why EPA decided to delete this provision. EPA's docket explains only that the agency decided to delete this provision because commenters questioned whether 100-percent compliance was achievable and because lead-acid batteries may be addressed under other environmental statutes. The states of New York and Florida, as well as NRDC, sued EPA over its decision to delete this lead-acid battery provision from its final rule, claiming, in part, that EPA's decision was not supported by the record. In its July 1992 decision, the Court of Appeals found that EPA had not adequately explained its reasons for removing this provision from the final rule and remanded the rule to the agency.

White House Entities' Participation in EPA's Operating Permit Program (OPP) Rule

Background

Title V of the Clean Air Act Amendments of 1990 requires tens of thousands of air pollution sources to apply for operating permits by November 15, 1996, and to subsequently obtain operating permits from authorized state or local air pollution control agencies by November 15, 1997. Known as the Operating Permit Program (OPP), these permits, which will be tailored to an individual source's operations, are supposed to significantly enhance regulatory agencies' ability to enforce emissions limitations and other requirements at an estimated 35,000 major stationary sources nationwide. The act requires, for the first time ever in EPA's air program, that all of the requirements an individual source must comply with be placed in a single document, known as an operating permit.

The act required EPA to issue rules by November 1991 specifying the minimum requirements that state and local agencies' permit programs must meet. It is these minimum requirements that industry and environmentalists have openly debated, since state and local agencies' implementing programs must at least adhere to EPA's minimum requirements.[1] The act requires state and local agencies to submit their permit programs, in accordance with EPA's minimum criteria, to EPA for review by November 15, 1993. EPA has until November 15, 1994, to approve or reject state and local agencies' permit programs, after which state and local agencies have until November 15, 1997, to permit all covered sources. While EPA had many decisions to make regarding the minimum requirements for permit programs, one of the most important decisions, according to EPA officials, centered on the procedures and circumstances under which sources would revise their permits before changing their operations to accommodate changing business conditions. Key disagreements centered on (1) whether sources could increase emissions above permit limits without need of a permit revision and (2) whether public notice and/or prior regulatory approval of such changes would be required.

Key Events in Rule Development

White House entities participated extensively in EPA's OPP rule. Meetings with staff of the Council on Competitiveness and other White House entities began soon after EPA sent its first draft to OMB in January 1991 and continued after EPA submitted its draft final rule to OMB in October 1991. For example, in February and early March 1991, staff of the Council met with EPA officials five times in 10 days to discuss the draft OPP rule with EPA and met with EPA six more times before EPA proposed its draft OPP rule on

[1]State and local programs may impose more stringent requirements, but they cannot impose less stringent requirements than EPA's OPP rule specifies.

May 10, 1991. Key events in the rule's development are summarized in table III.1.

Table III. 1: Key Events in Rule Development

January 25, 1991	EPA transmits draft proposal to OMB for review and comment; EPA's proposal for operational flexibility—the ability of sources to change operations to accommodate changing business conditions—does not allow sources to increase emissions above permit levels without prior notice to EPA, state, and the public.
February 27 to March 8, 1991	Council staff and staff of other White House entities meet with EPA 5 times in 10 days to discuss permit rule; operational flexibility and whether prior notice to EPA, state, and the public will be required are key issues discussed, according to EPA officials.
April 6, 1991	Memo to EPA from Council's Deputy Director deleting EPA's operational flexibility proposal and adding provisions allowing sources to increase their emissions above permit levels with 7 days notice to EPA and the state but no public notice.
April 8-19, 1991	Council staff and staff of other White House entities meet with EPA 5 times in 11 days to discuss permit rule; operational flexibility and whether prior public notice will be required are key issues discussed.
May 10, 1991	Proposed rule containing operational flexibility provisions allowing sources to increase their emissions above permit levels with 7 days notice to EPA and the state but no public notice is published in Federal Register; open public comment period begins.
July 9, 1991	Open public comment period ends; industry generally supports the rule's provisions for operational flexibility; environmental groups and some regulators claim it is illegal and inconsistent with the act.
July 22, 1991	Representative of White House Council on Competitiveness contacts NAM, the National Association of Manufacturers, a business association with over 13,500 member companies, seeking comments on a variety of regulatory issues, including environmental regulations; NAM submits same comments already docketed with EPA.
July 1991 - April 1992	At least 10 nongovernmental groups discuss and/or provide written comments to staff of White House entities after close of public comment period on the OPP rule; docket does not reflect these communications.
August 16, 1991	EPA General Counsel issues legal opinion stating that, regarding the opportunity for public comment, the proposed OPP rule is inconsistent with the act and not likely to be upheld in court.
October 15, 1991	EPA submits revised final rule to OMB calling for public notice and comment prior to allowing operational changes that increase emissions; most stringent EPA position calling for prior approval and public notice to date.
November 1-21, 1991	Council staff and staff of other White House entities meet with EPA 9 times in 21 days to discuss permit rule; operational flexibility and whether prior public notice will be required are key issues discussed.
November 15, 1991	EPA misses statutory deadline for publishing OPP rule.
December 10, 1991	EPA official testifies in congressional hearing that the Council has challenged EPA's August 1991 legal opinion that allowing emissions increases without public notice is illegal and inconsistent with the act.
December 26, 1991	GAO issues legal opinion stating that EPA's May 1991 proposal to allow facilities to increase emissions above permit levels without public notice is inconsistent with the act.
May 27, 1992	Department of Justice issues legal opinion stating that act does not directly speak to this issue; thus, in DOJ's opinion, EPA's discretionary authority allows it to address this ambiguity as EPA deems reasonable.

(continued)

July 21, 1992	Final OPP rule published in Federal Register authorizing states to allow sources to increase emissions above levels specified in permit without prior notice to EPA, state or local regulators, or the public; provision allows penalties to be imposed if the source fails to comply with the proposed terms and conditions.
August 11, 1992	NRDC and others file suit charging that, among other things, the OPP rule's provision allowing sources to increase emissions without public notice is illegal.

White House Entities Participated in Developing EPA's Proposed Rule

Consistent with EPA's Clean Air Act Implementation Strategy, EPA used a roundtable approach in developing the OPP rule in an effort to educate, involve, and build consensus among principal interested and affected parties. About five or six roundtable meetings were held with EPA between January and May 1991. In addition to state and local air agency officials, roundtable representatives included industry, small business, and environmental organizations.

Roundtable participants held differing views on a number of issues, but according to some of the EPA and roundtable participants, one of the most controversial issues from the earliest discussions centered on how to handle facilities' operational changes that would increase emissions above permitted levels. Some participants—led principally by the environmentalists—believed any increases above permit allowables should necessitate a complete permit modification, a process analogous to the initial application process, complete with public notice, an open hearing, and prior approval by EPA or an authorized state before changes could be made. Other participants—representing principally the industry's viewpoint—said that such provisions would be too restrictive and would hamper industry efforts to be competitive. Central among these issues was whether a source should be allowed to increase emissions before the public had an opportunity to review and comment on the proposed change.

EPA submitted its pre-proposal draft to OMB on January 25, 1991. This draft included provisions authorizing states to allow sources to make certain operational changes without public review and comment as long as the source's increased emissions did not exceed specified limits,[2] but all other changes would require prior public notice and comment. According to a Chemical Manufacturers Association (CMA) roundtable representative, although roundtable participants did not reach consensus on the pre-proposal draft, it basically represented what she and other participants

[2]Emission increases would be limited to either (1) 10 tons per year, (2) the applicable de minimis level in accordance with section 112(a)(5) of the act, (3) 40 percent of the applicable threshold emissions levels for defining a major source, or (4) any other applicable level determined by the Administrator.

expected would be in the proposed rule. For example, she said that while not all participants agreed with the provision on emission increases, in her opinion some participants expected the proposed rule to place defined limits on the amount of increase that could occur without the public having an opportunity to review and comment on the change beforehand, and that all other changes would require public notice prior to making changes.

Before EPA proposed the OPP rule on May 10, 1991, staff of the Council and other White House entities met with EPA 11 times to discuss the rule. We were unable to comprehensively discern the content of these meetings because White House entities instructed EPA staff not to summarize or keep records of these meetings. EPA officials said that the procedures and circumstances under which sources must revise their permits was a key point in most of these meetings. White House entity memorandums indicate that this continued to be a concern with EPA's pre-proposal draft. For example, an April 6, 1991, memorandum from the Council's Deputy Director transmitted the collective revisions to EPA's draft rule from the White House Counsel's office, the Office of Policy Development, and OMB's Office of Information and Regulatory Affairs (OIRA) on the proposed rule. The provisions that these White House entities asked EPA to incorporate placed no limits on the amount a source could increase its emissions without public notice and would allow sources to increase their emissions above permit levels with 7 days notice to EPA and the state. EPA's May 1991 proposed rule incorporated these collective revisions. According to senior EPA officials, White House entities' participation was a contributing factor in EPA's decision to include these provisions in its proposed rule.

Some Public Comments Question Legality of EPA's Proposed Rule

The 60-day public comment period ended July 9, 1991. EPA received nearly 500 comments on the proposed rule. Industry supported the provision to allow sources to increase emissions, while states and environmental groups opposed it. According to EPA, industry considered the provision necessary to accommodate changes in production and to compete successfully in international markets.

On the other hand, representatives of environmental groups and state air pollution control agencies believed these provisions violated the act. Environmental groups said the law clearly required public comment and agency review before sources could increase their emissions above the levels stipulated in their permits. Many state agencies agreed. While still questioning the rule's legality, a group representing state and local

agencies—in an effort to reach consensus—suggested that if EPA continued with such proposals, the agency should at least set specific limits on the amount of any increases, such as 5 tons or 20 percent of the major source cut-off, whichever was more stringent. Some also said it would be impossible to adequately review proposed permit revisions within 7 calendar days.

In response to a May 1991 congressional request, GAO issued a legal opinion in December 1991 stating that these provisions were inconsistent with the act.[3] GAO concluded that

> the statute requires that any revision process must provide, at a minimum, opportunities for the public to participate in a public comment period and for judicial review in state court. This is especially true where the proposed revision would result in an increase in emissions above agreed upon permit levels.

Revised Final Rule Submitted to OMB Limited Emissions Increases

Before submitting its revised final rule to OMB, EPA's air office obtained a legal opinion on the likelihood that a court would uphold EPA's May 1991 proposed rule. In his August 16, 1991, memorandum, EPA's General Counsel concluded that it was

> highly unlikely that the courts would uphold as 'reasonable' an interpretation of the statute that would authorize environmentally-significant changes to be made in emissions without appropriate opportunities for public notice and opportunities to participate.

Because this provision was so controversial, EPA held two meetings with selected nongovernmental groups after the close of the public comment period to clarify their views prior to submitting a revised rule to OMB. One industry representative, who attended the second meeting but was not invited to the first meeting, expressed concern that these quasi-roundtable discussions were not announced in the Federal Register nor any other formal notification system. Instead, she told us that EPA had invited certain individuals to the meetings but not others who had been roundtable participants earlier. EPA's air docket contained information on both meetings. EPA staff said they had sought clarification of views previously expressed during the open comment period in an effort to ensure that these views were fully addressed in the revised final rule before sending it to OMB.

[3]GAO/OGC Opinion, December 26, 1991 (B-243632).

After considering the EPA General Counsel's legal opinion, public comments on the proposal, and discussing the issues with White House entities, EPA submitted a revised rule to OMB on October 15, 1991, strictly limiting the types of changes that could be accomplished without opportunity for public notice and comment. In essence, this revised rule required significant increases to be subject to prior public notice and review by regulators. EPA's air docket does not contain information stating that OMB or other White House entities objected to this October draft; yet, in congressional testimony in December 1991, EPA testified that the Council had challenged EPA's August 1991 legal opinion and had asked the Department of Justice for its legal opinion.

Because of the disagreement between EPA and White House entities, EPA missed the November 15, 1991, deadline for issuing the final rule as required by the statute. Although EPA testified that the Council's request for a DOJ opinion was a factor in not meeting the November 15 deadline, the air docket does not contain the Council's November 12, 1991, memorandum challenging the EPA General Counsel's opinion, nor does it otherwise indicate that this controversy affected the rule's issuance. Instead, the final rule states that EPA sought DOJ's legal opinion. However, according to the former lead attorney in EPA's Office of General Counsel working on the permits rule, EPA and White House entities, including staff of the Council, debated the OPP rule's provisions for over a year, ultimately delaying the final rule's promulgation by more than 7 months.

White House and Outside Entities' Participation After Close of the Comment Period

During the OPP rulemaking process, White House entities' participation was extensive. Staff of the Council and other White House entities met with EPA at least 23 times in the 4 months following the close of the comment period (from July 15 to November 21, 1991). About half of these meetings focused solely on EPA's permit rule. However, according to senior EPA air program officials, these were the more formal meetings between EPA and White House entity staff. According to these senior EPA officials, staff of White House entities discussed the contents of the OPP rule with EPA staff almost daily from December 1991 until the rule's issuance; face-to-face meetings with White House entities occurred at least weekly.

In this postcomment period communications occurred between persons outside the government and White House entities concerning the permit rule; however, few of these communications were reflected in the docket. For example, after the close of the OPP rule's public comment period in July 1991, White House entities met and discussed these rules with

representatives of industries likely to be affected by the final rules, including accepting undocketed comments from at least 10 industries or industry associations in the first 4 months of 1992. We talked with some industry representatives who said they had provided comments to one or more White House entities on EPA's permit rule after the close of the public comment period. Some of these nongovernmental commenters discussed revised drafts of the permit rule that had not been disseminated for public comment. The procedures and circumstances under which operational changes would require permit revisions and prior public notice were nearly always discussed. Some who provided comments to White House entities after the close of the public comment period said they did so because they did not believe that EPA was going to adopt provisions favorable to them.

In discussing their contacts with White House entities after the close of the public comment period, representatives of one industry group told us that one of the reasons they discussed this rule with White House entities other than OMB was because—as they understood it—OMB kept records of all its communications with nongovernmental parties and provided these to EPA for inclusion in the docket. They told us that, as they understood it, their contacts with White House entities were legal since such communications are not prohibited by the Clean Air or Administrative Procedure Acts. They explained that they are an advocacy organization for industry and it is their job to favorably influence the outcome of legislation and agency rules affecting their constituents to the extent possible.

Nongovernmental groups also expressed their concerns about EPA's revised rule to the Council on Competitiveness after the close of the comment period. For example, the Chief Executive Officer of Ball Corporation wrote, in a March 1992 letter to the Council, that his company disagreed with EPA's proposed OPP rule, and that

> Companies should be able to make changes in their operations after giving regulators one to two weeks' notice. Also, there should be no public hearings and no formal opportunity to stop the changes.

It is important to note that there are no current requirements that such communications be included in the docket. However, the absence of the Ball Corporation's letter from the docket illustrates the potential for White House entities to become conduits for the unrecorded views or opinions of persons outside the government—persons with a vested interest in the outcome of a rule.

Final Rule's Legality Also Questioned

On May 27, 1992, DOJ issued a legal opinion stating that the Clean Air Act does not directly speak to this issue; thus, in DOJ's opinion, EPA's discretionary authority allows the agency to approve minor permit amendment procedures that do not require public notice and comment, assuming that the procedures adopted are otherwise reasonable.[4] EPA revised its final rule accordingly, which was signed by the EPA Administrator less than 1 month later. The final rule was issued on July 21, 1992.

According to an EPA permitting official, in some respects this rule made it even easier for permitted sources to make changes that would increase emissions than did the proposed rule. For example, not only could states allow the source to make the change without giving the public an opportunity to review and comment on it, but states could let the source make the change without any advance notification. He said that while it might appear that this was giving sources too much latitude, the public would still have the opportunity to review and comment on operational changes after the fact. He said that, in his opinion, this made it less likely that sources would make inappropriate changes. However, the Executive Director of STAPPA/ALAPCO said that he could foresee difficulties in getting facilities to undo such changes if they are not later approved, primarily because firms will already have invested too much in that particular change to turn back. He said that STAPPA/ALAPCO was very unhappy with the final OPP rule issued by EPA because only the most egregious violations will be disallowed after the fact because of the time, expense, and lost revenue associated with making facilities undo these changes. From STAPPA/ALAPCO's position, prior approval is imperative because regulators have lost all leverage once the changes are made and the money is spent.

On August 11, 1992, NRDC and others filed suit asking the court, among other things, to invalidate EPA's final rule because it allows sources to increase emissions without public notice.

[4]DOJ submitted the memorandum to EPA as privileged information and did not consider that it should be a part of the docket. Nevertheless, NRDC obtained a copy and submitted it for inclusion in the docket.

Objectives, Scope, and Methodology

Concerned about the participation of White House entities in the rulemaking process for selected rules issued pursuant to the Clean Air Act, as amended, the Chairman, Subcommittee on Health and the Environment, House Committee on Energy and Commerce, asked us to examine the participation of White House entities in two clean air rules. As agreed with the Chairman's office, the two rules we reviewed were (1) the Municipal Waste Combustor (MWC) rule, issued February 11, 1991, and (2) the Operating Permit Program (OPP) rule, issued July 21, 1992. For these two rules, we examined (1) White House entity participation in the rulemaking process, (2) changes that occurred after such participation, and (3) compliance with the act's public docket requirements.

To obtain a range of opinions and information regarding these objectives, we discussed the advantages and disadvantages, impact, and disclosure of White House entity involvement in clean air rules with representatives of both governmental and nongovernmental groups. Governmental entities we contacted included the Environmental Protection Agency, the Executive Office of the Vice President, the Executive Office of the President, and the Administrative Conference of the United States (ACUS)—whose primary mission is to study federal rulemaking processes and recommend improvements. We performed work at the following EPA offices:

- Office of Air and Radiation, Washington, D.C.
- Office of General Counsel, Washington, D.C.
- Office of Air Quality Planning and Standards, Research Triangle Park, N.C.
- EPA Air Docket Office, Office of Administration and Resources Management, Washington, D.C.

Officials representing the following White House entities were contacted:

- The White House Council on Competitiveness;
- The Office of Management and Budget;
- The Council of Economic Advisors;
- The Office of Policy Development; and
- The White House Counsel's Office.

With the Administrative Conference of the United States, we reviewed and discussed ongoing and prior studies, reports, and recommendations of ACUS regarding the issue of White House entities' participation in rulemakings.

With nongovernmental entities, we obtained a range of opinions and information regarding the issue of White House entity participation in clean air rules from representatives of industry associations, environmental groups, and state and local regulators. The nongovernmental groups contacted included:

- The American Furniture Manufacturers Association, Washington, D.C.;
- The American Petroleum Institute, Washington, D.C.;
- The Chemical Manufacturers Association, Washington, D.C.;
- The Environmental Defense Fund, Washington, D.C., and Denver, CO;
- The National Association of Counties, Washington, D.C.;
- The National Association of Manufacturers (NAM), Washington, D.C.;
- The National Environmental Development Association, Washington, D.C.;
- The National League of Cities, Washington, D.C.;
- The Natural Resources Defense Council (NRDC), Washington, D.C.;
- Occidental Petroleum Corporation, Washington, D.C.; and
- The State and Territorial Air Pollution Program Administrators/Association of Local Air Pollution Control Officials, Washington, D.C.

We selected these industry associations and environmental groups because they were among those most affected by the two rules, or were allegedly involved in the two rules in question. For example, we chose the National Association of Manufacturers because it represented about 14,000 companies, many of which may seek permits under the OPP rule, and because NAM was a roundtable participant in EPA's OPP rule. Similarly, we chose the Natural Resources Defense Council because NRDC sued EPA over the MWC rule, and because NRDC was also a roundtable participant in EPA's OPP rule.

To address these objectives, we reviewed the relevant provisions of the Clean Air Act (CAA) and the Administrative Procedure Act (APA), as well as their legislative histories. We also studied previous court cases pertaining to White House entities' participation and considered the views of ACUS, the Department of Justice, and EPA's Office of General Counsel on this issue, as well as the views of attorneys for environmental and industry associations. We also obtained and analyzed CAA and APA docketing requirements, as well as any court cases interpreting these requirements, and then used these criteria to

- review the dockets for each of the two rulemakings to ascertain whether the docket contained information indicating any undocketed White House entity participation in the two rules and
- interview EPA and other officials to determine the nature and extent of White House entity participation in the two rules and their communications with nongovernmental persons or organizations.

We compared drafts of rules before and after White House entities participated in the rulemaking process and discussed the significance of and reasons for changes with the EPA project officer or other EPA individual responsible for making the changes. Additionally, where possible, we obtained and analyzed the written comments that White House entities made on the two rules.

With the nongovernmental groups, in addition to discussing their specific comments on and involvement with EPA for each of the two rules, we also discussed whether they communicated with OMB, the Council on Competitiveness, or staff of other White House entities during rule development or after the close of the comment period. If undocketed communications were alleged, we asked the appropriate White House entity about these communications. Officials of the Office of Management and Budget discussed their participation in the two rules with us, but officials representing other White House entities declined to do so. Because we were able to discuss and confirm with selected nongovernmental persons or groups their communications with White House entities on the two rules in question, we did not pursue further discussions with these White House entities.

We reviewed EPA's Federal Managers' Financial Integrity Act report for fiscal year 1991, and noted no reported weaknesses in the agency's management controls relating to rulemaking. During our review we also sought the views of EPA officials responsible for overseeing EPA's clean air rulemakings, as well as those involved in the development and promulgation of the two rules reviewed. Their views are incorporated into the report where appropriate. However, as requested by the Chairman's office, we did not obtain official agency comments on a draft of this report. Our work was conducted from January 1992 to November 1992.

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