

achieved through E.O. 12,291. Such criticism has elicited reluctant admissions from OIRA's former Administrator that estimates "were mainly from industry sources," that estimates did not consider benefits of the regulations in place, and that, on the whole, "[i]t is conceivable" that OMB's regulatory reform efforts may have saved nothing and may have cost the American public.¹⁸⁹ Whatever the truth about savings resulting from OMB's efforts—which probably rests between critics' claims of negative benefits and OMB's bloated estimates—it is clear that OMB has substantially influenced the pace and substance of executive agency rulemaking.

In 1981 and 1982, OMB reviewed over 5,400 proposed and final regulations; roughly 140 of these were "major" rules.¹⁹⁰ About twenty percent of all rules reviewed by OMB were EPA rules;¹⁹¹ eight of these 1074 EPA rules were designated "major" under the Executive Order.¹⁹²

While, as of 1982, eighty-six percent of all draft rules sent by agencies to OMB had been "cleared without change,"¹⁹³ it is likely that OMB had some impact on their substance. Often the Office is in close contact with the agency staff drafting the rules, and sometimes helps to fashion the proposal before it is "logged" for review.¹⁹⁴ Roughly eight percent of all rules reviewed by OMB in 1981 and 1982 were found "consistent with minor change,"¹⁹⁵ sometimes undergoing "substantive modification."¹⁹⁶

As of the end of 1982, 101 regulations—or two percent of those

¹⁸⁹ *Hearings on Role of OMB*, *supra* note 31, at 114-15.

¹⁹⁰ Presidential Task Force on Regulatory Relief, Reagan Administration Regulatory Achievements 59-61 (Aug. 11, 1983) [hereinafter cited as 1983 Task Force Report]. OMB may "exempt" classes of rules from review if it determines that "as a class" they are consistent with the goals and requirements of the Order. Furthermore, a rule may be returned to an agency because it was improperly sent, or it may be passed through OMB due to an emergency or a statutory or judicial deadline. During 1981 and 1982, three percent of all rules fell into these categories. OMB 1982 Report on 12,291, *supra* note 187, at 11, 27.

¹⁹¹ OMB 1982 Report on 12,291, *supra* note 187, at 11, 27.

¹⁹² *Id.* at 59.

¹⁹³ *Id.* at 11.

¹⁹⁴ Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983); accord Telephone interview with Allan Jennings, EPA Office of Standards & Regulations (May 27, 1983); see also GAO Report on 12,291, *supra* note 24, at 53. EPA's High Level Radioactive Waste Disposal rule, see *infra* text accompanying notes 326-49, is one example of a rule substantively modified before proposal, after OMB review.

¹⁹⁵ OMB 1982 Report on 12,291, *supra* note 187, at 11.

¹⁹⁶ Office of Management and Budget Response, Questionnaire from Congressman Sam Hall, April 25, 1983 (response to Question 1.a.3.), reprinted in *Hearings*, *supra* note 83, at 2642.

reviewed by OMB—were returned to the agencies;¹⁹⁷ “returned” in some cases is a euphemism for “vetoed.”¹⁹⁸ Agencies had withdrawn eighty-one rules, in some cases upon receiving signals from OMB of an impending dispute.¹⁹⁹

The primary macroscopic impacts of the Executive Order appear to be delay of the regulatory process—especially where OMB and the agency disagree on the substance of a rule—and the day-to-day infusion of OMB input into agency decisionmaking.²⁰⁰ This OMB input generally is difficult if not impossible for the public to discern.

B. OMB Encroachment on EPA Discretion: A New Locus of Power

The struggle between EPA and OMB has at times become embittered. Former EPA Administrator Burford recently testified, for example, that “it is appropriate for the President of the United States to have an office which can overview [sic] regulations. . .but I think that there were some serious abuses [by OMB].”²⁰¹ Some EPA employees long have contended that the agency has been “singled out” by OMB for especially close scrutiny;²⁰² OMB admits that it gives EPA special attention.²⁰³

The friction between OMB and EPA is not surprising. OMB has openly criticized the entire health and environmental regulatory regime.²⁰⁴ It has charged that EPA’s management has tried to evade OMB oversight.²⁰⁵ EPA’s orientation toward “command and

¹⁹⁷ OMB 1982 Report on 12,291, *supra* note 187, at 11.

¹⁹⁸ See *infra* text accompanying notes 209-14.

¹⁹⁹ OMB 1982 Report on 12,291, *supra* note 187, at 11.

²⁰⁰ See *infra* text accompanying notes 246-53 (discussing internal EPA changes in response to OMB review).

²⁰¹ *Hearings on Superfund*, *supra* note 46, at 234 (testimony of Anne Burford).

²⁰² See *Special Report: Office of Management & Budget Plays Critical Part in Environmental Policymaking, Faces Little External Review*, 1976 *Env't Rep.* (B.N.A.) 693.

²⁰³ Interview with OMB, OIRA Official “B” in Washington, D.C. (May 3, 1983).

²⁰⁴ For example, OIRA Administrator DeMuth asserted: “[T]here are scores, hundreds of regulations on the books that are imposing costs without much positive results in terms of environmental or health improvements. . . .” *Office of Management and Budget Control of OSHA Rulemaking: Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 97th Cong., 2d Sess. 347 (1982) (testimony of OMB, OIRA Adm'r DeMuth) [hereinafter cited as *Hearings on OMB Control of OSHA Rulemaking*]. See also J. Lash, K. Gillman & D. Sheridan, *A Season of Spoils* 19-21 (1984) (citing criticism of environmental regulation by top-level OMB officials, including Director Stockman) [hereinafter cited as J. Lash].

²⁰⁵ See, e.g., *OMB Midterm Analysis Gives EPA Poor Marks on Reg Reform, Other Programs*, *Inside EPA* (Inside Wash. Pubs.) 1, 5 (Nov. 12, 1982) (quoting internal OMB

control" regulation often runs directly against the grain of OMB's market-oriented approach. A key former OMB official admits that OMB has "a loving bias against regulation . . . a rebuttable presumption against regulation," but insists that this bias results from OMB's "neutral competence" rather than from any pro-industry bent.²⁰⁶

As the following sections illustrate, OMB's philosophical bias against command and control regulation has led the Office to frequent, at times vehement, arguments with EPA. These disagreements have often resulted in substantive changes in EPA's rules.

1. OMB's De Facto Veto Power: The Displacement of EPA Discretion

The terms of Executive Order 12,291 give OMB no authority to "veto" an agency rule; the Order merely provides that the agency "shall . . . refrain from publishing" its rule "until the agency has responded to the [OMB] Director's views, and incorporated those views and the agency's response in the rulemaking file."²⁰⁷ The Order explicitly states that it shall not "be construed as displacing the agencies' responsibilities delegated by law."²⁰⁸

In practice, however, OMB has acquired a de facto veto power over certain agency regulations. OMB officials have essentially admitted to such power in testimony before Congress.²⁰⁹ Although a

memorandum):

EPA has resisted White House efforts to promote reform of environmental regulations. The agency's attempts to circumvent White House oversight of its regulatory activities has resulted on one or two occasions in considerable political embarrassment to the Administration. All of this could have been counteracted by sufficiently forceful action on the part of EPA's political appointees, but they appear unable to debunk the assertions of their staff, or to focus on the most important opportunities for regulatory reform.

²⁰⁶ Interview with Jim Tozzi, former OMB, OIRA Deputy Adm'r, in Washington, D.C. (June 14, 1983).

²⁰⁷ E.O. 12,291, *supra* note 1, § 3(f)(2).

²⁰⁸ *Id.* § 3(f)(3).

²⁰⁹ See, e.g., *Hearings on OMB Control of OSHA Rulemaking*, *supra* note 204, at 350 (testimony of OMB, OIRA Adm'r DeMuth):

Mrs. Collins. . . . When OMB disagrees with an agency and feels that a standard does not comply with the cost-benefit analysis, based on Executive orders, could that agency actually proceed to implement it, or target [sic] a standard anyway?

Mr. DeMuth. Sure.

Mrs. Collins. It could. Do you know of any that have done that?

Mr. DeMuth. No. Wait a minute, let me think. No, I think the answer is "No." *But see Hearings*, *supra* note 83, at 966 (OIRA Adm'r DeMuth, testifying that "OMB does not have 'veto power' over rules").

determined agency may be able to reject OMB's "recommendations" and promulgate the rule intact, OMB has publicly cited only a single instance in which an agency brought a dispute with the Office to the Presidential Task Force on Regulatory Relief²¹⁰—the now-disbanded "appeals board" from OMB decisions under the Executive Order.²¹¹ None of the forty-five rules "returned" to the agencies by OMB in 1981 was appealed to the Task Force.²¹²

When asked in August 1983 how many rules returned to agencies were later promulgated, OMB could not cite a single rule, ostensibly because they "do not maintain records" of such cases.²¹³ In the view of former OIRA Administrator Miller, agencies generally are unlikely to test OMB's bureaucratic mettle, because "if you're the toughest kid on the block, most kids won't pick a fight with you. The executive order establishes things quite clearly."²¹⁴

Although OMB is indeed a "tough kid," its experience with the Executive Order demonstrates that the Office is neither omnipotent nor prodigal in the use of its powers. For example, when OMB attempted in a drawn-out battle to pressure EPA into significantly relaxing the standards for lead in gasoline—the "lead phasedown" debate—OMB, in the words of former EPA Assistant Administrator Bill Drayton, "was rolled."²¹⁵ That OMB is not prodigal in exercise of its powers is illustrated by the fact that in 1981 and 1982 it returned only thirty-one of the 1074 EPA rules reviewed.²¹⁶

²¹⁰ In the spring of 1982, OMB opposed OSHA's "Hazard Communication" rule, and OSHA appealed to the Task Force. The Task Force upheld the rule, although the standard ultimately differed from the original OSHA proposal. Perhaps it is no coincidence that the Task Force's approval occurred during a congressional inquiry into OMB's delay of the rule. See *Hearings on OMB Control of OSHA Rulemaking*, *supra* note 204, 4-5, 20-26, 55, 316-19; see also GAO Report on 12,291, *supra* note 24, at 53.

²¹¹ See E.O. 12,291, *supra* note 1, § 6 (setting forth role of Task Force). The Task Force was disbanded in August 1983. Wash. Post, August 12, 1983, at A-15, col. 4-5.

²¹² GAO Report on 12,291, *supra* note 24, at 53.

²¹³ OMB Response to House Questionnaire, *supra* note 83 (Question 7), reprinted in *Hearings*, *supra* note 83, at 976.

²¹⁴ *Deregulation H.Q.: An Interview on the New Executive Order With Murray L. Weidenbaum and James C. Miller III*, Reg., Mar.-Apr. 1981, at 22 [hereinafter cited as *Deregulation H.Q.*].

²¹⁵ Telephone interview with William Drayton, Jr., former EPA Ass't Adm'r for Planning & Mgmt. (April 28, 1983).

²¹⁶ OMB 1982 Report on 12,291, *supra* note 187, at 10-12. This figure is misleading because most of the thousand-odd rules sent by EPA to OMB are of minor significance; only perhaps a fourth or less are of substantial influence, and only a handful were designated "major." See *Hearings*, *supra* note 83, at 3146-3215 (worksheet of proposed and final EPA rules received by OMB through April 30, 1983, for E.O. 12,291 review) [hereinafter cited as *OMB Worksheet*].

A key OMB official explains that it requires "too many bureaucratic chips" for OMB to insert itself into and possibly polarize many rulemakings and to "bring in the heavies" too often.²¹⁷ When OMB does bring its power to bear, however, it often is very influential.²¹⁸

OMB's power to "return" rules²¹⁹ is analogous to the President's power to veto legislation. If the agency writing the rule can muster enough will and political support to override OMB, it will prevail, much as Congress may override a presidential veto. But, the threat of an OMB veto probably has its greater effect in a day-to-day sense, as a threat looming on the horizon. Its mere existence gives OMB the power to influence EPA policymaking.

Of course, OMB has many powers other than the power to return a rule with which it can encourage EPA to alter its course. OMB sanctions include budget and personnel cuts, and delay of future rules.²²⁰ An additional sanction, presidential dismissal of the EPA Administrator, is an extraordinary measure.²²¹ Perhaps a fur-

²¹⁷ Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983).

²¹⁸ See *infra* Section III.D., Case Studies.

EPA's Administrator Ruckelshaus, recently resigned, may have been more independent of OMB and the White House than was his predecessor or will be his successor. When quizzed by Senator Stafford about his views on OMB's power, he asserted: "I will have the final authority to promulgate regulations, not OMB." Written responses of William Ruckelshaus, EPA Adm'r-designate (Question 7) (written questions of Sen. Stafford following confirmation hearings) (undated) (copy on file with author).

However, a recent review by the Oversight and Investigations Subcommittee of the Senate Energy and Commerce Committee concludes: "[I]t seems quite clear that the problem of OMB interference in EPA rulemaking has not ceased with the shakeup of the top leadership of the Environmental Protection Agency in early 1983." Oversight Subcomm. Report on Executive Privilege, *supra* note 79, at 293. The ability of Administrator-designate Lee Thomas to resist OMB influence remains to be seen.

²¹⁹ When OMB decides to return a rule to EPA, the Desk Officer usually drafts a memorandum recommending return of the rule as inconsistent with the Executive Order. That memorandum climbs the OMB chain of command and ultimately may lead to a letter to EPA, usually from the OIRA Administrator, notifying the Agency of OMB's determination that the rule is inconsistent with the Executive Order. Interview with OMB, OIRA Official "B" in Washington, D.C. (May 3, 1983).

²²⁰ As discussed *supra* text accompanying notes 5-17, OMB may combine its vast array of powers with the veto threat to effectively persuade EPA. No overt threats of such sanctions have been cited by EPA officials in interviews, but the mere existence of such powers may have a chilling effect on EPA's willingness to contravene OMB orders. "[T]housands of transactions a year with OMB" take place; therefore "if you've publicly humiliated [OMB], they'll get even—this can come in many different ways." Interview with Douglas Costle, former EPA Adm'r, in Washington, D.C. (Aug. 17, 1983).

²²¹ Former EPA Administrator Costle notes that the actual firing of the EPA Administrator is not a real threat—absent a major political crisis—because of the extraordinary nature of this remedy. *Id.*

ther power is illustrated by former EPA Chief of Staff John Daniel's recent testimony that he received "veiled threats" when EPA took actions objectionable to OMB.²²² After EPA Administrator Burford issued a rule under court order without first receiving OMB approval, Daniel explained: "Late that evening I received a call from an OMB official . . . [who said] words to this effect[:] that there was a price to pay for doing what we had done, and that we hadn't begun to pay."²²³

2. OMB's More Subtle & Pervasive Influence on EPA

As noted, OMB only rarely resorts to vetoing EPA rules; the veto appears to be its bluntest weapon, to be used only when EPA resists OMB arm-twisting and refuses "voluntarily" to alter a rule's substance. This section reveals the day-to-day influence OMB exerts on EPA rulemaking short of a management-level veto.

a. Early OMB Involvement in EPA Rulemaking

There is "an old OMB saying: get in below the bow line"; in other words, get involved in agency rulemaking as early as possible to maximize influence on rules that are still in their formative stages.²²⁴ To this end, there are reports that OMB is planning to use the "unified agenda of federal regulations" mandated by § 5 of E.O. 12,291 to involve itself in "ground-floor" decisions on whether proposed rules should even be drafted by agencies.²²⁵

In many cases OMB already is involved in the EPA rulemaking process prior to formal submittal of a proposed rule to the Office. An excellent example of this is the early OMB involvement in the National Ambient Air Quality Standard (NAAQS) for particulate matter; OMB was involved for over a year before any proposal was floated by EPA.²²⁶

²²² Daniel Testimony, *supra* note 46, at 7.

²²³ *Id.* at 7-8.

²²⁴ Interview with Jim Tozzi, former OMB, OIRA Deputy Adm'r, in Washington, D.C. (May 14, 1983).

²²⁵ *OMB Gearing to Control Agency Decisions at the Earliest Stage*, Inside OMB (Inside Wash. Pubs.) 5 (Oct. 8, 1982). OMB would accomplish this through review of all agency rules planned and placed on the regulatory agenda; if OMB were to find that "policy issues" were raised by the agency's planned rulemaking, the regulatory plan would be brought to the attention of OMB for an overall decision on whether to begin the regulatory process. This would be the first step toward establishing "regulatory budgets" for agencies. *Id.*

²²⁶ See NAAQS case study, *infra* text accompanying notes 371-80. The rule was finally proposed on March 20, 1984. See 49 Fed. Reg. 10,408 (1984).

This pre-proposal input is critical because, once the inertia builds after proposal of a rule, it takes many more "bureaucratic chips" for OMB to halt or significantly alter the EPA rule. One observer of the OMB-agency debates explains, "[B]y the time that [a] standard is issued as a proposal in many agencies' views, it is nailed down . . . [the] proposal is close to, if not identical to, the agency's final action."²²⁷

Under EPA's formal procedures OMB clears a proposed or final regulation, and the EPA Administrator signs it.²²⁸ This may avoid the appearance of OMB overriding the EPA Administrator, but it also precludes a "pure" EPA rule—the rule is always the joint product of OMB and EPA before it actually reaches the Administrator's desk for signature. OMB review is completed *prior to* the EPA Administrator's signature. While this is procedurally courteous, the Administrator often is fully aware of—and indeed completely supports—a rule that has gone through internal low level review *before* it is sent to OMB.²²⁹

Early OMB involvement compromises EPA's role as the front-line expert decisionmaker in matters entrusted to EPA by Congress. EPA's former Assistant Administrator Drayton feels that early OMB input over-politicizes the EPA background scientific work before it has had a chance to see the light of day.²³⁰ This directly undercuts the ideal mode of regulation: first, expert determination of risks, and then, a policy decision as to what level of risk is acceptable.²³¹

b. Day-to-Day OMB Review of EPA Rules

Once formally submitted to OMB, non-major EPA rules are in

²²⁷ *Hearings on OMB Control of OSHA Rulemaking*, *supra* note 204, at 12 (testimony of Peg Seminario, AFL-CIO).

²²⁸ See EPA, Office of Standards and Regulations, *Managing the Process* 51-52 (August 1982) (Regulation Management Series).

²²⁹ The EPA High Level Radioactive Waste Disposal rule, for example, was fully supported by EPA Administrator Burford, who personally debated its provisions with OMB officials during OMB's extended one-year review. See *infra* text accompanying notes 329-46.

²³⁰ Telephone interview with William Drayton, Jr., former EPA Ass't Adm'r for Planning & Mgmt. (April 28, 1983).

²³¹ For an excellent treatment of how the ideal federal agency's risk assessment and risk management decisionmaking might proceed, see National Academy of Sciences, National Research Council, *Risk Assessment in the Federal Government: Managing the Process* (1983). See especially *id.* at 33-49, discussing the interplay between science and policy in risk assessment and regulation.

most cases cleared within ten days.²³³ If the rule is controversial, however, copies of the rule may be sent to key White House and other executive staff, and review may take several months or more than a year.²³³

OMB review of most non-major rules must be cursory because of the volume of rules to be reviewed.²³⁴ "Major" rules receive substantially more scrutiny; the average time for review is over thirty days.²³⁵

Because of time constraints, and because OMB sees itself as an overseer of the process rather than a "bunch of technicians redo[ing] the work of EPA,"²³⁶ OMB almost never looks at the EPA rulemaking docket or at any public comments other than those sent directly to OMB.²³⁷ OMB does accept, and sometimes actively solicits, industry comments both written and oral,²³⁸ on rare occasions OMB receives comments from non-industry parties, but in general the "record" before OMB is distinctly one sided.²³⁹ EPA officials have charged that OMB has given draft EPA rules to industry for comment before the rules are available to the public,²⁴⁰ presenting industry a secret "first shot" at the rules.

c. *Delay in the Regulatory Process*

OMB's quick turnaround for most EPA regulations is only a part of the story. For those regulations with which OMB disagrees, re-

²³³ Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983); see *OME Worksheet*, *supra* note 216.

²³⁴ Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983).

²³⁵ Interview with OMB, OIRA Official "B" in Washington, D.C. (May 3, 1983).

²³⁶ *Hearings on OMB Control of OSHA Rulemaking*, *supra* note 204, at 302 (testimony of OMB, OIRA Adm'r DeMuth).

²³⁷ Interview with OMB, OIRA Official "B" in Washington, D.C. (May 3, 1983).

²³⁸ Interview with OMB, OIRA Official "C" in Washington, D.C. (May 3, 1983); see also *J. Lash*, *supra* note 204, at 24:

The long rulemaking record, the legal basis of the rule, the opportunity for public comment were just too cumbersome for OMB. "We should read the record," say [former OIRA Deputy Administrator] Tozzi, "but we didn't." When OMB reviews rule, [former OIRA Administrator] Miller testified, "we are not evaluating a record."

²³⁹ See *infra* text accompanying notes 282-95.

²⁴⁰ In response to the author's FOIA request, for example, OMB produced scores of letters, fact sheets, and other documents which oil refiners, lead producers and other industrial interests sent to OMB advocating relaxation or rescission of a single EPA rule, the gasoline "lead phasedown" regulations. Materials provided pursuant to author's FOIA request (June 13, 1983) (on file with author).

²⁴¹ See, e.g., *Daniel Testimony*, *supra* note 46, at 5, 80.

For a discussion of OMB solicitation and acceptance of industry comments on EPA rule see *infra* text accompanying notes 282-95.

view is neither smooth nor predictable. Regulatory packages sent to OMB may become enmeshed in disagreement for over a year.²⁴¹ EPA reported in May 1983 that OMB had extended its review of 158 proposed and final rules beyond the time limits prescribed in the Executive Order, sometimes for several months, and in four cases for over a year.²⁴²

Once OMB announces an extension, there is no time limit on OMB review. In some cases, OMB has extended its review well beyond the statutory deadline for a rule's promulgation,²⁴³ despite the Order's clear mandate that such deadlines be honored.²⁴⁴

Interagency dispute produces delay and incremental, sometimes substantial, change in the rule or proposal. Although relatively few rules are delayed for more than ten weeks, many of those rules are from EPA.²⁴⁵

d. Internal Changes at EPA as a Consequence of OMB Review

As this section attempts to demonstrate, direct OMB intervention results in EPA policy changes. In addition, the very knowledge that rules will be reviewed by OMB has brought about internal changes at EPA.

First, a more rigorous internal review has developed.²⁴⁶ EPA has beefed up its economic analyses; in fact, by May 1983 EPA had spent \$2.45 million on the still-uncompleted Regulatory Impact Analysis (RIA) for RCRA owner/operator land disposal standards.²⁴⁷ The Reagan Order requires that considerable analysis be undertaken; however, in general, EPA staff interviewed believed that a full-blown cost-benefit RIA is of little value to EPA deci-

²⁴¹ See, e.g., discussion of OMB's year-long reviews of EPA's High Level Radioactive Waste Disposal rule and NSPS's, *infra* text accompanying notes 326-70.

²⁴² Letter from Joseph A. Cannon, EPA Assoc. Adm'r, Policy and Resource Mgmt., to Hon. Sam B. Hall, Chm'n, House Subcomm. on Admin. Law and Govtl. Relations (May 26, 1983) (enclosure) (Questions 5a.(6), 5b.(6)), *reprinted in Hearings, supra* note 83, at 1561-62 [hereinafter cited as EPA Response to House Questionnaire].

²⁴³ See, e.g., NSPS case study, *infra* text accompanying notes 350-70 (noting that several of these rules were delayed by the OMB review process for months, even more than a year, after the statutory deadline had passed).

²⁴⁴ E.O. 12,291, *supra* note 1, § 8(a)(2).

²⁴⁵ Interview with OMB, OIRA Official "B" in Washington, D.C. (May 3, 1983).

²⁴⁶ Interview with EPA, Office of Standards & Regulations Official "E" in Washington, D.C. (June 6, 1983).

²⁴⁷ EPA Response to House Questionnaire, *supra* note 242 (Attachment K), *reprinted in Hearings, supra* note 83, at 1615-18.

sionmakers and is essentially a waste of EPA's scarce resources.²⁴⁸

EPA's more rigorous internal review has increased significantly the time it takes to issue some rules. The drafting of the RIA's for two major rules, for example, have taken in excess of two years.²⁴⁹ In 1982, General Accounting Office (GAO) investigators found in general that "the knowledge that all regulations must be reviewed by OMB may indirectly cause delay" due to intensified internal review within the agency.²⁵⁰ A more recent GAO study concluded that while cost-benefit analyses may be time consuming, costly and flawed by significant data gaps, in some cases these analyses have aided EPA decisionmakers.²⁵¹

A more subtle and consequential internal EPA development induced by OMB review is a "guessing game," in which EPA attempts to draft rules it believes will clear OMB. As one EPA official put it, "we are practicing the art of the possible": the agency staff starts with reduced expectations, and drafts initially a proposal that will clear both the EPA hierarchy and OMB.²⁵²

The Executive Order has effectively institutionalized OMB input, especially where OMB has a strong policy interest. Of course, most rules receive little OMB attention. It is, however, OMB's goal to induce in EPA staff the understanding that rules in certain form will never clear OMB, and therefore should not even be sent there for review.²⁵³ This goal seems to have been at least in part achieved.

²⁴⁸ *E.g.*, Interview with EPA, Office of Standards & Regulations Official "D" in Washington, D.C. (March 30, 1983). Publicly, EPA states that the cost-benefit analyses have been useful to the agency. *See, e.g.*, Letter from John M. Campbell, Jr., EPA Acting Ass't Adm'r for Policy, Planning & Evaluation, to J. Dexter Peach, GAO (Oct. 20, 1983), *reprinted in* GAO, *Cost-Benefit Analysis Can Be Useful in Assessing Environmental Regulations, Despite Limitations* 40-41 (1984) ("In general, EPA agrees with GAO in its finding that cost-benefit analysis is a useful tool in considering options for setting standards despite some inherent limitations.") [report hereinafter cited as GAO Report on Cost-Benefit Analysis].

²⁴⁹ EPA Response to House Questionnaire, *supra* note 242 (Attachment G), *reprinted in* *Hearings, supra* note 83, at 1595-97; *accord* Telephone interview with EPA, Office of Policy & Resource Management Official "I" (May 31, 1983).

²⁵⁰ GAO Report on 12,291, *supra* note 24, at 51.

²⁵¹ GAO Report on Cost-Benefit Analysis, *supra* note 248.

²⁵² Interview with EPA, Radiation Programs Official "K" in Arlington, Va. (May 24, 1983).

²⁵³ Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983). OMB officials will on occasion tell EPA that it is "O.K. to propose" x and/or y, "but be forewarned that we're looking for x" in the final rule. Interview with OMB, OIRA Official "C" in Washington, D.C. (May 3, 1983). The official noting this practice did not suggest how often or in what cases it is invoked. If used effectively, it would directly undercut the APA public comment process.