Improving CS Regulations

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October 1980

Prepared for the U.S. Department of Energy
under Contract DE-AC06-76RLO 1830

Pacific Northwest Laboratory
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EXECUTIVE SUMMARY

The research described in this report was performed by the Pacific Northwest Laboratory (PNL) with assistance from The Synectics Group (TSG) for the U.S. Department of Energy (DOE), Assistant Secretary for the Office of Conservation and Solar Energy (CS), Office of Policy, Planning, and Evaluation (PPE). The major objective of the work was to develop recommendations which could be implemented to improve the CS regulatory process and ultimately to minimize burdensome impacts from CS regulations on the U.S. economy.

Regulatory action is increasingly used to implement energy legislation and policies set by DOE. CS currently manages several major regulatory programs whose cumulative impact on the economy is substantial; these include for example, Building Energy Performance Standards (BEPS), Appliance Energy Efficiency Standards, Emergency Building Temperature Restrictions, Energy Conservation Grants Program, and the Residential Energy Conservation Service.

In an effort to reduce the burden of regulations on the U.S. economy and to ensure that regulations are designed, promulgated, and implemented properly, President Carter issued Executive Order 12044 (43 FR 12661, 3/28/78), which requires all federal agencies to distinguish between significant and insignificant regulations, and to determine whether the regulation will result in major impacts. The Order also requires agencies to follow specified procedures for developing regulations, to evaluate the effectiveness of regulations periodically, and to publish a semiannual regulatory agenda. To implement the Order, DOE first issued DOE Memorandum 2030.1, "Procedures for the Development and Analysis of Regulations, Standards, and Guidelines" (DOE 12/18/78), which was issued later for public comment as "Improving Government Regulations, Proposals for Implementing Executive Order 12044" (43 FR 18634, 5/1/78). DOE operated under the guidelines established in DOE 2030.1 for more than a year. Recently a proposed rescission for DOE 2030.1 was issued, "Guidelines for the Development and Analysis of Regulations" (45 FR 12282, 2/25/80).

PPE is responsible for responding to the requirements of the Executive Order and the DOE guidelines as they affect current and anticipated CS

regulatory programs. This study was commissioned to gather information on the impact of the Order and the guidelines on CS regulatory practices, to investigate problems encountered by CS staff when implementing the Order and guidelines, and to recommend solutions to resolve these problems.

Four principal objectives for this study were first identified:

1) review federal administrative procedures relevant to the Carter Administration's regulatory reform initiatives, 2) analyze current CS regulatory practices, including the impact of the Executive Order and DOE guidelines on these practices, 3) explore issues and problems encountered by CS staff with current CS regulatory practices, and 4) recommend potential solutions to these problems.

To accomplish these objectives, five major tasks were outlined. First, legislation, Executive Orders, and DOE Memoranda concerning federal administrative procedures relevant to the development and analysis of regulations within CS were reviewed. Second, relevant DOE Orders and Memoranda were analyzed and key DOE and CS staff were interviewed in order to accurately describe the current CS regulatory process. Third, DOE staff from the Office of the General Counsel (GC), the Office of Policy and Evaluation (PE), the Office of the Environment (EV), and the Office of the Secretary were interviewed to explore issues and problems encountered with current CS regulatory practices. Fourth, the regulatory processes at five other federal agencies were reviewed in order to see how other agencies have approached the regulatory process, dealt with specific regulatory problems, and responded to the Executive Order. Fifth, based on the results of the preceding four tasks, recommendations for potential solutions to the CS regulatory problems were developed.

MAJOR FINDINGS

The major findings of the study are listed below.

CS and Regulatory Reform

- An extraordinarily wide range of CS actions are significantly affected by the requirements of Executive Order 12044 and by guidelines established by DOE to implement the Order.

- DOE guidelines to implement the Order are too general in scope to be applied to specific CS actions. Guidelines covering rulemaking procedures are focused at the Assistant Secretary level, not the program manager level. Guidelines covering regulatory analysis requirements are too broad to be of use for preparing an actual regulatory analysis.
- Pending legislative proposals indicate that the regulatory process will be subject to permanent procedural changes, which will significantly affect CS regulatory practices.

CS Regulatory Problems

- Regulatory responsibilities are relatively new activities to CS, and are likely to become increasingly important in the future. Requirements of the Energy Security Act increase CS regulatory responsibilities in several key areas.
- Program offices throughout CS lack guidance regarding the requirements of the Order and the DOE guidelines to implement the Order. Furthermore, it is not generally clear to CS staff how to best implement the objectives of the Order. For instance, the Order establishes two objectives for performing regulatory analyses. These analyses are principally intended to be decision documents that are an integral and on-going part of the regulatory development process. They are also intended for use by the public as general information and are published in draft form in the Federal Register with the Notice of Proposed Rulemaking (NPR). These two functions of regulatory analyses are sometimes incompatible and have caused some confusion. Program office staff have been reluctant to display all options and analyses performed internally in the public regulatory analysis.
- Insufficient time and manpower have made it difficult for CS to improve the development and analysis of their regulations. This has

resulted in an expanded role for outside contractors in the development of many major regulations in CS. While realizing the necessity of contractors, program offices noted several problems, ranging from contractors developing DOE policy to the difficulty of getting useful help from contractors unfamiliar with CS needs.

- Procedures for policy review and management concurrence have increased in order to implement the requirements of the Executive Order. Many CS program office staff find that the additional procedures, while increasing policy review, inhibit the staff's ability to deliver regulatory programs in a timely and efficient manner.
- Recent changes in DOE's organizational structure and management have caused short-term problems related to regulatory procedures within CS. When Secretary Duncan took office, he revised PE's mission, which thus dramatically reduced their role in the regulatory process and in implementing the Executive Order. No office has thus far replaced PE's role of policy review in the regulatory process.
- Many program offices reported significant problems when preparing analytical documents. It often took a long time for staff to agree on which standard assumptions and methodologies to use. Access to DOE data bases has sometimes been difficult, which has thus caused delays. Third, preparation of analytical documents, principally the regulatory analyses, has typically become a process of publishing voluminous documents justifying decisions rather than tools to aid making decisions.

Alternative Regulatory Approaches

- Several other federal agencies have far more rulemaking experience than CS and, in many instances, there are clear differences between how these other agencies promulgate regulations and how CS promulgates regulations. The experiences of other agencies often formed the basis for recommendations to improve the CS regulatory process.

- An agency's organizational structure strongly influences its approach to promulgating regulations and its management of the process. Most agencies have established a central office for coordinating the regulatory process and monitoring it for compliance with Executive Order 12044. With the exception of DOE, the more decentralized agencies, such as the Department of Transportation, have also established regulatory offices for each Assistant Secretary or administration within the agency. This policy has provided for better communication and coordination of the regulatory process.
- Few agencies, with the exception of the Environmental Protection Agency and Housing and Urban Development, have issued clear and substantive guidance on the specific steps and activities included in the regulatory process. In particular, little guidance has been drafted on the preparation of the regulatory analysis.

RECOMMENDATIONS

Based on the findings of the study, we developed the following list of recommendations.

- Increase the Role of PPE in the Review Regulations

PPE now plays a relatively minor role in the development of rules and regulations. Several sources, including the OMB Progress Report on "Improving Government Regulations" and DOE's Revisions to 2030.1, have noted the importance of improved policy supervision. A number of specific actions could be taken by PPE to increase its role in regulatory review. For example, PPE could sign off on all authorization memos before they are submitted to the Secretary and Deputy Secretary. The current PPE role should be expanded to include inter- or intra-agency coordination on CS regulatory matters and to provide assistance to the program offices on regulatory or rule-making problems.

- Strengthen the Regulatory Initiation System

No consistent, formal arrangement currently exists that provides for early decisions and coordination on the schedule for the development of a regulation. We recommend that a formal process be instituted that brings the lead program offices together with other DOE groups responsible for regulation development (i.e., PE, GC, EV). This group would develop an Action Plan of requirements and schedules for the documents and milestones in the regulation's development.

Other federal agencies have a system which requires the initiating office to submit a proposed schedule to the relevant offices. We believe such a system would be appropriate for CS. PPE would act as coordinator to bring the actors together. The schedule and its deadlines would encourage the program offices to use the Regulatory Analysis as a tool for developing and writing the regulation. Also, commitments from EV, GC, and PE on the necessity and scheduling of various formal documents would reduce the uncertainty about requirements for such documentation. The Action Plan could efficiently be used as input into the DOE Action Coordination Tracking System (ACTS).

Implementation of this recommendation would increase PPE's role in policy review. However, the Action Plan might require commitments from offices outside CS. The changes in responsibilities for CS, GC, PE and EV may require decisions from the Secretary's level. Lastly, the increased role for PPE in an Action Plan could only occur if additional resources were made available.

- Integrate the Impact Assessments

The various analyses and formal documentation presently required to develop and promulgate a regulation are intended to serve much the same purpose: they all seek to provide information on the effects of the implemented regulation. The individual analyses focus on different, particular impacts, for example, environmental and regulatory. The integrated assessment would show the regulation's

positive and negative impacts in one document. This would increase the decisionmaker's awareness of the tradeoffs of implementing the regulation. Integrating the analyses should reduce duplication as well as meet the needs of those with policy responsibilities, the affected public, and the developers of the regulation. We recommend that PPE actively pursue the goal of integrated assessments within CS.

- Develop a Program to Improve Regulatory Analyses

Our interviews with program offices responsible for preparing regulatory analyses revealed a common problem with the time and effort spent in choosing assumptions, models or data sources to use for baselines or impact estimates. In addition, regulatory analyses are often performed on compressed time schedules with background data and models that are often inadequate to make firm predictions of the regulation's impacts.

We recommend that PPE provide broad studies of approaches to evaluate regulatory alternatives as well as more focused studies of data sources and assumptions for baseline development. This type of activity should not only ultimately reduce the time required to conduct specific regulatory analyses but also help ensure consistency and thoroughness in conducting analyses.

- Write a Regulatory Process Guidebook

It is highly recommended that PPE continue its efforts to publish a guide or handbook for program offices to use in writing, developing or analyzing a regulation. The handbook would positively increase PPE's visibility within the program offices and identify PPE as a resource in the regulatory process.

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1.0 INTRODUCTION

Regulatory action is increasingly used to implement energy legislation and to execute policies set by the Department of Energy (DOE). The Office of Conservation and Solar Energy (CS) currently manages several major regulatory programs whose cumulative impact on the economy is substantial, including, for example, Building Energy Performance Standards, Appliance Energy Efficiency Standards, Emergency Building Temperature Restrictions, Energy Conservations Grants Program, the Residential Energy Conservation Service, and the Federal Energy Management Program, to name a few.

In an effort to reduce the burden of regulations on the U.S. economy, and to ensure that regulations are designed, promulgated, and implemented properly, President Carter issued Executive Order 12044 (43 FR 12661, 3/28/78), which requires all federal agencies to distinguish between significant and insignificant regulations, and to determine whether the regulation will result in major impacts. The Order also requires agencies to follow specified procedures for developing regulations, to evaluate the effectiveness of regulations periodically, and to publish a semi-annual regulatory agenda. To implement the Order, DOE first issued DOE Memorandum 2030.1, "Procedures for the Development and Analysis of Regulations, Standards, and Guidelines" (DOE 12/18/78), which was issued later for public comment as "Improving Government Regulations, Proposals for Implementing Executive Order 12044" (43 FR 18634, 5/1/78). DOE operated under the guidelines established in DOE 2030.1 for more than a year, when revised proposals were issued, "Guidelines for the Development and Analysis of Regulations" (45 FR 12282, 2/25/80).

The Office of Policy, Planning, and Evaluation (PPE) is responsible for responding to the requirements of the Executive Order and the DOE guidelines as they affect current and anticipated CS regulatory programs. This study was commissioned to gather information on the impact of the Order and the guidelines on CS regulatory practices, to investigate problems encountered by CS staff when implementing the Order and guidelines, and to develop recommendations to resolve these problems.

1.1 APPROACH

Four principal objectives were first identified: 1) to review federal administrative procedures in order understand how the Carter Administration's regulatory reform initiatives affect CS and PPE, 2) to analyze current CS regulatory practices, including the impact of the Executive Order and DOE guidelines on these practices, 3) to explore issues and problems encountered by CS staff with current CS regulatory practices, and 4) to develop recommendations for PPE to consider as potential solutions to the issues and problems raised by CS staff.

To accomplish these objectives, five major tasks were outlined. First, legislation, Executive Orders and DOE Memoranda concerning federal administrative procedures relevant to the development and analysis of regulations in CS were reviewed. Second, relevant DOE Orders and Memoranda were analyzed and key DOE and CS staff were interviewed in order to comprehensively describe the current CS regulatory process. Third, DOE staff from the Office of the General Counsel (GC), the Office of Policy and Evaluation (PE), the Office of the Environment (EV), and the Office of the Secretary were interviewed to explore issues and problems encountered with current CS regulatory practices. Fourth, the regulatory process at five other federal agencies were reviewed in order to analyze how other agencies have approached solving regulatory problems and responded to the Executive Order. Fifth, based on the previous four tasks, recommendations for potential solutions to the CS regulatory problems uncovered were developed.

1.2 ORGANIZATION OF THE REPORT

The report is organized according to the five tasks outlined above. Chapter 2 presents general background information on the federal regulatory process, on the different types of regulatory procedures, and on informal rulemaking requirements. In addition, the Carter Administration's regulatory reform initiatives, and DOE's responses to them, are reviewed; these include Executive Order 12044, the Regulatory Analysis Review Group (RARG), and the Regulatory Council.

Chapter 3 gives a phase-by-phase description of the current regulatory process within CS. Five distinct but interdependent phases of this process have been identified: 1) initiation of the regulatory development process; 2) coordination of key actors and activities; 3) analysis and evaluation of the regulation; 4) public participation in the development and analysis of the regulation; and 5) policy oversight and concurrence by management on the regulation.

Interviews with DOE staff revealed a number of issues and problems encountered in the CS regulatory process. Chapter 4 presents these problems and issues in four major categories: 1) those related to regulatory procedures; 2) those related to the organization of CS; 3) those related to the performance of analyses and evaluations of regulations; and 4) those related to the management and review of a regulation's key policy issues.

Chapter 5 reviews the regulatory process at five other federal agencies, 1) the Environmental Protection Agency (EPA), 2) the Department of Agriculture (USDA), 3) the Department of Transportation (DOT), 4) the Department of Housing and Urban Development (HUD), and 5) the Occupational Safety and Health Administration (OSHA). Separate reports on each agency are presented as Appendices A through E.

Finally, Chapter 6 presents recommendations for possible solutions to problems encountered in the CS regulatory process. Based on the findings of this study, five major recommendations were identified.

2.0 THE REGULATION DEVELOPMENT PROCESS: ITS LEGAL, POLITICAL, AND INSTITUTIONAL ENVIRONMENT

This chapter reviews the various constraints that are brought to bear on federal agencies when they develop regulations. The chapter outlines types of regulatory procedures, the historical development of informal rulemaking, recent activities supporting reform, and external requirements imposed upon formal rulemaking.

Regulation promulgation can be evaluated based on results or on the process. An evaluation based on results focuses on the merit of the regulation, which ultimately requires some external normative model of what is "best." For the most part, regulations have been evaluated according to their process. This type of evaluation is based on the belief that an adversary process most effectively achieves optimal results. The adversary process means that all sides must be heard, all information aired, and all facts and conclusions questioned. The results are "best" not in the sense that they will match some normative conception of the public interest, but rather in the sense that every side is accounted for and fallacies of fact and conclusion are eliminated. One commentator argues that, short of omniscience, it is impossible to make good decisions without an adversary approach:

It is now abundantly clear that the knowledge base is generally so inadequate that issues can be fully explored only by means of a dialectic process in which disagreement is openly recognized. How to use conflicting opinions in a constructive way is probably the major problem facing regulators today (Majone 1979).

However, the adversary process is precisely what critics attack when they seek to challenge a regulation, and so the process must be strengthened in the sense that it satisfies the opportunities for input by all interested parties. Congress, the President, and the courts have all expressed concern over the effectiveness and efficiency of the adversary process, and each branch has implemented some reforms. The consequence of these actions has been a number of requirements on agencies that, to a fairly large degree, constrain agencies' discretion in promulgating regulations.

2.1 TYPES OF REGULATORY PROCEDURE

Various regulatory agencies dot the bureaucratic horizon. All of these agencies at various times need rules and regulations to aid them in carrying out their tasks. Rules and regulations can be promulgated in three different ways, internal rulemaking, adjudicative rulemaking, and informal rulemaking.

Internal rulemaking refers to regulations made by the agency to govern its own operating procedures; thus, although internal rulemaking quantitatively accounts for the greatest number of agency regulations, it really is of little concern outside of the agency. Outside parties do not participate in the process, and it is subject to no statutory limits.

Adjudicative rulemaking, also known as "on the record" or formal rulemaking, was first developed by the Administrative Procedure Act (APA). Formal rulemaking is required whenever Congress provides by statute for a decision made "on the record after opportunity for an agency hearing." (5 U.S.C 553(c), 554(a)).

Formal rulemaking mimics the procedures of a courtroom: testimony is taken and a hearing examiner reaches a decision through a written opinion. The hearing examiner is known as an Administrative Law Judge (ALJ). In most cases, the APA requires the ALJ to be completely independent of the agency; for example, the ALJ, rather than the agency staff, must write the decision. In some other circumstances (licensing, for example), the APA permits a more relaxed standard. In practice, however, the distinction usually is not made, and agencies run formal rulemaking proceedings quite strictly, with the full panoply of rights afforded in a judicial court, including direct and rebuttal evidence and cross-examination.

Those who disagree with a result of the proceedings can appeal to the agency head, and under such circumstances several strict rules apply to this individual's behavior. For example, he cannot speak to any of those involved in the process. As a result, many agencies keep separate staffs, one to "prosecute" cases before ALJs and another to assist the agency head.

Obviously, this procedure is complex, costly, and time-consuming. It is for this reason that APA carefully limited its use and introduced the concept

of informal rulemaking. Today formal rulemaking is used primarily in rate-making and market entry cases by the FCC, ICC, CAB, and EMC, and in unfair labor practices cases by the NLRB.

Informal (or "notice and comment") rulemaking is the most important form of rulemaking, and is thus the focus of this chapter. Most legislative and substantive (as opposed to purely internal and procedural) rules are promulgated this way, and it is being used more and more, following a general decline in adjudicative rulemaking. In fact, the focus on many courts now is not on the category (adjudicative or informal), but rather on "whether the procedures used seem fair in a particular case (U.S. Congress 1977)."

As envisioned by the APA, informal rulemaking consisted of a few simple steps in the Federal Register. The agency develops a proposed rule, publishes it in the Register, receives public comments, and publishes a final rule, accounting for the public comments.

2.2 HISTORICAL DEVELOPMENT OF INFORMAL RULEMAKING

Informal rulemaking was created and developed in three steps: 1) The Administrative Procedure Act created informal rulemaking; 2) early 1970s court decisions added content to the procedure; and 3) Executive and legislative reforms have altered procedures in response to regulations' perceived excessive costs and "over-regulation." This last step is treated in a separate section.

2.2.1 The Administrative Procedure Act

The New Deal policies of Franklin Roosevelt resulted in an explosion of regulation that caught even the Government by surprise. Pressure for some sort of control on the regulatory process came from those who believed the existing procedures to be inadequate and those who saw the APA as an indirect way of undercutting regulation itself.

Pre-APA procedures clearly were inadequate. Although regulations were issued after trial-like hearings, the agency (including, on occasion, those who had argued for the rule) wrote the decision. The process was anonymous and inaccessible to outsiders. Results, it seemed, were preordained.

Reformers argued that agencies should be split in two, separating the prosecutorial and judicial functions. Agencies argued in response that much rule-making was not "prosecutorial" in nature.

The result was the APA, an extraordinary compromise made more remarkable by the fact that it has endured for nearly 40 years. The APA established formal and informal rulemaking. Informal rulemaking was a great innovation. Under the APA model, the agency developed rules in a free-wheeling manner, using any "sources of information and analysis, including business or consumer representatives, academicians, or the agency's own expertise (DeLong 1979)." The agency had discretion to hold hearings, initiate studies, or do anything it wished to help it develop regulations. After proposing the rule in the Federal Register and receiving comments, the agency could reverse, withdraw, or promulgate as is. In promulgating the final rule, the agency could freely use information or arguments at its disposal, even if they had not been raised before. If challenged in court, the agency had to prove two items: that the rule was within the agency's legal authority, and that the rule was neither arbitrary nor capricious.

Clearly, the original model of the APA intentionally left much room for discretion in procedures to the agencies. The New Deal era "rejected any suggestion that the quality of regulatory decision could be improved by 'mere' procedural means (Majone 1979)." The goal of the informal rulemaking process of the APA was to allow agencies much latitude in obtaining information. It was a philosophy that, quite simply, discounted the influence of special interests and regarded all agency personnel as selfless creatures motivated only by the public interest.

2.2.2 Court Activity

In the early 1970s, a new series of regulatory initiatives appeared. The OMB noted:

As new laws were passed, new agencies were needed to carry them out. Often laws overlapped, resulting in regulations that were duplicative or in some cases contradictory. This historic change in both the nature and scope of Federal regulation made the Administrative Procedure Act out of date (OMB 1979).

The Federal courts were the first to initiate reform. In its 1971 decision in Citizens to Preserve Overton Park, Inc. v. Volpe, the Supreme Court completely changed the informal rulemaking process. The Court concluded that effective judicial review required access to records used by the agency. The problem was that agencies did not keep records, although one could argue that the APA discouraged records. The result of Overton Park was that agencies had to keep records.

Court review of agency rules is not a substantive process; it is solely procedural. But Overton Park and subsequent cases imposed a significant number of formal procedural requirements on agencies. For example, the agency must establish a proper "framework for principled decision-making," and the record must show "thorough ventilation of issues (DeLong 1979). The effect of these requirements was to narrow the gap between formal and informal rule-making procedures. The Court's inquiry was into fairness: its goal was to ensure that every side participated and that the agency honestly considered all relevant factors.

2.3 RECENT ACTIVITIES SUPPORTING REFORM

2.3.1 Carter Reforms

In 1978, President Carter introduced three reforms that imposed a new series of requirements on most agencies:

- Executive Order 12044
- The Regulatory Council
- The Regulatory Analysis Review Group.

On March 23, 1978, President Carter released Executive Order 12044, which set out a series of reforms to create a regulatory process that ensures that:

- Agencies detail the need for and purpose of a regulation
- Agency heads continuously participate in the process
- Public participation opportunities expand
- Regulatory alternatives are considered
- Costs of regulations are minimized.

Executive Order 12044 gives OMB, not the courts, responsibility for implementing the Order's requirements. The Executive Order included requirements for regulatory analyses, "sunset" review of current regulations, plain English, a post-issuance evaluation plan, and public outreach efforts.

Executive Order 12044 did not apply to independent regulatory agencies, primarily because Carter wished to avoid a possible confrontation with Congress. However, Carter did ask the independent agencies to comply voluntarily.

Carter created the Regulatory Council to assist in coordinating regulatory activities. Before the Council existed, two groups -- the Interegulatory Liaison Group (IRLG was composed of EPA, FDA, CPSC, and OSHA) and the Toxic Substances Strategy Committee -- attempted to secure some coordination. However, neither of these groups covered all agencies.

Most agencies are represented on the Regulatory Council. The Council prepares the Calendar of Federal Regulations, undertakes studies of aggregate effects caused by multiple regulation, and can take the lead in coordinating two or more agencies.

The Regulatory Analysis Review (RARG) primarily helps OMB enforce the Regulatory Analysis requirement of Executive Order 12044. RARG is supposed to examine 15 to 20 regulations per year to see if the source agency adequately performs its own Regulatory Analysis. RARG will attempt to convince an agency to alter regulations that impose excessive costs.

2.3.2 Legislative Reform Initiatives

In an effort to make agency promulgation more responsive to a sensitive economic climate and to promote better-informed decisionmaking, the Senate Governmental Affairs Committee, the Senate Judiciary Committee, and the House Judiciary Committee have initiated legislative activity to enhance external control over agency promulgation. Senate efforts have culminated in S262, which at this time has two distinct versions -- the Governmental Affairs text

and the Judiciary text. The two committees are presently negotiating in an effort to meld these two versions into one bill to be presented on the Senate floor. The House has prepared another version, H.R. 3263.

Originally introduced by Senator Ribicoff (D-Conn), the Senate Governmental Affairs text is designed to complement Executive Order 12044 by supporting Executive control over agency promulgation. According to this version, each regulatory agency will establish a separate office for regulatory planning and management -- a proposal essentially designed to promote the centralization of the regulatory process. Each regulatory agency will have the power to subpoena any person to appear and produce books, papers, and documents germane to the proposed regulation. Also, each regulatory agency will be granted a fund to be used to increase public participation.

The Senate Judiciary Text was originally introduced by Senator Kennedy (D-Mass). This text is designed to remedy some of the problems currently associated with agency promulgation. Specifically, this version seeks to:

- Consolidate the joint responsibilities of both the Regulatory Council and RARG.
- Establish a Regulatory Management Information System designed to:
1) classify the subject areas of agency regulations and the persons or class of persons subject to such regulations, 2) identify those regulations that apply to particular industries, and 3) make this data available to officials who are planning new regulatory requirements.
- Incorporate a regulatory flexibility analysis into each agency's regulatory process, designed to protect small businesses, small organizations, and small agencies from regulations aimed at large corporations.

The House of Representatives' version of regulatory reform, H.R. 3263, endeavors to promote a more cost-sensitive evaluation of the impacts of agency promulgation. This version focuses attention on the RA and directs that the final RA: 1) assess how the requirements of the regulation accommodate

regional differences; 2) state whether it is lawful, feasible, and desirable for the agency to exempt small businesses or small organizations from any requirements of the regulation; and 3) state the total costs of preparation, compilation, review, and publication of the preliminary and final RA. This version seeks to eliminate the use of contractors in the preparation of the RA except for the compilation of information to be used in the preparation of any such analysis. This initiative would also restrict future federal funding for the costs of public participation in agency proceedings.

2.3.3 DOE Responses to Reforms

DOE officially responded to Executive Order 12044 with its own internal order: DOE 2030.1. Some highlights of this order were:

- The establishment of a special staff unit (the Regulatory Program Division in the Office of Policy and Evaluation) to oversee compliance with the Order and other regulatory reform tasks
- The establishment of 12 criteria (in contrast with the Executive Order's eight criteria) to be satisfied before the issuance of a regulation
- The establishment of a computerized action coordination and tracking system (ACTS) to monitor progress over time on regulatory actions
- The compilation of special mailing lists with 29,000 names on an issue-specific basis in compliance with the public participation portion of Executive Order 12044.

OMB (September 1979) assessed the agencies' abilities to comply with Executive Order 12044. While recognizing some of the aforementioned achievements of DOE, OMB nevertheless criticized DOE on its less than satisfactory RA effort. Specifically, OMB charged that DOE had not adequately considered alternative approaches or alternative enforcement mechanisms. OMB cited a lack of high-level support for the RA as a major contributor to the inadequacy of the Department's performance. In response to this criticism, DOE proposed a revision of 2030.1 to incorporate the changes suggested by OMB in an effort to remedy the apparent deficiencies of the original DOE order.

2.4 EXECUTIVE, LEGISLATIVE AND JUDICIAL REQUIREMENTS IMPOSED UPON INFORMAL RULEMAKING

The actions of Congress, regulation, the courts, and the President all have served to add requirements to promulgation. None of the reforms have reduced these requirements. The promulgation process still follows the basic "notice and comment" framework laid out by the APA, but the philosophy and intent of today's informal rulemaking differs significantly from yesterday's. The Act's original philosophy rejected process as a control and gave agencies great discretion. It was oriented toward results. Today's philosophy is premised on concerns for equity and a belief that a public adversarial process that considers all alternatives is the only way to reach satisfactory results, and is thus oriented toward process.

This section briefly describes the requirements imposed by the executive, legislative and judicial activities described in the preceding sections. The requirements are presented in roughly the same order in which the agency would encounter them in the promulgation process.

2.4.1 Agency Head Oversight and Approval

For a long time, regulations were developed and promulgated without the agency head's knowledge. Now the agency head must participate in the promulgation process from the beginning. Before significant regulations are begun, the agency head must concur that they are needed and approve the workplan for the regulation's development. This individual is responsible for ensuring that the agency examines alternatives, solicits and responds to public comments, uses plain English, calculates costs and benefits, chooses the least burdensome regulations, and develops a post-issuance evaluation plan.

2.4.2 On the Record

The on-the-record requirement means that agencies cannot use unrevealed sources as a basis for their decisions. Ex parte contacts may be a per se basis for a court overturning and remanding a regulation. This may be the case even if the contact is a Presidential one. Courts will not accept allusions to an agency's "expertise." Furthermore, the record must be available

to the public and in a usable form (in other words, indexed). In effect, on-the-record requirements mean that, from the beginning, agencies should document a regulation's development.

2.4.3 Agenda of Regulations

Agencies must publish a schedule of upcoming regulations. They must inform the Federal Register in October of what dates they will publish. The Agenda must detail: 1) the regulations the agency is considering, 2) need for the action, 3) its legal basis, 4) the regulation's status, 5) the telephone number of the official responsible, 6) whether an RA is required, and 7) what currently existing regulations are scheduled for review.

2.4.4 Regulatory Analysis

Executive Order 12044 calls for an RA if:

- The annual effect of the regulation on the economy is \$100 million
- The regulation would result in major increases in costs or prices for individual industries, levels of government, or geographic regions
- The agency head desires one.

This requirement should not be read restrictively. OMB notes that an RA should be the rule, not the exception.

The purpose of an RA is to avoid "unintended and undersirable side-effects, as well as to ensure that rules do not impose unjustified costs on the private sector (Clark 1979)." The RAs grew out of President Ford's inflation impact statements. However, the Ford statements were without teeth; they were produced late in the process, did not examine alternatives, and their results were not binding.

A draft RA must be prepared prior to the Notice of Proposed Rulemaking (NPR) in the Federal Register and be available to the public. When the Final Regulation is published, the final RA must be available to the public. The RA should include a statement of the problem, the alternatives available, the direct and indirect economic consequences of each alternative, and the reasons for choosing one alternative over the other.

2.4.5 Urban and Community Impact Analysis

The Executive Order requested the OMB to develop an analytic mechanism for evaluating the impact of regulations on communities. OMB Circular A-116 provides instructions for conducting Urban and Community Impact Analyses (UCIAs). An OMB memorandum of 1979 suggests that UCIAs look at four factors affected by the regulation:

- Population shifts in local areas, particularly among minority and low income persons
- Effects on per capita income
- Employment levels
- Fiscal impacts on localities.

UCIAs are to be conducted for regulations that appear to have disproportionate impacts on cities or certain regions. Final criteria for when UCIAs should be conducted have not been developed.

2.4.6 "Due Process" Requirements

Courts have ruled that anyone interested in the regulation must have an opportunity to participate. The agency must provide a "genuine opportunity to challenge the main points of the agency's case" (U.S. Congress 1977). This interaction may mean hearings, oral testimony, and at times cross-examination of witnesses, especially those presenting expert or technical information.

As part of this requirement, the agency must notify the public of its intention to promulgate. Executive Order 12044 makes this point explicit. Aside from publishing notice in the Federal Register, agencies may have to inform the public with open hearings, advertisements in newspapers, and direct notification. Without such notification, courts may void regulations because the process did not offer "a genuine opportunity to challenge...."

2.4.7 Publication of Proposed Rule

The agency must specify why it wants to take the action and information and conclusions that support the action. Everything there must be exposed to public comment. All of this should be published in the Federal Register.

2.4.8 60-Day Comment Period

After publication of the proposed rule, the agency must allow at least 60 days for public response. In complex or controversial cases, agencies are encouraged to lengthen the comment period.

2.4.9 Response to Comments

Courts require that agencies meet, rebut, or otherwise respond to every comment received in the Federal Register. This duty to criticize is so strong, in fact, that some courts require the agency to raise and respond to issues on its own, even if there is no public comment on it.

2.4.10 Publication of Final Rule

The final rule must identify all the major issues, show the agency's reasoning, and demonstrate that all relevant factors were examined. At the same time, the agency must publish public comments and its responses to them.

2.4.11 30-Day Implementation Gap

With the exception of rules for financial assistance, promulgated rules cannot become effective until at least 30 days after publication in the Federal Register.

2.4.12 'Sunset' Review

Executive Order 12044 requires agencies to begin a periodic review of all existing regulations, following the same procedural steps they would for new regulations. Agencies must consider: 1) the continuing need for the regulation; 2) complaints received; 3) direct and indirect burdens of the regulation; 4) language simplification; 5) overlap problems with other regulations, and 6) changes in technological, economic, and social conditions since the regulation was first promulgated. Eventually, this review should bring all existing regulations within the scope of Executive Order 12044.

3.0 REGULATORY GUIDELINES AND PRACTICES IN CS

The wide variety of activities conducted within the various CS program offices makes it difficult to develop generic procedural guidelines applicable to all instances. For example, at least three different types of CS activities and initiatives develop rules and regulations:

- implementation assistance programs such as demonstration or cooperative agreements
- financial assistance programs such as loan guarantees and price supports
- regulatory actions such as the Building Energy Performance Standards.

These varied types of rulemaking activities have different purposes and results. In some cases the rulemaking procedures differ. It might appear that no set of specific guidelines are applicable to all CS activities. However, these initiatives share one important feature: they are all activities originated within the federal government that will affect the private sector.

This chapter describes the current regulatory process within CS and the requirements of Executive and DOE regulatory reform actions. The development of a regulation within CS involves five types of actions or phases: 1) action initiation, 2) action coordination, 3) analysis and evaluation, 4) public participation, and 5) policy review and concurrence. These actions are applied in varying degrees to the various rulemaking activities. All CS activities do not require the same level of action.

Since CS develops its regulations within the framework of DOE 2030.1 and its revisions, this chapter describes both the general DOE requirements and the actual CS practices for each phase of the regulatory development. The information on actual CS practices was obtained from a series of interviews with CS and DOE personnel. The topics covered in the interviews and the names of those interviewed are listed in Appendix F.

3.1 INITIATION OF ACTION

DOE Memorandum 2030.1 (44 FR 1032, 12/18/78) states that the DOE Secretarial Office that proposes a regulation is responsible for its development and administration. This "lead office" first notifies the Director of the Office of Executive Secretariat, which in turn notifies all of the Secretarial Offices and the Deputy Secretary of the proposed regulation. The Secretarial Offices are responsible for notifying the lead office if they wish to help in the regulation's development and analysis. Their contribution is made primarily through participation in the working group. Under DOE 2030.1, the Executive Secretariat's Office is also responsible for tracking the progress of the regulation through its development, which is accomplished with the Action Coordination and Tracking System (ACTS). ACTS helps ensure meeting milestones in the regulation's development. In addition, a CS tracking system, the Action Tracking System (ATS) performs a similar function for CS. ACTS and ATS are further described in the next section.

The recently proposed revisions to DOE 2030.1 (45 FR 12282, 2/25/80) would change the initiation process. The first step, presently in effect, would be for the lead office to submit an "authorization memo" to the Secretary and Deputy Secretary. This authorization memo would include:

- a description of the problem that the regulation addresses
- the rationale for developing the regulation now
- a statement of who would be harmed or benefited by a regulation
- a discussion of alternative solutions to the problem
- an assessment of whether a Regulatory Analysis (RA) should be performed
- procedures for involving the public in the regulation's development
- a schedule for the completion of the regulation's development.

A meeting with the Secretary or the Deputy Secretary may be substituted for the authorization memo. At the meeting, the above items should be discussed and a memorandum for the record should be prepared by the lead office and submitted to the Secretary and Deputy Secretary.

The authorization memo is an important first step in the regulatory process. Based on the memo, the Secretary or Deputy Secretary can determine the

appropriate level of supervision and review over the regulation's development, and can determine whether a Regulatory Analysis is necessary. Individuals with responsibilities for overseeing the regulation's development will have reviewed the intent of the regulation and an appropriate concurrence process can be implemented. The authorization or information memorandum will be reviewed by GC and PE.

3.2 ACTION COORDINATION

Two systems are used to coordinate the various actions and their scheduling, the Action Coordination Tracking System (ACTS) and the CS-Action Tracking System (CS-ATS). These two systems track actions such as Notices of Inquiry, Availability, Issuance of Order, Proposed Rules, Final Rules, and Program Information, and internal planning documents, studies, and reports. This report is interested in those actions that result in final rules and that are eventually published in the Code of Federal Regulations.

The major purpose of both systems is to provide easy access to information on scheduling and milestones for various actions. The ACTS charts all DOE actions while CS-ATS charts only CS actions. These two systems are closely connected since the progress of actions are tracked in both systems by establishing milestones and completion dates for activities such as action initiation, working group coordination, mandatory concurrence, secretarial review, issuance of end product. Along with milestones and target dates, the title of the action, a brief summary of the purpose of the action, and the legislative or other authority for undertaking the action are also submitted to both ACTS and CS-ATS. Incorporating milestones into the ACTS and CS-ATS is one of the first steps in current rulemaking procedures.

The time it takes to move through the process depends largely on the type of action considered. For example, if the action is a significant regulation with major impacts (as defined by Executive Order 12044) and requires an RA and an Environmental Impact Statement (EIS), and exhibits coordination and concurrence problems, it could take several years from initiation of the process to publication of the final rule. A simpler action, like a Notice of Inquiry, probably will not require a formal analysis or cause concurrence problems and will require much less time to complete.

Because the Proposed Revisions to DOE Memorandum 2030.1 require the Office of the Executive Secretary to track the development of all significant regulations through ACTS, the following additional information about an action is submitted into ACTS: 1) whether the action is significant, 2) whether the action has major impacts, and 3) whether an EIS or an Environmental Assessment (EA) is required.

Similarly, because the CS-ATS is concerned only with CS actions, two additional milestones are charted by CS-ATS: 1) a CS concurrence chain, and 2) revision and signoff by the Assistant Secretary for CS.

Working groups provide a way of coordinating CS rulemaking with other DOE secretarial offices. They are defined in DOE Memorandum 2030.1 as an "ad hoc group, representing interested secretarial offices, which works with the lead office in developing a regulation." If the working group members also happen to represent offices on the mandatory concurrence chain (e.g., GC or PE), which is frequently the case, then the working groups can perform the added function of easing the concurrence process by providing the opportunity for input from those offices in the mandatory concurrence chain in the early stage of drafting a rule.

It is primarily the Program Manager's (i.e., lead office staff member who manages the development of the regulation) responsibility to organize and coordinate the working group. Once a regulation is scheduled and charted on ACTS, interested parties from all over DOE have the opportunity to review the action and inform the Program Manager if they wish to participate in the working group. The Program Manager elicits comments from working group participants and raises issues relevant to developing and analyzing the action. The Program Manager also coordinates the incorporation of the working group's comments into the regulation's development.

Disagreement is of course inevitable in a working group. Many CS or DOE actions address broad and complicated issues. By definition, the working group represents the interests of a variety of DOE Offices. Typical CS working groups include representatives from GC, PE, EV, and other interested program offices and Secretarial Offices. Clearly, developing a regulation is a

collective effort. When the diversity of interests, skills, and perspectives in the working group are utilized properly, more effective regulations usually result.

3.3 ANALYSIS AND EVALUATION

The purpose of an RA is to help government officials determine the desirability of a regulation, and the content and requirements of the regulation. If prepared properly, the document should increase the quality of regulatory decisions made by agency decisionmakers. Simultaneously, proper analysis should help accomplish the President's goal of reducing the regulatory burden on the American public. Analysis of regulations is performed within the framework of the requirements of the Executive Order and DOE guidelines. This section first describes the criteria for determining when an RA is required and what the document is expected to address.

Executive Order 12044 lists three criteria for determining which federal regulations will require a formal RA:

1. The regulation would have an annual effect on the economy of at least \$100 million.
2. The regulation would cause a major increase in costs or prices for individual industries, levels of government, or geographic regions.
3. The head of the agency desires one.

The DOE has issued guidelines (DOE 2030.1) for implementing Executive Order 12044. These guidelines, currently under revision go beyond the Executive Order, and list two additional criteria:

1. The regulation is likely to affect any of the objectives of the national energy policy or energy statutes.
2. The regulation would have a substantial adverse impact on competition.

These two DOE guidelines help agencies anticipate when an analysis will be required.

Office of Management and Budget (OMB), which is responsible for implementing the Executive Order, believes too much emphasis has been placed on the \$100 million dollar criterion (OMB 1979). OMB interprets the Executive Order to mean that an RA should be done for any important or controversial rule that the agency's head feels deserves an analysis or causes a major impact on any segment or region of the economy. The \$100 million effect on the economy would be a last criterion.

Under Executive Order 12044 and DOE 2030.1 and its revisions for implementing the Executive Order, an RA must cover the following topics:

- a succinct statement of the problem and the mandate for government action
- a description of alternative regulatory and nonregulatory approaches to dealing with the problem
- an analysis of the economic consequences of each of the alternatives
- the reasons for choosing one alternative rather than the others.

Supporting documentation should provide a more detailed explanation of why the preferred alternative is chosen or other information that will contribute to determining the regulation's requirements. Examples of such information would be the costs of compliance, enforcement and reporting burdens for the alternatives, and a description of the distribution of the regulation's costs and benefits (45 FR 12281, 2/25/80). DOE often feels the legislation under which the regulation is being developed requires a certain form of regulation that precludes certain alternatives. In this case, while the agency may be prevented from choosing one of the alternatives, analysis of alternatives might indicate where further legislative action would be appropriate. OMB describes the function of the analysis as focusing attention on developing a regulation using good common sense.

The comparison of alternatives is to be done early in the decision-making process so that policy officials and the public can join in the debate over the most efficient and effective way to regulate.

The analysis may compare different approaches (market incentives vs. alternative enforcement mechanisms, or the timing of compliance). The analysis is not designed to identify costs and benefits for a particular decision; it is intended to be a thorough, common sense consideration of the strength and weaknesses of various alternative regulatory approaches based on both descriptive and numerical comparisons. The scope and nature of these comparisons is determined by the information available. But for all costly new regulations, decisionmakers have the benefit of a discussion of alternative choices, quantified to the greatest extent possible, before the agency proposes the new regulation (OMB 1979, p. 19).

The diversity of rulemaking activities conducted within CS results in a diversity of impressions about the use of a regulatory analysis in developing a rule or regulation. The impacts of BEPS, one of the largest regulatory activities undertaken by DOE, were analyzed with approximately 3000 pages of documentation. On the other hand, several financial programs (for example, loan guarantees and price supports) performed no formal regulatory analysis. The tendency is to avoid a formal analysis if possible. Also, manpower limitations at DOE have turned many of the program offices into groups of contract monitors. Given the present constraints, the use of contractors to perform regulatory analyses seems unavoidable. Problems related to this trend are discussed in Chapter 4.

Executive Order 12044 requires agencies to systematically review existing regulations in order to weed out those that are unnecessary and to update and simplify those that continue to be necessary. In addition, the Proposed Revision of DOE 2030.1 requires periodic evaluation of the effectiveness and continued need of existing regulations. In fact, the Proposed Revision requires that "each new significant regulation shall be reviewed within 5 years of its effective date, or, for existing regulations, by September 30, 1983." Procedures for review of regulations within DOE are outlined in the Proposed Revision of DOE 2030.1 and are the same as those for the development of new regulations.

DOE began to undertake a review of unnecessary regulations when it announced 15 regulatory reform initiatives in May 1978. These initiatives included regulations which were to be amended or abolished as determined by

DOE's Regulatory Reform Task Force. However, when the Task Force was abolished late in 1979, the regulatory reform initiative program went with it.

Effective sunset review is difficult for CS to implement at the same time that complicated new energy statutes are being interpreted and implemented. However, with the demise of the regulatory reform initiative program, there is currently no mechanism to begin laying the groundwork for reviewing newly implemented regulations--both to meet sunset review requirements and to assist effective policy formulation.

3.4 PUBLIC PARTICIPATION

The Administrative Procedures Act requires that the public be involved in the rulemaking process, and increased public participation is a major goal of the President's Executive Order. Although public participation may delay the regulation, the involvement of the public should produce a number of visible benefits to the program offices and CS. Specifically, it improves the quality of rules promulgated by DOE. By including information from a broad spectrum of the public, the rulemakers should become more aware of the rule's impacts. Involvement of the public also reduces the possibility of the courts striking the rule as arbitrary. Public participation strengthens DOE's position in any litigation.

Several mechanisms are available for program offices to inform and involve the public in the regulatory process. These mechanisms, which should be coordinated with the Directors of Intergovernment Affairs and Consumer Offices, include the regulatory agenda, the ANOPR, and the public comments period.

The semi-annual agenda of regulations being developed by CS and DOE provides the public with the earliest indication that CS is developing a regulation as well as the regulation's schedule. The agenda describes the status of regulations being developed and provides the name and telephone number of a contact person at CS. OMB notes that the semi-annual agendas have generated consistently positive comments from the public about their usefulness (OMB 1979).

A second method of informing the public early in the development of a regulation is publication of an ANOPR in the Federal Register. This notice requests public comment before the agency has formally proposed the regulation. The ANOPR can be used to identify specific questions or issues that would be helpful sources of public comments.

Near the completion of the regulation's development an NOPR in the Federal Register is used to describe the regulation and the impacts determined by the RA (if required), and to invite the public to comment on the regulation or its impacts. If the public comment periods are to effectively provide public input to the regulation's development, there must be enough time for written comments. The Executive Order requires at least a 60-day comment period for significant regulations.

Public hearings, conferences and press releases to trade journals, magazines or newspapers all serve to provide information to the public that might not read the Federal Register. Hearings and conferences held outside Washington, D.C. have been effective in providing a method of involving persons who would otherwise have difficulty responding to requests for public comments. Some regulations are most effectively brought to the public's attention by involving state governors or regional DOE representatives.

In addition to informing the public and requesting their comments, the public comments must also be incorporated into the decision process. For example, public comments regarding BEPS were placed into special documents alongside the relevant portion of the ANOPR and DOE's response to the comments. This allowed decision makers (at DOE) to review public concerns and information as well as the agencies' response to those concerns.

3.5 POLICY REVIEW

One of the major goals of Executive Order 12044 was to increase review and supervision by agency heads and top policy officers in a regulation's development. The supervision provides an opportunity to determine whether the regulations are the most effective policy tool to accomplish a specific objective and whether they are written to minimize any undesirable costs and

burdens. With DOE and CS, DOE 2030.1 and its recent revisions provide the framework for ensuring effective policy management.

The regulation's development is reviewed by policy and upper level DOE personnel at three important points. It is first reviewed at the initiation of the regulation through the authorization memo. At this point the Secretary's and Deputy Secretary's offices, as well as PE and GC, become aware of the regulation and review it. In addition, the Secretary or Deputy Secretary can require the lead offices to submit the final regulation to them for concurrence.

Under DOE 2030.1 a second point of review in the development of the regulation would occur through the involvement of GC and PE in the working groups. However, the revisions to DOE 2030.1 do not provide the working groups opportunity to review the regulation. It is not yet clear if any formal or informal structure will be substituted for the working group.

The final significant step in the development of a regulation is the concurrence process. This provides a final check point to ensure that the regulation is appropriate and desirable for the problem it is intended to correct.

The lead office is responsible for meeting all of the requirements in the regulatory process. After the final comment period, the lead office circulates the regulation to PE, GC, Intergovernmental and Institutional Relations, the Energy Information Administration, and any offices that participated in the working group. These offices review the documents in light of DOE Memorandum 2030.1 and can make comments to the Secretary or Deputy Secretary. Regulations which require concurrence by the Secretary or Deputy Secretary are to be reviewed by them after review by all other offices. Regulations which do not require Secretary or Deputy Secretary review may be signed by the head of the lead office.

4.0 CS REGULATORY PROBLEMS AND ISSUES

Interviews were conducted with DOE staff from CS, GC, and PE. The approach and design of the interviews are described in Appendix F, which also provides a list of people interviewed and an outline of topics discussed.

Problems were identified in four major areas from information collected during the interviews: 1) procedural problems, 2) organizational problems, 3) analysis and evaluation problems, and 4) policy review and oversight problems. Comments, impressions, and observations by DOE staff concerning these problems have been synthesized and are reported herein.

4.1 PROCEDURAL PROBLEMS AND ISSUES

A set of related problems and issues concerning current regulatory procedures were reported by DOE staff. The most important issues stem from problems related to 1) uncertainty about DOE rulemaking requirements, 2) particular steps in the rulemaking process, notably the authorization memo and working groups, and 3) frustration with current procedures.

As stated earlier, DOE Memorandum 2030.1 was issued in December 1978 in order to implement Executive Order 12044. Recently, however, Proposed Revisions to DOE 2030.1 were issued for public comment, which changed DOE requirements in two significant ways: 1) authorization memos must be prepared and reviewed by the Secretary or Deputy Secretary, and 2) the requirement to organize formal working groups was abolished. These revisions have informally been in effect since December 1978. While public comments concerning the proposed revisions have been compiled and assessed, a final version of the revisions has yet to be issued. Because these procedures have changed significantly recently, and because new procedures are informally in place and have yet to be made final, there is still much uncertainty concerning what is required for rulemaking.

Staff from the Office of the Secretary and from GC reported that the requirement for formal working groups was abolished because they were cumbersome and ineffective but that the authorization memos were not working much better. CS staff experiences with both of these activities support both

assertions. For example, it was reported that authorization memos were submitted for review but no discernible review occurred. In fact, it was reported, weeks went by before program managers were informed of the status of the memo. This form of delay could seriously hinder program managers from delivering regulatory programs efficiently.

Many instances of dysfunctioning working groups were reported. DOE 2030.1 required formal working groups, including formal participation by the lead office, PE, and GC. Problems coordinating these groups occurred frequently and probably led to the decision to abolish their requirement. However, working groups perform a key function and still exist in current CS regulatory practices on what is now an informal basis.

One result of the widespread uncertainty in CS concerning rulemaking requirements is a detectable air of frustration with rulemaking on the part of many program managers. Frustration results primarily from the lengthy review and concurrence requirements in the early stages of rulemaking when draft actions are prepared, authorization memos considered, and milestones scheduled and coordinated. Some staff noted the importance of striking a balance between reforming the regulatory process in a way to increase policy supervision and efficiently delivering regulatory programs.

4.2 ORGANIZATIONAL PROBLEMS AND ISSUES

A number of DOE staff reported problems and issues related to the organizational structure of CS as it affects the regulatory process in CS. The most important issues stem from problems related to 1) overlapping programs, 2) the particular regulatory needs of several solar program offices, and 3) the lack of understanding among CS program offices concerning the role of PPE in the CS regulatory process.

Several CS staff cited instances of overlapping regulatory programs in CS which they felt were not being adequately coordinated. CS staff reported three major causes of this problem. 1) The recent change in management at DOE and the subsequent reorganization of CS had caused some confusion about particular program office responsibilities and about the fate of particular regulatory programs. In the confusion, some felt, duplication of effort was

possible. Most agreed that this situation was likely to clear up with time as the changes to the CS organization chart became final. 2) It was reported that CS staff and management tend to view program activities on the CS organization chart vertically and not horizontally; that is, potential areas of overlap between related CS programs which were developing in parallel were not being properly coordinated by staff members involved. 3) Serious manpower and time constraints have prevented program staff from actively coordinating and tracking overlapping program areas.

Another issue raised by staff in several Solar Program Offices (Industrial Applications, Power Applications, and Alcohol Fuels) centers on a lack of rulemaking experience in these offices, and a perception that the regulatory needs of the Solar Program Offices differ from those of other program offices. It appeared that the involvement these offices had with rulemaking took the form of technical support and participation in working groups with other CS programs or with the Federal Energy Regulatory Commission (FERC). Most of the staff interviewed were involved in R&D or commercialization activities and admitted a general lack of understanding about typical regulatory procedures. Staff indicated that this lack of understanding was inhibiting their interest and involvement in approaches to facilitate the commercialization of solar technologies which require rulemaking, e.g., loan guarantee programs, price supports, and regulations. Program offices often expressed interest in information and analysis of the best choice among the numerous policy instruments (loan guarantees, demonstration plants, regulations) to achieve their particular goals: in particular, how to determine which policy instrument is most effective, and how to know when the policy instrument has accomplished its task and should be deleted.

Many CS staff expressed uncertainty about the role of PPE in the current regulatory process. They responded negatively to the idea of adding PPE as another formal link in the concurrence chain. The question of PPE's role and responsibilities vis a vis PE's role and responsibilities was frequently raised. Several CS staff expressed a preference to work with PPE rather than PE if only to minimize outside (CS) review. They responded positively to the

idea of PPE performing activities which explain rulemaking processes, procedures, and requirements to staff. Much of the current confusion is the result of recent DOE and CS organizational changes in management and rulemaking procedures and requirements.

4.3 ANALYSIS PROBLEMS AND ISSUES

One of the most difficult aspects of Executive and DOE requirements is that rulemakers use the RA as a decision document. This problem is due primarily to the conflict between using an analysis as an internal decision document and using it as a way to allow the public an early opportunity to participate in the regulation's development. This conflict was often apparent in the comments made by CS program staff.

Few program offices viewed the RA as a document to contribute to making decisions. Often it was viewed as an impact assessment with much of the analysis showing the effects of the chosen level of the regulation. This is in contrast to OMB's interpretation that the RA is designed to compare the alternative approaches to regulation (OMB 1979). In addition, several people felt the analyses were not correctly timed. Apparently, little analysis is taking place by the time critical decisions are made.

There remains a concern, probably based on legal interpretations of environmental analyses, that the courts could delay regulations if the RA were not sufficiently detailed and documented. This has led program offices to produce regulatory analyses with supporting documentation more closely resembling an EIS than a document for making decisions.

One of the most common problems was the lack of adequate staffing in most of the program offices. The understaffing meant either contractors were used to analyze the regulations or the office would advocate an exemption from the usual regulatory process. The use of contractors is now a common component in the regulatory process, and several CS personnel mentioned difficulties dealing with contractors. Often the contractors lacked direction and supervision in their work. Two different opinions were offered for the cause of the problem: 1) the problem was caused by the general lack of direction within DOE,

which resulted in continually changing the tasks requested of the contractors, 2) the problem was caused by contractors not responding adequately to DOE's needs and direction.

Several CS staff members mentioned the lack of standardized assumptions and difficulties in establishing a baseline against which the impact of regulations are measured. The lack of standardized assumptions such as discount rates or fuel price increases resulted in the program offices spending a great deal of time making such decisions. Values for a number of these variables could be given by a policy office to ensure consistency across CS.

The two Executive Offices responsible for regulatory reform, the Council of Wage and Price Stability (CWPS) and OMB, stated that CS was performing and using the analysis more appropriately than other DOE offices. At the time of the interviews, BEPS was being evaluated by RARG, which is staffed by individuals from CWPS and OMB. The preliminary RARG report encourages Congress to postpone the date of promulgation and reconsider the need for BEPS. The report cites the lack of analysis in several areas and makes specific recommendations for more research. The report states that the problems are the result of both the legislation and DOE's actions.

4.4 POLICY MANAGEMENT PROBLEMS AND ISSUES

The recent revisions to DOE 2030.1 identify policy supervision as the most important area for improvement. Review and direction by policy-making officials are essential to the executive regulatory reform initiatives. The Executive Order and the DOE responses to 12044 increase policy supervision through greater involvement at the Secretarial and Deputy Secretarial level in the decision to proceed with a regulation and through involvement in the final concurrence system. Although this involvement improves policy supervision and is essential to the regulatory process, interviews with the CS program offices revealed a number of problems with current policy supervision.

Most program personnel interpreted policy supervision to mean the active involvement of both PE and GC in the regulation's development and the concurrence process following development of the regulation. Several

individuals mentioned that avoidable delays were created by problems in the policy supervision and working group arrangements. For example, the working group members from PE and GC were often unable to convince their management to sign off on decisions made during the regulatory process, which led to iterations on decisions and some delays. Problems also resulted from the change of staff members representing GC and PE. This lack of continuity on working groups caused delays and the necessity of reconsidering past decisions.

Several individuals noted that the presence of PE in the supervision of regulatory development had diminished in the past several months. They felt this was probably due to organizational changes in PE. Some noted that possibly as a response to PE's diminished role, GC's role has increased. The increased responsibility and presence assumed by GC was viewed as both helpful and detrimental. Although GC's knowledge of the regulatory process is almost essential to the program offices, as a result of their expertise, they are able to exercise a great deal of control over the regulation's development. At times, GC's influence extended to making policy decisions. This creates a problem because the program offices felt control of the regulation to be their responsibility.

5.0 ALTERNATIVE REGULATORY PROCESSES

We reviewed the promulgation procedures at five other Federal agencies (EPA, DOT, HUD, USDA, and DOL) in order to analyze how other agencies have approached regulatory problems and responded to Executive Order 12044. Our analyses revealed a number of elements critical to the regulatory process. For purposes of this discussion, elements have been organized into the same four categories that are discussed in Chapter 4.

- procedural issues
- organizational issues
- analysis and evaluation issues
- policy oversight issues.

The agencies' procedures, as well as some of the problems they have encountered, are detailed in Appendixes A through E. This chapter presents a general picture of the problem-solving mechanisms evolved by the various agencies, and points out how agency processes and institutions are related to their individual structures and needs. The chapter is not a complete description of the regulatory process within each agency; rather it focuses on how the agencies have dealt with problems similar to those experienced in CS.

5.1 PROCEDURAL ISSUES

Chapter 4 revealed a number of problems with CS' procedures for developing regulations. One particular problem cited was CS program staff's lack of knowledge of CS and DOE regulatory procedures. This section provides a brief review of other agencies' approaches to procedural guidance, scheduling and early decisions on required documentation, as well as their procedures for preparing the rule, including coordination, Federal Register notices, and public participation.

Although it is not feasible to evaluate the success of each agency's regulatory process, it is safe to state that agencies with clear and thorough guidelines have had the most success in making the participants in the process aware of the procedures to be used in promulgating regulations. The most frequent complaint encountered when discussing regulatory procedures with government officials has been the lack of guidance.

EPA has compiled and distributed an extensive handbook for staff on the preparation of regulations. The handbook clearly outlines the procedures to be used by all offices at each stage of the process. The Office of Regulations at HUD has also drafted a handbook, in outline form, offering assistance to lead offices in preparing their regulations. These handbooks clearly spell out the roles and responsibilities of offices involved in the rulemaking process. Other agencies have issued very little in the way of guidelines, preferring to leave the guidance in the hands of the individual administrations or lead offices.

The CS interviews revealed a particular lack of direction and guidance in the early stages of a regulation's development. Decisions pertaining to documentation requirements, milestones and agency coordination often need to be made early in the process. For many agencies, preparation of a work plan provides a means of making early decisions concerning the development of the regulation. The information contained in the work plans varies for each agency, but generally includes 1) a brief discussion of the issues necessitating regulatory action, 2) timetable/milestones, 3) brief discussion of the alternatives to be considered, 4) decision, with supporting justification, on the need for an RA, and 5) offices that may be affected by the action.

The EPA's work plan (known as the Development Plan) also includes the ANOPR and a brief description of EPA resources that will be needed for promulgation of that regulation. After initial review by the Standards and Regulations Division (SRD), the Development Plan is placed on the agenda of the Steering Committee (composed of the Director of SRD, the General Counsel, and all Assistant Administrators) and is considered at one of their regular meetings. After this Steering Committee review, the Development Plan is reviewed by all others on the concurrence chain (including the Regional Administrators in some cases) and is checked by Administration Correspondence Control for grammar and format of the ANOPR.

Work plans at other agencies undergo much less extensive review. At DOT, the work plan is prepared by the lead office and sent to the head of the Administration and then to the Secretary for review and feedback. HUD work

plans are reviewed by the Office of Regulations and the Office of Policy Development and Research. HUD also uses the timetable prepared for the work plan as the basis for a "composite calendar" that schedules development of all regulations at HUD.

In lieu of a work plan, USDA lists all proposed rulemakings in a "decision calendar" containing the information usually found in the work plan, along with a list of officials that must approve each stage of the process. The decision calendar is maintained by a Public Participation Office at USDA and is updated weekly.

Meaningful public participation in the regulatory process is difficult for most agencies, including DOE. DOE uses ANOPRs and other methods of informing the public of its rulemaking intentions and requesting their participation. The ANOPR, optional under Executive Order 12044, is employed extensively by EPA, but is used by other agencies only when significant amounts of information are needed by the lead office preparing the regulation.

The NOPR incorporates input received from the public through various outreach techniques employed by the agencies. USDA requires all lead offices to prepare an extensive public participation plan for each regulation, which is published as the prenotice. Financial aid for eligible participants has been used to a limited extent by USDA and some DOT administrations. Other mechanisms include mailing lists, public hearings (including field hearings), the ANOPR, information requests published in trade magazines, and direct notification of parties that will be affected by the proposed regulation. DOT has established the practice of leaving the public record open for up to a year after publication in the Federal Register. At the end of this additional public comment period, the rule is revised to eliminate any unnecessary difficulties with the regulation.

5.2 ORGANIZATIONAL ISSUES

This section examines the relationship between the organizational structures and the regulatory processes of several agencies outside DOE. It particularly addresses how the organizational structure of these agencies have helped resolve the problems cited in Chapter 4.

The organizational structure of an agency has a strong influence on the process it uses to promulgate regulations. Agencies that are strongly centralized are able to develop uniform procedures that can be applied department-wide. An agency that has a decentralized administrative structure will have difficulty applying the same process to different offices or divisions within the agency. Agencies also differ in their missions and clientele. An agency that functions more as a "grants-giving" agency than as a "regulatory" agency often finds that a highly structuralized and complex regulatory process is not necessary to achieve its purposes.

Since EPA has a more focused objective, its structure is highly centralized and has thus allowed that agency to employ a highly centralized regulatory process. Although EPA administers several different programs dealing with the control and abatement of pollution in the areas of air, water, radiation, noise, and toxic substances, the programs are functionally interdependent. Regulations promulgated in one office often affect the programs of other offices.

Other agencies, including DOE, do not have such a high level of interdependence and thus can employ a more decentralized regulatory process. Program areas within HUD and DOT were administered by independent governmental units before the mid-1960s. At that time, these various independent units were subsumed under the authority of the two departments. As a result, each administration and program office within HUD and DOT has been vested with more responsibility for promulgating regulations--authority it accumulated in the past.

A highly centralized agency such as EPA provides for the monitoring and coordination of its regulatory process on an agency-wide basis. EPA has established the Standards and Regulations Division (SRD) for these purposes and has given it an active role in the regulatory process. Other agencies have also established offices to provide for the coordination of the regulatory process, but a much less active role is usually taken. DOT and HUD have established offices within the General Counsel's office to provide a limited level of coordination of their regulatory processes. These offices are little more than checkpoints in the concurrence chain and do not participate in the entire process as SRD does in EPA.

An agency with a decentralized organizational structure usually employs a mechanism for coordinating the regulatory process within each administration or Assistant Secretary's office. Each of the eight administrations within DOT has at least one office or committee charged with intra-administration coordination. For example, in the National Highway Traffic Safety Administration (NHTSA), the Office of Plans and Programs (OPP) is responsible for the coordination of the regulatory process and preparation of all regulatory analyses. In the Coast Guard (USCG), the Marine Safety Council, a board of seven admirals, has the coordination and oversight function (although the actual preparation of the RA is done by the lead offices).

Most agencies also involve policy-level officials in the regulatory process by means of "committees" or "panels." DOL has established a Regulations Review Panel made up of the Under Secretary, all Assistant Secretaries, the Solicitor, and other high-ranking officials. DOT has created the Regulations Council, composed of all Administrators and senior staff officials. Such a group is used for a variety of tasks: reviewing lead offices' proposals to develop regulations, reviewing the Regulatory Analysis requirement, resolving intra-agency conflicts, and making recommendations to the agency head on matters dealing with regulatory issues.

Each agency has also adopted mechanisms to provide coordination between offices within the agency and outside the agency. The committees and panels discussed above are the chief means of intra-agency coordination and their involvement in the regulatory process differs from agency to agency. At EPA, the Steering Committee is involved in each stage of the process, providing maximum coordination and input from various offices within the agency. DOT's Regulations Council, however, is rarely used, and intra-agency coordination is much less substantial. Coordination with offices outside of the agencies is usually carried out by the lead offices, with some assistance from an agency office established for that purpose.

DOE's organizational structure is closer to the decentralized structures of DOT than to the more centralized structure of EPA. Most of the Assistant Secretary offices have distinct, independent programs and goals. Thus, CS is responsible for coordinating and guiding its own regulatory programs.

Currently, no office in CS is providing this guidance. Chapter 6 provides several recommendations for coordinating the CS regulatory process.

5.3 ANALYSIS AND EVALUATION ISSUES

Analytic decisionmaking has been incorporated into the regulatory process at each agency in several different ways. There are variations in the types of analyses done, their degree of detail, the timing of the analyses in the regulatory process, and the offices involved in the preparation of the analyses.

Most agencies perform preliminary economic analysis on all significant regulations. For example, USDA conducts a Draft Impact Analysis and DOT prepares a Regulatory Evaluation. These early analyses are limited in scope and provide preliminary assessments of all regulatory approaches available. They are also used to determine the need for a full RA.

EPA is attempting to merge all analyses done for a proposed regulation into a single, integrated process and document. This would prevent overlapping, duplication, and the use of different data and assumptions by the various groups conducting the analyses. HUD officials in the Office of Policy Development and Research also feel that greater use of more analyses and integration into a single document would be helpful in the future. The integrated assessment is listed in Chapter 6. as one of our recommendations for CS.

Each agency examined has established a central office responsible for monitoring proposed regulations for the RA requirements of Executive Order 12044, although their levels of involvement vary. At DOT, the Office of Regulations and Enforcement has the authority to require an RA if it is not included in a work plan submitted by a lead office. The Office of Policy Development and Research (PD&R) at HUD works closely with each lead office preparing an RA, monitoring the progress of the RA at each stage of development for compliance with Executive Order 12044. PD&R lends technical assistance to the lead office and has made some progress in the use of economic models for the application of data when considering alternative regulatory approaches. At EPA, the Regulatory Reform Staff, established by SRD, has prepared an extensive checklist of alternatives to be examined by the work groups.

GC advises the work group on the legality of alternatives, and the Office of Policy Evaluation (OPE) provides the work group with information and descriptions of various techniques available to the staff in conducting the different analyses.

The Evaluation Plan (EP) is often performed in a perfunctory way by most agencies. EPA, however, views the EP as a valuable management tool to be included in the agency's analytical process. EPA officials believe that the EP can catch problems that may have been overlooked in conducting other analyses. The EP is also used to improve the relevance of data required to be collected for the proposed regulation. USDA has incorporated public comment on a final rule into its EP requirements and uses it to review a regulation for success in reaching its goals in the "least burdensome manner."

5.4 POLICY OVERSIGHT ISSUES

One of the major objectives of Executive Order 12044 is to increase policy review and oversight for the increasing range of regulatory activities. Policy oversight provides accountability for all regulatory actions. Effective oversight is more difficult for organizations with less centralized control, and, therefore, methods of assuring policy oversight will differ from agency to agency depending on their organizational structure. This section examines procedural mechanisms that have been adopted by each agency to meet the goal of effective policy oversight.

An essential element of policy oversight is the involvement of management in the earliest stages of the development of a regulation. The EPA Start Action Notice (SAN) and the DOL concept paper are examples of mechanisms used by the agencies to assure policy oversight at the beginning of the process. The SAN and concept paper are reviewed by all policy level officials and forwarded to the agency head with recommendations on final concurrence. At this point, management can provide input, such as requiring an RA to be completed by the lead office.

Besides having the Administrator or Secretary "sign-off" on all regulatory documents, the agencies have employed other oversight mechanisms. In all

agencies, at least one office is charged with tracking a regulation completely through the process. In some agencies a committee or panel composed of all policy level officials is used.

EPA uses both the SRD and the Steering Committee for policy oversight. All regulatory documents are submitted by lead offices to SRD for initial review and circulation to members of the Steering Committee and offices in the concurrence chain. The Steering Committee has complete control over format and content of all regulatory documents and reviews them for accuracy, clarity, thoroughness and compliance with Executive Order 12044. The Steering Committee also has the authority to use SRD staff in conducting their own evaluation of the work done by the lead office.

DOT has also established an office and committee to carry out the oversight functions. However, the Office of Regulations and Enforcement (OR&E) and the Regulations council are much less involved with the regulatory process than their counterparts at EPA. OR&E reviews regulatory documents for compliance with Executive Order 12044 and makes concurrence recommendations to the Secretary; however, this review is usually not extensive. The Council was also established to provide review and resolve conflicts between administrations, but it does not meet on a regular basis and has been rarely used.

The Office of Regulations at HUD is similar to OR&E, and provides little more than a clearinghouse function for regulatory documents going to the agency head. DOT and HUD rely on the individual administrations' and Assistant Secretaries' offices to provide most of the oversight duties. Each lead office within DOT must appoint a Regulations Officer to act as liaison between the lead office and management on matters dealing with a proposed regulation.

DOT and USDA divide oversight responsibilities between the Secretary and the Agency Administrators. Formal Secretarial participation takes place at the beginning and end of the process, with approval required for the action initiation and final rule. Secretarial staff offices continually monitor the regulatory process on an informal basis.

A concurrence procedure has also been adopted by some agencies to provide a uniform and complete review by all management level officials. This procedure is known as the "clearance process" at HUD and is facilitated by the use of departmental processing forms. The "HUD 22" form is circulated along with the regulatory document to all offices involved in the review process. Review offices note concurrence or nonconcurrence, along with reasons for nonconcurrence, on the HUD 22 to enable the lead office to use the process for feedback purposes. Another form, the "HUD 8," provides an abstract of negotiations that take place between the lead office and the review offices. The HUD 8 is included with the regulatory document when it is sent to the Secretary for final concurrence.

6.0 RECOMMENDATIONS TO IMPROVE THE CS REGULATORY PROCESS

There are two primary reasons that DOE has had difficulty developing and implementing a clearly defined regulatory process. First, the process has had to be flexible enough to incorporate the many forms of rules and regulations promulgated by the Department. This has led DOE to develop such broad guidelines for initiating, writing and developing regulations, that they fail to provide specific, unambiguous information for use by the program offices. The program offices thus remain uncertain about the steps in the regulatory process. Second, the objectives of recent energy legislation and programs which use regulations to address the energy crises often seem inconsistent with the goal of Executive Order 12044 to reduce regulatory burdens. The regulatory process must provide guidance on how these two objectives might be balanced.

Based on the findings of our study, we developed a number of specific actions that CS and PPE could adopt to improve the process of initiating, developing and analyzing CS regulations. In most cases the recommendations are intended to overcome the specific problems discussed in Chapter 4. The recommendations also draw on the experiences and procedures of other agencies in dealing with similar problems, as discussed in Chapter 5.

These recommendations are viewed as the first steps in changing an administrative system. The process of changing such a system requires that alternatives be considered and evaluated. Several obstacles must be addressed before these recommendations could be implemented. For example, several of the recommendations would require allocating additional CS and DOE resources to PPE; others would require changes in the roles presently played by GC or PE. However, since many of the recommendations are based on existing procedures in other government agencies, the recommendations should be considered feasible.

6.1 INCREASE THE ROLE OF PPE IN THE REVIEW AND DEVELOPMENT OF CS REGULATIONS

Many of the CS program offices have little regulatory experience. However, they see rules and regulations as potential tools to achieve their

programmatic objectives. Most program office staff regarded only GC as a source of information on how rules and regulations should be developed. In many instances GC went beyond procedural guidance and resolved policy issues.

Both the recent OMB review of agency performance under the President's regulatory reform initiatives (OMB 1979) and recent DOE revisions to their regulatory guidelines (45 FR 12282, 2/28/80) cite the need to improve policy review and guidance of regulatory development. We recommend that PPE take a greater role in the review and guidance of CS regulations.

PPE may wish to increase their participation in the regulatory process in a series of steps. Specifically, PPE could begin by reviewing all authorization memos before they are submitted to the Secretary and Deputy Secretary and having the option of reviewing the RA. When the authorization memo is reviewed, PPE could decide whether to review the final regulation or RA before it leaves CS. Also as a first step, PPE could act as CS representative on DOE and federal regulatory issues. This might include acting as a liaison with Congress on pending Congressional regulatory initiatives, commenting on proposed regulations that might affect CS program initiatives, or coordinating overlapping CS regulatory programs.

A second step might be for PPE to increase its regulatory responsibilities within CS to provide broad policy guidance to the program offices. For example, the interviews revealed that the programs offices had difficulty obtaining working group agreements on which discount rate or future price projection to use in their regulatory analyses. PPE could provide policy support on broad regulatory issues of this type that might apply to all CS program offices.

A third step might be for PPE to become a part of the concurrence chain for documents such as authorization memos, Federal Register notices, final rules and regulatory analyses. In this role PPE would be able to direct and approve the development of regulations within CS. Although this would add another layer in the regulatory process, it could provide a significant improvement in policy review.

6.2 STRENGTHEN THE REGULATORY INITIATION SYSTEM

Program office staff cited problems with the process of initiating a regulation and developing a schedule of milestones for the regulation. Most staff traced the problems to the working groups, which are made up of members of the lead office, GC, PE and other appropriate DOE offices. Problems included a lack of continuity of staff, which required remaking a number of decisions, and an inability of GC and PE working group members to concur for their offices. This frustrating situation made it impossible for the program offices to know with any certainty which documents would be required. The development of a regulation would be considerably strengthened, and the process much smoother, if the documentation requirements could be agreed upon and known by all the participants at the initiation stage of regulation development.

These working group problems have led to their virtual abandonment, and no consistent, formal arrangement currently exists for deciding and coordinating the development of a CS regulation. We recommend that a formal process be instituted to bring the lead office together with other DOE groups involved in the development of regulations (i.e., PE, GC, EV) at the initiation stage. This group would develop an Action Plan of requirements and schedules for the documentation and milestones in the regulation's development. It would be a decision making group whose major purpose would be to develop a milestone schedule plan for the regulation and to discuss substantive requirements. It would not continue as a group to review the entire development of the regulation.

EPA has a system which requires the initiating office to submit a proposed schedule and discussion of major issues to the relevant offices. Under a similar scheme, PPE could act as a coordinator to bring the actors together. Ultimately, EV, GC, PPE and PE could be expected to make early commitments to the program offices as to which documents are required, which could eliminate a great deal of the uncertainty about these requirements and serve to encourage early development of documents such as the RA. Initially, implementation of an Action Plan could be only within CS; however, the best use of the Plan would require that GC, PE, and EV commit themselves to the decisions laid out

in the Plan. Until such commitments are obtained, the Action Plan could be implemented only within CS. The Plan would provide PPE with early information on a regulatory initiative and an opportunity to participate in determining and reviewing its proposed schedule.

6.3 DEVELOP AN INTEGRATION OF IMPACT ASSESSMENTS

The plethora of analyses and formal documentation presently required to develop and promulgate a regulation have much the same purpose--to provide information on the effects of the regulation. The individual analyses emphasize the importance of particular impacts, for example, environmental or urban. Completing separate documents often results in program office resources spent on a duplication of effort. In addition, since the documents are often prepared in isolation, the impacts are often estimated from different baselines. Thus, the impacts are not comparable and the program office cannot evaluate the tradeoffs of the regulation's costs and benefits. Our recommendation is that these analyses be integrated into a single, consistent decision document.

Several of the recent CS regulatory programs have integrated the required documentation. For example, BEPS and the Appliance Efficiency Standards have used consistent baselines, assumptions and methodologies in the environmental and economic analyses. This could be logically extended to having all regulations developed within CS use methodologies which allow comparisons among the various decision documents. The result would be a single analysis of a regulation's impacts with supporting documentation as required.

This recommendation is not intended to reduce court or agency demands that certain impacts be explicitly considered. Coupled with the Early Work Plan, the integration of assessments could increase the value of the supporting documentation in developing and writing the regulation.

6.4 DEVELOP A PROGRAM TO IMPROVE REGULATORY ANALYSES

Program office staff who have written regulatory analyses felt they spent too much time choosing among assumptions, models or data sources to use in their analyses. In addition, regulatory analyses within CS are often performed

on compressed time schedules with background data and models that are often inadequate to make firm predictions of a regulation's impacts.

We recommend that PPE develop a Regulatory Analysis Methods Development Program that would provide both broad studies of methods to evaluate regulatory alternatives as well as more focused studies of data sources and assumptions for developing an adequate baseline. Such a program would have four basic functions: 1) provision and analysis of data sources, models and techniques to estimate the impacts of various regulatory alternatives, 2) development of standards, methodologies and models to choose among the various alternatives, 3) development of methods to evaluate the program's effectiveness, and 4) research on the social, institutional and economic mechanisms related to the achievement of regulatory objectives.

The development of assumptions, models and data sources to estimate the impacts of regulatory alternatives should help ensure consistency and thoroughness in CS regulatory analyses. Rather than recreating baseline projections for each analysis, studies could be developed to make a consistent baseline available across CS. Similarly, the development and evaluation of methodologies to compare regulatory alternatives would help ensure consistency across CS regulatory programs and ultimately reduce the time required to complete a regulatory analysis. The development and evaluation of the methodologies would be based on the regulatory experience of the program offices.

Background studies describing the strengths and weaknesses of various policy tools could be used in selecting among regulatory and nonregulatory policy tools. Background studies may also be needed to determine the response of individuals and business to various types or forms of regulations (e.g., prescriptive vs. proscriptive). A great deal of research could be performed on implementation and enforcement problems and methods of tailoring regulations to reduce their impacts on small businesses. PPE would seem a logical actor for this type of broad, generic research.

6.5 WRITE A REGULATORY PROCESS GUIDEBOOK

Most program office personnel felt they had inadequate information on the steps involved in developing and writing regulation; nor did they know who

would be able to provide guidance and specific answers to their questions. We think that a guidebook written by PPE for the use of program offices in writing, developing or analyzing a regulation would be of significant value to the program offices, providing the kind of guidance and information that now seems to be lacking.

As presently envisioned, the guidebook would contain three sections: 1) Background to the CS Regulatory Process, 2) Regulatory Procedures and Analysis and 3) Appendices, References and a Glossary. These sections would not only provide information on the procedural steps in the regulatory process and ways to improve the quality of the regulatory analysis but also serve as a reference document for where to turn for help.

Two agencies, EPA and HUD, have written handbooks for persons involved in the regulatory process. EPA has written a Handbook that is intended to describe "who should do what, when and how" (EPA Handbook 1979). The document is divided into three main sections, Procedures and Formats, Participation, and Analysis. Within these three sections are fifteen topics that all serve as stand-alone descriptions of one aspect of the regulatory process. The HUD Handbook (HUD, The Rulemaking Process, January 1979) has a different style. It resembles an internal memo, usually stating legal requirements and several succinct statements of how to fulfill those requirements. It pulls together information from a number of sources internal and external to HUD and describes those steps in a Handbook that resembles a formal reference document.

The goal of writing the guidebook is to produce a document that is helpful to the program offices. This means a document that is readable, accessible and accurate. It is also important to utilize the information and insights already obtained by the program offices in writing and developing regulations. This could be achieved through a series of workshops between the CS program offices and PPE to solicit program office comments and ensure usefulness of the guidebook.

The guidebook could be an important tool for promoting an increased role for PPE in the regulatory process. The program offices would begin to view PPE as a resource with information on the regulatory process. The inclusion

of the program offices in the guidebook's development would not only ensure incorporation of their experiences but would also help develop relationships between the program offices and PPE that would be important if PPE became actively involved in review of regulations or regulatory analyses.

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APPENDIX A

HUD's PROCESS FOR DEVELOPING REGULATIONS

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HUD's PROCESS FOR DEVELOPING REGULATIONS

The Department of Housing and Urban Development (HUD) was established in 1965 by the HUD Act (78 Stat. 667, 42 U.S.C. 3531-37) to provide coordination for an array of programs previously administered by several independent agencies. HUD is the principal federal agency responsible for dealing with housing and community improvement needs. Some of its major programs involve mortgage insurance, rental subsidies, rehabilitation and preservation of inner cities, protection of the home buyer in the market, and encouragement of the housing industry to provide a suitable living environment as well as adequate housing.

This report examines the regulatory process within HUD with special emphasis on the Regulatory Analysis (RA). The study first describes HUD's promulgation process and then presents issues of particular concern, including:

- how the regulatory process varies with different levels of regulatory impact
- how evaluations of regulatory impact are conducted
- how HUD has responded to Executive Order 12044

DESCRIPTION OF THE PROMULGATION PROCESS

Although HUD is considered to be more of a "grants agency" than a regulatory agency, it does issue a large number of regulations dealing with grants, subsidies, housing standards, and related matters. Because HUD's regulatory process centralizes input from many lead offices, it also serves as a mechanism for integrating the disparate areas of interest with which these offices are concerned. The Department has extensive field operations: regional, area, and insuring offices are aggregated geographically into ten major regions headed by regional administrators. These administrators are directly responsible to the Secretary for the implementation of HUD's programs.

OMB has described HUD as "slow in getting its regulatory reform program started," (OMB 1979) although progress has been made recently. Procedures to implement Executive Order 12044 were proposed by HUD in May 1978, and final procedures were printed in the Federal Register on January 5, 1979. As of mid-1979, HUD had still not established a workable system of Secretarial oversight and involvement in the early stages of the regulatory process. Attempts to correct this problem began with use of a revised Rulemaking Handbook and a 5-day rulemaking training session completed on May 20, 1979. The regulatory process is now monitored by the Office of Regulations within the Office of the General Counsel, which reviews all Work Plans before they are sent to the Secretary for approval.

THE PROCESS

Authority to issue HUD regulations is invested in the Primary Organization Head (POH), who is an Assistant Secretary or other head of a major organizational unit in the Department. If rulemaking authority for a particular regulation has not been delegated to any POH, the Secretary will sign off as the issuing officer. Responsibility for moving a proposed regulation through HUD's regulatory process is given to a Project Manager. The Project Manager is the chief of the organizational unit within the lead office (known as the "drafting office" at HUD) assigned to the regulation.

A formal Departmental Clearance process is used to review most of the regulatory documents to be published in the Federal Register. An abbreviated clearance process is used for Work Plans, ANPRMs, and Composite Calendars; a "Clearance Committee" is used for certain controversial or urgent regulations. The following sections are presented in the order in which they occur in the regulatory process.

Work Plan

The first step in HUD's regulatory process is the creation of a Work Plan. This plan must be prepared and cleared before the drafting of any non-emergency regulation can begin. The Work Plan contains 7 major sections:

1. Identifying Information: Subject matter, responsible office and Project Manager, and statutory authority
2. Regulation Content: Need for the regulation, changes that will occur in existing HUD programs, and what the regulation will accomplish
3. Classification as Significant, Routine or Emergency: Includes a description of any controversial or major policy areas involved
4. Need for Regulatory Analysis (RA): Possible alternative approaches to be considered and benefits provided by the regulation
5. Environmental Impact: Need for Environmental Impact Statement and justification for decision
6. Public Participation Plan: Use of ANPRMs, surveys, hearings; state or local governments to be involved; length of comment period
7. Timetable for Processing: Schedule for drafting, clearance, publication, and comment for each stage of the process.

The Work Plan is prepared by the lead office and submitted to the Office of Regulations (OR).

At least 30 days before the ANOPR is scheduled to be submitted for clearance, the Work Plan is sent to OR, which forwards it to the Office of Policy Development and Research (PD&R), which reviews the RA requirement section. PD&R is responsible for monitoring the rule throughout the regulatory process for any changes that might indicate new evidence of major impacts that would require or modify the RA. PD&R then sends the Work Plan on to the Secretary/Under Secretary for final approval. Approval of the Work Plan may be contingent upon its modification, if that is deemed necessary by the Secretary/Under Secretary.

For example, he may see fit to require an RA for the regulation, even though its impacts are not costly enough--as determined by Departmental criteria detailed below--to automatically qualify for one. The Work Plan is "kept alive" from its inception until the publication of the final rule. It must be updated and submitted for the review process described above every 6 months, in conjunction with preparation of the semiannual agendas (see next section).

Although this procedure for the preparation and review of a Work Plan is clearly explained in HUD's Rulemaking Handbook, actual implementation of the process has been poor. Questionnaires used to provide the information for the Work Plan have been filled out inaccurately and incompletely for the most part, and concurrence by the Secretary/Under Secretary has been bypassed in many instances.

Agendas of Regulations

After the Work Plan is approved, the POH submits it, along with an initial summary of the proposed regulation, to OR for inclusion in the two agendas the Department compiles. HUD is required under Sec. 7(0)(1) of the 1978 Amendments to the HUD Act to submit a semiannual agenda to the Congressional Banking Committees that have jurisdiction over HUD programs. The Congressional agenda is issued for legislative review of proposed regulations (discussed in "The Clearance Process"). It contains (1) a summary description of each proposed regulation, accompanied by the name and phone number of the responsible HUD official, and (2) a list of all existing regulations to be reviewed by the Department over the next 6 months.

The OR also prepares the semiannual agenda of significant regulations required under Executive Order 12044. It is compiled from information submitted by various POHs at least 6 weeks before the date the agenda is scheduled for publication in the Federal Register. The POH classifies the regulation as significant, routine, or emergency on the basis of criteria for determining "substantial impacts.

A regulation is classified as significant if it 1) implements a new program or activity, 2) substantially alters an existing program or activity, 3) requires substantial new requirements or standards, 4) is of particular concern to Congress, national organizations, local interest groups, program participants, industry, state and local governments, or other federal departments or agencies, or 5) substantially alters the competitive structure in any market. A regulation is classified as routine if it, 1) is issued in accordance with the formal rulemaking provision of the Administrative Procedures Act (HUD issues very few), 2) concerns agency management or personnel procedure, 3) concerns procurement procedure, or 4) is recurring or repetitive by nature. An emergency regulation is issued in response to an emergency situation (including statutory or judicial deadlines). The Secretary/Under Secretary must approve all requests for emergency status.

Each semiannual agenda of significant regulations contains:

- A summary description of each proposed rule, including the need and legal basis, whether an RA is required, and the contact official for the regulation
- A list of existing regulations to be reviewed
- The status of regulations listed on previous agendas
- A paragraph inviting state and local governments to notify the Office of Legislation and Intergovernmental Relations (OLIR) of interest in a proposed regulation (OLIR notifies the lead office for follow-up attention).

Both agendas of regulations are started through the Departmental Clearance process by OR. When the agendas reach the Secretary/Under Secretary for final approval, this top official can require that a rule be reclassified.

After Secretarial approval, the Congressional agenda is transmitted to the House and Senate Banking Committees, and the agenda of significant regulations is sent to the Federal Register for publication. At any time, "supplements" may be printed in the Register describing regulations that were not anticipated at the time the semiannual agendas were prepared.

The agendas contain not only "new" regulations, but also updates on the status of regulations previously listed but not yet made final. The semi-annually updated Work Plans described in the foregoing section provide the necessary information.

Composite Calendars

At the same time the Work Plans are submitted, a "composite processing calendar" is prepared for OR by each POH. The composite calendar is a processing timetable for all regulations for which Work Plans were prepared, and provides the basis for a Department-wide processing schedule issued by OR. The following time guidelines have been issued by OR to be used for setting realistic deadlines:

1. Clearance deadlines of not less than 1 week for a ANOPR, 2 weeks for any regulation which is to be reviewed only by HUD headquarters components, and 3 weeks for any regulation which is also to be reviewed by HUD field offices
2. At least 2 weeks following clearance for revision and signature of a regulation by the lead offices
3. At least 2 weeks for approval of the revised and signed regulation by the Secretary/Under Secretary
4. For proposed and interim rules, 3 weeks following approval by the Secretary/Under Secretary for Congressional review and publication, and a 60-day public comment period following publication
5. For ANOPRs and final rules, 1 week following approval by the Secretary/Under Secretary for publication
6. For interim and final rules, a 30-day deferred effective date.

OR reviews the composite calendars submitted by each POH and can suggest changes to the calendar indicated by Congressional adjournments, unreasonable "bunching" of regulations, and other processing problems. These changes are discussed with the lead offices and unresolved scheduling disputes go to the Under Secretary for a decision.

In practice, HUD is experiencing difficulties with the composite calendars. Lead offices are not setting realistic deadlines, and in many cases they are not attempting to set processing schedules at all. Currently, OR is attempting to improve the system by issuing explanatory memoranda and sample documents. The office has promised strict enforcement, with requests for deadline extensions required to be addressed to the Under Secretary.

ANOPR

After review and approval of the Work Plan and completion of the agendas, the lead office begins drafting the proposed regulation. Although an ANOPR is supposedly required for each significant regulation unless specifically exempted by the Secretary/Under Secretary for reasons of expedience, this rule is not effectively enforced. When it is employed, the ANOPR is used along with surveys, panels, conferences, and public hearings to encourage public participation at an early stage. The ANOPR briefly presents:

- The proposed new program or changes
- Major policy issues
- A request for public comment
- Questions about the proposed regulation designed to elicit needed information from the public
- All known estimates of increased recordkeeping and reporting requirements necessitated by the proposed regulation
- The address to which comments should be directed and the deadline for them

After the ANOPR is prepared by the lead office and approved by the POH, it is subject to review by the PD&R and the Office of General counsel. Upon successful completion of this review, OR forwards the ANOPR to the Secretary/Under Secretary for final approval, and then to the Federal Register for publishing. The lead office also sends copies of the ANOPR to all parties identified in the public participation section of the Work Plan.

The Clearance Process

After receiving and reviewing comments collected as a result of the ANOPR and the other public outreach techniques used, the lead office drafts the NOPR. Unlike the ANOPR, the NOPR must undergo the full Departmental Clearance process. It is accompanied throughout its travels by a "HUD 22" form, which is the Departmental Clearance and Approval Record attached to the semiannual agendas and other documents required to be published in the Federal Register (except for ANOPRs).

The POH signs off on the HUD 22 and sends it along with the NOPR to OR. OR distributes the NOPR/HUD 22 to all interested POHs for simultaneous review and clearance. If appropriate, the package is also distributed to HUD's field offices through the Deputy Under Secretary for Field Coordination. The POHs and field offices have three review options: 1) concur without comment, 2) concur with comment, or 3) nonconcur.

Any office involved in the clearance process may nonconcur if it insists that a substantive concern exists that must be resolved before approval can be given. The concurrence or nonconcurrence is recorded on the HUD 22, which is supplemented with attachments if additional comments are needed. The HUD 22 is signed by the reviewing POH and returned to OR. After all clearance comments are returned to OR, they are forwarded to the lead office for examination. Special attention is given to comments from reviewing offices with programs that will be affected by the proposed regulation. After consultation and negotiation with the reviewing offices, the lead office redrafts the proposed regulation, taking the clearance comments into account. In cases of nonconcurrence that cannot be resolved through negotiation, a conference is arranged by OR between the regulation's Project Manager and representatives of the reviewing offices. If agreement still cannot be reached, the matter is decided by the Secretary.

The revised NOPR is then submitted to OR by the lead office accompanied by the following items:

- HUD form 8, Abstract of Secretarial Coorespondence, listing the reviewing offices and the major policy issues involved. The abstract also includes major substantive comments and unresolved nonconcurrences that must be decided by the Secretary
- Draft Regulatory Analysis
- Draft Environmental Impact Statement (or finding of inapplicability)
- Discussion of reasons for not adopting each substantive clearance comment

(These items are required for all documents submitted to the Departmental Clearance process or Clearance Committee review and will be referred to as Clearance Support Documents for the purpose of this report.)

The OR reviews the NOPR for proper Federal Register format, giving special attention to the preamble. The preamble must contain a brief discussion of the need for the rule and its regulatory history. A discussion of public and internal comments is also required.

After OR reviews the NOPR, it is forwarded to the Secretary/Under Secretary for approval, along with all Clearance Support Documents and a summary of all clearance comments and the major issues involved. If the Secretary/Under Secretary does not approve the NOPR, it is returned for revision to the lead office.

If it is approved, OR must arrange for full compliance with applicable requirements of the HUD Act that provide for legislative review of certain proposed regulations. Under the 1978 Amendments to the HUD Act, significant regulations to the House and Senate Banking Committees. The Committees indicate which proposed regulations they wish to review, and HUD must transmit them to the Committees 15 days before the NOPR is published in the Federal Register. All proposed significant regulations not included in the semiannual agenda must be sent to the committees for a 15-day review period prior to

publication. At this stage, Congressional action is limited to comment on the proposed regulation, although later in the regulatory process they can invalidate or modify the regulation.

A 60-day public comment period following publication of the NOPR is required unless it is specifically waived by the Secretary as being "impractical," unnecessary, or contrary to the public interest." After reviewing public comment, the lead office drafts the final rule and submits it to OR for Departmental Clearance. Besides the Clearance Support Documents, the following additional information must be submitted to OR:

1. Summary of public comment
2. Final RA (if applicable)
3. Final Urban Impact Analysis (if applicable)
4. Final Environmental Impact Statement or finding of inapplicability
5. Estimate of impact on staff resources
6. Summary flow charts of new administrative procedures
7. Analysis of record-keeping and reporting requirements imposed
8. Need for regulation, direct and indirect consequences, alternative approaches considered
9. Final plan for evaluating effects of the regulation after issuance

(These items will be referred to as Final Clearance Support Documents for the purpose of this report.)

After Department Clearance, the Secretary reviews the final rule for the following "required findings":

1. The regulation is necessary.
2. Direct and indirect effects have been adequately examined.
3. The regulation represents the least burdensome approach of alternatives available.

4. Public comments were considered.
5. Plain English is used.
6. Estimate of reporting and record-keeping requirements has been made.
7. HUD contact official has been identified.
8. Evaluation plan has been included.

Upon Secretarial approval, the final rule is published in the Federal Register. Before the regulation becomes effective, it is once again subject to Congressional action for a period of 20 calendar days of continuous session. During this time, either the House or Senate Banking Committee can delay the regulation's effective date for another 90 days by reporting out legislation intended to invalidate or modify the regulation. If the full House or Senate rejects or fails to act on the legislation within the 90 days, the regulation becomes effective. Any action taken by the full House or Senate in support of the Committee's position is subject to the normal legislative process, including Presidential Veto.

Congress has only used this authority to delay issuance of a regulation once since adoption of the procedure. The details are rather mundane, and need not be presented here. At any rate, a court ruled that the 20-day limit had been exceeded, and voided the Congressional action. Overall, HUD believes that Congressional review has not been as harmful a procedure as first expected. Although the delay period has caused some administrative problems during adjournments or recesses, the definite time periods have made it possible for HUD to "live with" legislative review.

Clearance of Non-Significant Regulations

Clearance of routine regulations is essentially the same as that of significant regulations with one difference; the Secretary/Under Secretary does not review the final regulation for the same "required findings" for final significant regulations (see previous section).

Emergency regulations (including regulations issued under short-term statutory or judicial deadlines) are subject to abbreviated clearance, or in extreme cases, no clearance at all other than review by the Office of General Counsel. A lead office may request emergency clearance through a memorandum submitted to OR containing descriptive information on the regulation deadlines imposed, and the reasons why the lead office is unable to meet the deadlines using regular clearance procedures. After the request is reviewed by OR and the Office of General Counsel, the Secretary/Under Secretary makes a final decision on emergency status. If the request for emergency clearance is approved, the Secretary/Under Secretary issues instructions for the abbreviated clearance process. If the request is denied, the lead office must prepare a Work Plan and propose a significant or routine classification.

Clearance Committee

HUD has a special procedure for promulgating regulations that are considered urgent or controversial. This procedure, known as the Clearance Committee, is used in lieu of the full Departmental Clearance process. Since HUD is restricted in its issuance of regulations when Congress is not in session, the Committee process--which is considerably speedier than full clearance--is used frequently toward the end of each session of Congress.

A lead office can request use of the Committee in the Work Plan, and the request is approved or disapproved by the Secretary/Under Secretary. The Committee is chaired by the Under Secretary or Deputy General Counsel, and is composed of representatives of the lead office and all reviewing offices. (Thus, the make-up of the Committee depends upon which offices have interests in the proposed rule.) The representatives have full authority to negotiate for their review office and take final clearance action on the regulation. The lead office must submit the proposed regulation to OR for distribution to all Committee members. After a 5-day review period, the Committee meets and members directly negotiate any differences. After the meeting, the Committee members prepare comments and nonconcurrences that are to be submitted to OR within a deadline set at the meeting. Comments and nonconcurrences are collected by OR and sent to the lead office for review. After making any necessary revisions, the lead office forwards the proposed regulations, along with

all Clearance Support Documents and Final Clearance Support Documents to OR. The Office of General Counsel then reviews the documents. The regulation and a memorandum identifying all unresolved issues are sent to the Secretary/Under Secretary for ultimate action. If the regulation is approved, it is published in the Federal Register, after arrangements are made for compliance with the Congressional review requirements.

REGULATORY ANALYSIS AND EIS

The RA for a HUD regulation is done concurrently with preparation of the regulation itself, and is supposed to aid in that preparation. However, HUD has had serious problems in developing the RA as a decision-making tool as called for by Executive Order 12004. Top management is not totally committed to the RA; some officials consider it "more unnecessary paperwork." The RA requirement is usually considered to be "another hurdle" by the lead offices and no full RA has been completed at this time (six are currently under way).

Unlike EPA, HUD has no strict timetable for the preparation of the RA. The Department has "suggested" that the draft RA be placed in the public docket before publication of the NOPR, and the final RA is required to be available upon publication of the final rule.

HUD's policy documents require an RA for any regulation that:

- is likely to result in a \$100 million increase or decrease in federal spending for one year
- is likely to result in a \$50 million cost or price increase for an individual industry, level of government or geographical region
- is likely to result in an annual \$100 million nationwide price or cost increase
- is determined by the Secretary/Under Secretary to need an RA

The RA must state the problem, the alternatives available/examined, the economic consequences of impacts, and the reason for choosing the alternative used.

In the alternatives section, consideration must be given to different types of regulations: no regulatory action (reliance on market forces); informational requirements; performance standards; design approaches. Attention must also be paid to possible phasing in or delayed implementation of the regulation, alternative methods of ensuring compliance, and alternative methods of implementing the program. The analysis of economic impacts must include an examination of the burdens imposed, the specific gains produced, the overall economic impact, and a summary of the environmental impacts.

Executive Order 12074 requires that an Urban Impact Analysis (UIA) be incorporated into the RA. The UIA is prepared by PD&R and appended to other parts of the RA done by the lead office.

The draft RA is prepared by the lead office (with technical assistance from PD&R) and submitted to PD&R for review and clearance. Included in the NPRM is the statement that an RA was used and is available to the public through the docket. The RA is subject to change from the time the initial draft is placed in the docket to publication of the final RA in conjunction with issuance of the final rule. At each stage of the promulgation process, the RA is reviewed by PD&R for compliance with Executive Order 12044.

An environmental assessment of all regulations is also required to determine the need for an Environmental Impact Statement (EIS). The decision as to whether an EIS is needed is made by the Environmental Clearance Office (located in each lead office) and must be approved by the Assistant Secretary for Community Planning and Development through the Director, Office of Environmental Quality and the General Counsel. The draft EIS or Statement of Inapplicability is required to accompany the NOPR through the clearance process and the final EIS (if required) must accompany the final regulation through the clearance process.

ISSUES OF PARTICULAR CONCERN

Four specific issues are discussed in this section. These four issues were specified by DOE as of particular interest.

HOW HUD VARIES ITS REGULATORY PROCESS FOR DIFFERENT LEVELS OF REGULATORY IMPACT

As discussed earlier under "The Clearance Process" HUD has slightly different procedures for developing regulations, depending on their classification as significant, routine, or emergency. All significant and routine regulations must go through the full Departmental Clearance process at HUD, although less supporting documentation is required for the routine regulations. A recent change at HUD has resulted in a requirement for Work Plans for routine as well as for significant regulations.

The Clearance Committee is a mechanism available for the processing of particularly controversial regulations. Use of the Committee for consideration of regulations is a much speedier process, with more direct "head to head" negotiation between the lead office and the review offices. However, the Committee is more frequently used as a result of time limitations than because of differing regulatory impacts.

Different types of analyses are done for proposed regulations with differing impacts. The RA is prepared for all proposed regulations with major economic consequences as defined by the established criteria. PD&R is responsible for reviewing the lead office's statement of need for the RA in the Work Plan and throughout the regulatory process. An Environmental Assessment is done for all proposed regulations and an EIS is performed for those that will have significant impacts on the quality of the human environment.

EVALUATION OF IMPACTS, AND MECHANISMS FOR EVALUATION AND MODIFICATION OF REGULATIONS AFTER PROMULGATION

HUD's Rulemaking Handbook makes program evaluation one of the "required findings" the Secretary must review when assessing final rules, but in

practice the Department has not yet set up a formalized process for implementing this process. Sources inform us that evaluation plans will be used once HUD has fully installed the new regulatory process in compliance with Executive Order 12044.

CHANGES IN HUD'S REGULATORY PROCESS IN RESPONSE TO EXECUTIVE ORDER 12044

Policy Oversight

HUD's Departmental Clearance process provides for top level review of, and Secretarial concurrence on, all proposed and final regulations. However, there is still little top level involvement in the initial stages of the regulatory process. Although Work Plans are supposed to go to the Secretary/Under Secretary for final approval, this scheme has not been carried out successfully. It appears that a serious effort is now under way to correct this situation: A simplified Work Plan format is now being used to encourage greater participation by the lead offices and to provide better information for the Secretary. HUD has also distributed a Rulemaking Handbook, updated in February 1980, which outlines the procedures for formulating regulations and clearing regulatory documents prior to their publication in the Federal Register.

The Office of Regulations (OR) was, until recently located within the Office of the Secretary. Although OR is now located in the General Counsel's office, it remains the chief liaison agent between the Secretary and all lead offices.

OR is responsible for the semiannual regulatory agendas required under Executive Order 12044 and the HUD Act amendments of 1978 (legislative review agenda). The first two agendas prepared by HUD lacked information concerning the use of RAs and failed to distinguish between new regulations under development and existing regulations under review. The third agenda, published February 5, 1980, did contain information concerning use of RAs and distinguished between new and existing regulations. However, the agenda is still far from being as informative as it could be. The latest agenda contains no

explanation of why a regulation is significant, no chronological history of the proposed regulation's development at HUD, and no date of expected action.

Regulatory Analysis

HUD has not yet completed a single RA, although six are presently under way. This small number of RAs is partially due to the nature of HUD, which is largely a grants agency rather than a regulatory agency. However, another reason is the lack of commitment, at all Departmental levels, to the use of RAs in the regulatory process. Lead offices frequently consider it to be just another obstacle to overcome in preparing a regulation, while top management (particularly in OR) is "not completely sold" on the effectiveness of RAs. Our sources indicated that an increased emphasis on research and development would better benefit the effective promulgation of rules. Thus, the attitude toward using RAs at HUD seems to favor compliance with the minimum requirements of Executive Order 12044.

Public Participation

Methods for obtaining public participation must be discussed in the Work Plan for all significant regulations. Principal means of encouraging greater participation are:

- ANOPRs
- Trade-media-based surveys
- Public hearings
- Mailing lists
- Forums, conferences, and panels

Use of the ANOPR has been limited to approximately 10% of HUD's regulations, but top management is making an effort to enforce the requirement for all significant regulations. Use of the other methods has been extensive; surveys and public hearings have been effectively conducted for many proposed regulations. A mailing list of 78,000 individuals is used to notify interested parties of ANOPRs, NOPRs, and meetings. Extension of the public comment period for ANOPRs from 30 to 60 days has also been helpful in increasing public participation.

Periodic Review of Existing Regulations

HUD has set up a schedule of regulations that will be subject to a sunset review process. The schedule was based partially on public response to an ANOPR soliciting aid in identifying regulations in need of elimination or revision. The process will occur in two phases: first, obsolete and redundant regulations will be eliminated; second, the remaining rules will be examined for more substantive review. The sunset review will also be used to examine existing regulations for compliance with Executive Order 12044's plain English and least burdensome requirements.

Use of Plain English

Considerable attention to the use of a clear and concise writing style is apparent in a "Legal Drafting Style Manual" distributed in April 1979 as an appendix to HUD's Rulemaking Handbook. The Style Manual, prepared by the Office of the Federal Register, contains specific guidelines for the use of clear, precise, and concise language in the drafting of all regulatory documents.

Lead offices have been directed to allow sufficient preparation time for careful drafting when setting deadlines for Work Plans and composite calendars. All review offices are required to examine review documents for quality of draftsmanship as well as the more substantive issues. Nonconcurrence of a review item for poor writing quality is treated in the same way as nonconcurrence on policy and legal grounds and may be grounds for disapproval by the Secretary/Under Secretary.

Review and Evaluation of the Regulatory Process by HUD

HUD has not done an evaluation of its regulatory process, as modified to comply with Executive Order 12044, and presently has no plans to do so in the near future.

APPENDIX B

THE PROCESS FOR DEVELOPING USDA REGULATIONS

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USDA's RESPONSE TO EXECUTIVE ORDER 12044

The Department of Agriculture (USDA) contains 21 agencies that issue regulations affecting "the production, pricing, and distribution of agricultural commodities as well as the conservation and development of agricultural resources (OMB 1979).

The USDA system for developing regulations is consistent with Executive Order 12044, but goes beyond its specific requirements. Whereas the Order is concerned specifically with the process for developing regulations, the USDA system was designed to apply to all decision processes in the Department. In particular, it applies "to all informal rulemaking in the Department except for those areas exempted in Executive Order 12044 which involve agency management, personnel selection and Federal Government Procurement" (USDA, Nov. 1, 1978). And, because of the high degree of public interest, the process has been extended to include formal rulemaking for marketing order programs. The objective is to have a single decision process which works well at all levels of the organization.

"The Secretary has provided strong personal support for implementation of the Order. Guidelines for each phase of Executive Order implementation have been issued, conferences have been held with agency administrators, and analytical staff assistance has been made available to agencies" (OMB 1979).

The regular publication of Department decision calendars satisfies the requirement for publishing semi-annual agendas. In addition, a schedule of regulations identified for review is published with each decision calendar.

Many of the features of the USDA decision-making system existed prior to the Executive Order. The Department's response to the Order basically consisted of further standardizing and systematizing the existing procedures.

INITIATION OF THE DECISION PROCESS

When the possibility of taking an action of some kind is being considered, the agency administrator is required to review the initial proposal. In this review the following items are considered:

- The need to take action
- The alternative actions already authorized or available to achieve the desired results
- The need, and plans for, public comment
- The tentative schedule for completing all stages of the decision process.

If this evaluation indicates that action is needed, the initial proposal is submitted to the appropriate program Assistant Secretary for review. Simultaneously, the Administrator initiates development of a Draft Impact Analysis (see later) and publishes a "prenotice" indicating plans and opportunities for public participation in the decision process prior to the notice of proposed rulemaking.

IDENTIFICATION OF "SIGNIFICANT" REGULATIONS

All proposed actions are reviewed for "significance" by the appropriate program Assistant Secretary. An action is considered to be "significant" if it:

- Requires "a decision or concurrence by an Assistant Secretary or a higher level official..."
- Will cause a substantial increase or reduction in program coverage that will affect a significant number of people.
- Will cause a substantial change in total program outlays or in the level of direct, indirect or induced benefits or costs.
- Will substantially alter enforcement or compliance requirements.
- Will significantly expand or contract public services which might affect any stage of production, processing, distribution, or consumption.

- Is likely to raise significant controversy due to conflict over questions of fact or impact" (USDA, Nov. 1, 1978).

The program Assistant Secretaries and other general officers of the Department are responsible for finally determining the question of significance. The Office of the Secretary has oversight responsibility for proposed actions that are classified as significant.

USDA believes that Executive Order 12044 requires an impact analysis for all significant regulations. This is based on the fact that activities specified in paragraphs 2(d) (1) through (3) of the Order as prerequisites for approving a significant regulation do in practice constitute a regulatory analysis. Therefore, USDA makes no distinction between "major" regulations requiring an analysis and "minor" ones for which a full regulatory analysis is unnecessary.

AGENCY DECISION CALENDARS

Each agency maintains a decision calendar covering all proposed agency actions, both regulatory and nonregulatory. After review for significance by the appropriate Assistant Secretary, an action is entered on the decision calendar. This marks the formal beginning of the decision process.

The prescribed format for the calendars includes the following items:

1. the title and a broad description of the action, accompanied by a statement of authority;
2. the current stage of development and projected dates for each subsequent step;
3. names, addresses, and phone numbers of persons to be contacted for additional information; and
4. the name of the Department official designated to approve each stage of the rulemaking procedure.

The decision calendar has several functions. It is a "reliable source of information on the schedule and status of all decisions" (USDA,

Sept. 19, 1978). It provides information to the public on approaching decisions. It provides an "opportunity for early review and monitoring of analysis and public participation plans, and it is used to "identify significant actions and provide for oversight and review of delegated authority" (USDA, Sept. 19, 1978). The calendar is maintained under the direction of the agency head and is reviewed by the Departmental public participation staff.

DEPARTMENT DECISION CALENDAR

Agency actions that are determined to be significant are placed on a Department decision calendar, which is maintained by the Department's public participation staff (see later). The Department calendar has the same format as that prescribed for the individual agency calendars. In addition to being a vehicle for coordination, it is used to satisfy the requirement of publishing a semi-annual agenda and is therefore published at least twice annually in the Federal Register (USDA, May 15, 1979; USDA, Nov. 15, 1979). Through weekly updating, the calendar has become a useful planning device and management tool.

The published (semi-annual decision) calendar is organized into four sections corresponding to the status of USDA decisions.

- A list of actions completed, withdrawn, or redesignated not significant since publication of the last calendar
- A list of actions under development, identifying the USDA agency responsible and including descriptions, projected schedules, etc. for each action
- A list of regulations scheduled for review by each USDA agency including all regulations for which review is ongoing or will be initiated in the next 6-month period
- A list of regulations proposed for review by each USDA agency on which public comment is solicited as to the appropriateness of reviewing the listed regulations during the next calendar period (USDA, Nov. 15, 1979b).

DECISION LOG

A decision log is prepared for each proposed agency action, whether regulatory or nonregulatory. The decision log is a vehicle for structuring and controlling the agency's decision process. The Department has issued a form to be used in maintaining the decision log (Figure B.1).

The decision log form requires a description of the action, the projected schedule, an analysis of indicators of significance, plans for public participation, and the intended approach to performing the impact analysis. The last two items are prepared by the Policy Analysis staff.

In addition to requiring that explicit attention be given to these concerns from the very beginning of the decision process, the decision log also serves to control that process by requiring the following actions:

- (a) approval to proceed, by the Assistant Secretary;
- (b) review of plans for public participation and for performing the impact analysis;
- (c) a log showing the date of completion of each phase of the decision process; and
- (d) approval of the final decision.

DRAFT IMPACT ANALYSIS

At the same time that the agency Administrator submits a proposal to the Assistant Secretary for initial review, he is also required to begin developing a Draft Impact Analysis. This is intended to be the primary activity in the decision process. This analysis assesses the impact of each alternative course of action for attaining the stated objective. The USDA has stated that all decisions, whether major or minor, "can only be made with confidence after an appraisal of the impact of each meaningful alternative course of action for reaching the stated objective," (USDA, Nov. 1, 1978), although the nature of the analysis and the quantity of the resulting documentation may vary considerably, depending on the decision.

Impact Analyses are an integral part of agency decision-making, and, as such, are "required for proposed USDA policies, regulations, or

U. S. DEPARTMENT OF AGRICULTURE		DECISION CALENDAR NUMBER:	
DECISION LOG			
USDA AGENCY/OFFICE	DATE INITIATED	APPROVED FOR AGENCY (For Agency Head)	
DECISION CALENDAR ENTRY (To be completed by the Agency)			
LISTING TITLE:			
AUTHORITY/REASON FOR ACTION:			
DESCRIPTION OF ACTION:			
PROJECTED SCHEDULE:			
(Dates)	PRE-NOTICE	PROPOSAL	FINAL
CONTACT: Agency		Office of the Secretary	
INDICATORS OF "SIGNIFICANCE" (Economic, Population, Uncertainty)			
APPROVAL TO PROCEED (To be completed by the Office of the Assistant Secretary)			
OVERSIGHT BY:			
☐ AGENCY	☐ OFFICE OF SECRETARY	☐ OFFICE OF THE PRESIDENT	
APPROVED: ASSISTANT SECRETARY			DATE
ANALYSIS AND PARTICIPATION SUMMARY (To be completed by the Policy Analysis Staff)			
PUBLIC PARTICIPATION (Pre-Notice, Comment) LIST INTENTIONS FOR NOTICE, HEARINGS, MEETINGS, ETC.			
DRAFT IMPACT ANALYSIS (Anticipated Alternatives and Impacts)			
REVIEWED BY:			DATE
COMPLETION LOG (To be completed by the Policy Analysis Staff)		REMARKS: (List all supplementary information attached)	
	DATE		
1. APPROVAL TO PROCEED (Need for Action) BY ASST. SEC.			
2. PLAN REVIEWED FOR ANALYSIS OF ALTERNATIVES AND PUBLIC PARTICIPATION PLAN			
3. PRE-NOTICE			
4. REVIEW OF PROPOSAL:			
-- APPROVED DRAFT IMPACT ANALYSIS			
-- REVIEW OF LANGUAGE			
-- APPROVAL TO PUBLISH PROPOSAL			
-- CONTACT (Name)			
5. FINAL DECISION			
-- REVIEW OF COMMENTS			
-- FINAL IMPACT STATEMENT			
-- EVALUATION PLAN			
ACTION COMPLETED			
APPROVED BY:		DATE	

COPY 1

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FIGURE B.1. USDA's Form for Maintaining Decision Log

program-related activities (excluding administration facilitating provisions) including: 1) legislative, regulatory, or rulemaking proposals; 2) nonprocedural actions and authorizations requested by the Board of Directors of the Commodity Credit Corporation; and 3) program and policy proposals to be considered by the Program and Budget Review Board" (USDA, Sept. 19, 1978a).

The Draft Impact Analysis provides the analytic base for a decision and should contain all the information needed for deciding upon a particular course of action. Where applicable, the analysis includes an examination of secondary impacts on the environment, inflation, the economy, and compliance burden. The specific format prescribed for these analyses is shown in Figure B.2, which indicates the substance of the required analysis. The analysis is made available to the public at the time of publication of the proposal, as well as prior to any public meeting held to discuss the proposal.

To avoid duplication of effort, the Impact Analysis is modified, as needed, to satisfy the requirements for other types of analyses, such as Consumer Impact Statements, Civil Rights Impact Analysis, Inflation Impact Statements, etc. Environmental Assessments or Environmental Impact Statements include an analysis of the type required for the Impact Analysis and can be used either as a substitute for, or for incorporation in, the Impact Analysis Statement.

The agencies have varying staff arrangements for performing the analyses. Some have a central staff for this purpose and others assign the responsibility to the program staff. In still other cases, the program staff initiates the process, which is completed by a central staff. The Department-level staff work with the agencies from the beginning of the decision process, thus taking a proactive, rather than a reactive, approach.

ENCOURAGEMENT OF PUBLIC PARTICIPATION

Each agency is required to identify a Public Participation Office reporting directly to the Administrator. A Public Participation staff also exists at the Department level, and reports to the Director of Economics, Policy

IMPACT ANALYSIS STATEMENT

Date: _____
Agency: USDA - _____
Contact: _____
Phone: _____

1. Title:
2. Nature of Proposed Action and Groups Impacted (intended - and when feasible, unintended)
3. Purpose and Need for the Action
4. Options Considered (Brief description of each feasible option considered)

For each option considered provide: (in full detail for Draft Impact Analysis, but summarized for all but the proposed option in Final Impact Statement.)
5. USDA and Other Federal Costs (dollars, man-years, and offsets from non-federal sources)
6. Expected Impacts
 - a. Impact on main purpose and need to which action is addressed and duration.
 - b. Cost impacts (compliance burdens and other cost impacts for each group affected significantly)
 - c. Other Significant Economic Impacts (employment, prices, market structures and systems, competition, terms of trade, supply and utilization, farm inputs, input markets, energy use, resource use, technology, productivity, investment, credit supply, etc.)
 - d. Other Significant Social Effects (health, safety, nutrition, civil rights, institutions, invasion of privacy and other human concerns)
 - e. Distribution of Effects (geographic concentration or dispersion, time trends, income classes or size classes of enterprise effected within impacted groups, etc.)
7. Reason for Selection of Proposed Option (This need not be provided in Draft Impact Analysis.)
8. Public Comment (Summary and analysis of comments requested from the public; Final Impact Analysis should be responsive to public input.)
9. Approval on significant actions, provide on last page:
Approved: _____
Director, Economics, Policy
Analysis and Budget

FIGURE B.2. Form of USDA's Impact Analysis Statement

Analysis and Budget. The Department's Public Participation staff coordinates with the corresponding agency offices.

When the new procedures were established, the Secretary directed that the Public Participation Office in each agency perform an initial review of agency public participation activities. (Because of the diverse characteristics of USDA agencies, there has been no general public participation plan in the Department). After an evaluation of existing public participation plans and activities, each agency must develop an Agency Public Participation Plan. This is a public document which explains public participation procedures. Each of the steps in this review process is to be performed with consultation of the Departmental staff.

As part of initiating the decision process for a proposed action, an agency is required to develop a specific public participation plan. The Secretary has "directed all agencies to actively solicit public comment and other inputs. Agencies are encouraged to use several means to obtain broad, meaningful, public input. These means may include financial aid for costs incurred in presenting views, public meetings, soliciting added comment on proposals, organized followup on complaints, and training to improve public ability to participate in government procedures" (USDA, Nov. 1, 1978). Public participation plans are to be tailored to the agencies' programs and are intended to stimulate the broadest possible range of public input at each significant stage of an action, including proposal analysis, proposal comment period, post-rulemaking evaluations, and review.

The departmental public participation staff monitors public complaints concerning regulations and the agencies' response to the complaints. They also advise the Secretary on the status of public participation in the Department.

USDA has defined three general criteria, meaningfulness, breadth, and openness, for measuring the quality of the public participation plan for a proposed action. A plan is meaningful if it:

- provides information related directly to the pending decision or action

- adds to or helps confirm the quality of information available to the agency
- conveys attitudes which will reflect the receptivity of the affected public to the proposed action.

A plan has sufficient breadth if it:

- does not overlook or exclude any significant, interested population
- seeks a balance of information from all groups who will experience either primary or secondary impacts.

A plan is sufficiently open if it:

- assures an opportunity to verify that the decision process is fair and well founded
- assures that selected or privileged interest groups are not having an undue or inappropriate influence" (USDA, Sept. 19, 1978b).

CONTROLLING DEVELOPMENT OF THE PROPOSAL

The agency Administrator is responsible for assuring that the following items are attended to: 1) preparation and approval of a Draft Impact Analysis, 2) adherence to the public participation plan, 3) usage of clear language, and 4) minimization of compliance burdens.

When the proposal has been prepared, it is reviewed by the appropriate authority and then published. The notice must indicate the availability of the Draft Impact Analysis and the input desired from the public. It must also indicate that at least 60 days will be allowed for public comment, unless a shorter comment period is necessary, in which case justification must be provided.

Writing Understandable Regulations

Agency administrators are responsible for preparing understandable regulations. Their public information officers must participate in writing regulations to make certain that the language is clear and understandable. The USDA Office of Governmental and Public Affairs is responsible for helping

agencies develop a better writing process and for reviewing their progress with the Secretary (USDA, Nov. 1, 1978). Before a decision log (see later) receives final approval by the Department staff, the agency is required to certify that the language has been reviewed.

One specific action taken to improve the readability of regulations has been the offering, by the USDA Graduate School, of a special course on writing clearer regulations.

PREPARATION OF THE FINAL DECISION AND THE FINAL IMPACT STATEMENT

After public comments have been reviewed and the impact analysis revised, a final decision is made concerning the proposal. To support the decision, a Final Impact Statement is then prepared. This consists of a summary of supporting documentation contained in the Draft Impact Analysis and of additional information obtained during the comment period.

The Director of Economics, Policy Analysis and Budget is responsible for reviewing the adequacy of the Draft Impact Analysis and the Final Impact Statement for significant actions. These documents require his approval. Agency heads have authority to approve impact analyses for all other actions.

Before a final regulation or decision is approved and signed, the Administrator must submit to the appropriate official an assurance that all required steps have been followed. For significant actions, such submittals must include documentation.

EMERGENCY DECISIONS

A special procedure exists for situations in which decisions must be made without adequate time for consideration via the regular procedure. "When an emergency situation requires immediate program action, an agency may promulgate and implement needed regulations or regulatory changes without delay. But in publishing the emergency regulations, the agency must state the basis on which the "emergency" determination was made and must immediately schedule the regulations for review. This review must adhere" to the requirements of the regular decision process (USDA, Nov. 1, 1978).

REVIEW OF EXISTING REGULATIONS

Regulations that must be renewed at specified regular intervals are subjected to the regular decision process at the time of the review. Other regulations must be reviewed at least every 5 years.

The review process consists of the following steps:

1. selection by the agency heads of regulations proposed for review;
2. evaluation of the proposals by the Departmental public participation staff;
3. placement of the proposals on the Department Decision Calendar;
4. publication with the semi-annual decision calendar under the heading "Regulations Proposed for Review;"
5. review of public comments;
6. publication with the semi-annual decision calendar under the heading "Regulations Scheduled for Review;"
7. review of the regulation as follows:
 - (a) invitation of public comment;
 - (b) performance of an impact analysis, using the same procedure as for new regulations; and
 - (c) review of the language for clarity;
8. recommendation by the agency head of any proposed changes; and
9. publication of a notice of final action, including a statement of the basis for the conclusion and a recommended time for the next review.

GENERAL RESPONSIBILITY AND OVERSIGHT OF THE PROCESS

"When matters must be decided by an agency lead or a subordinate, the full responsibility for the operation of the decision-making system rests with the agency administrator or the office director. When matters require a decision by an Assistant Secretary or above, the responsibility for the system is shared between the agencies, the Office of the Secretary and, in some cases, the Domestic Policy staff. Staff offices in the Office of the Secretary have

the responsibility to assist the agencies to operate the system and they have the task of monitoring the system's performance" (Hjort 1978).

The Executive Order stimulated a comprehensive review of the USDA decision process. This review culminated in the refinement of the decision process in order to implement specific aspects of the Order and to ensure greater uniformity. However, as already explained, the resulting process extends beyond the requirements of the order. Prior to the Executive Order, "there was no systematic oversight of the Department's policy decisions... virtually all program authority was delegated to agency administrators" (OMB 1979), and only some controversial programs received in-depth review.

The decision-making process in USDA is intended to be followed uniformly for all types of actions, irrespective of the level of impact. The only variation is in the level of oversight and in the level of required approval for final decisions. The identification of an action as significant does not alter the procedure, only the levels of oversight and approval.

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APPENDIX C

THE PROCESS FOR DEVELOPING DOL/OSHA REGULATIONS

APPENDIX C

THE PROCESS FOR DEVELOPING DOL/OSHA REGULATIONS

PREFATORY NOTE

The procedure described herein is the general procedure used by all agencies within the Department of Labor. OSHA complies with this procedure, but has also been developing the specific details necessary for implementing each step within the context of its particular circumstances. That effort should be completed later this year (1980).

INTRODUCTION

The Department of Labor (DOL) is required to "implement many statutes and executive orders which relate to a wide range of subjects.... Each agency within the Department is responsible for developing its own regulations.... The procedures used by the agencies...vary in accordance with the needs of the programs being administered" (DOL, Jan. 26, 1979).

On May 26, 1978, the Department published proposed guidelines for public comment (DOL, May 26, 1978). After review of the comments received and appropriate revision of the proposal, final guidelines were published on January 26, 1979. Later, the Secretary issued an order which clarified procedures and roles under the guidelines (DOL, May 30, 1979).

The guidelines represent a complete revision of Department procedures. In particular, the Secretary now has direct control over the process of developing regulations, whereas before, each Assistant Secretary could issue regulations without the Secretary's approval. Another important change is the establishment of a department-wide review of development plans for proposed significant regulations.

This report summarizes the new procedures.

INITIATION OF THE REGULATION DEVELOPMENT PROCESS

When it appears that a new regulation may be necessary, the official responsible for its development must assess the need for the regulation and possible alternative approaches. If the official decides to recommend development of a regulation, he must first prepare a concept paper, which is the first part of a development plan.

Concept Paper

The concept paper contains an "assessment of the need for a regulation and possible alternative approaches (DOL, May 30, 1979). The purpose of the concept paper is "to provide for early discussion and input representing the full range of perspectives within the Department. It also provides information for the Secretary and the DOL Agenda on regulations being developed (DOL, May 30, 1979).

After the concept paper is approved by the appropriate agency head, it is circulated, for review and comment, to all affected agencies, including the Secretary, the Under Secretary, the Office of Policy, Evaluation and Research, the Solicitor, and the Office of Legislation and Intergovernmental Relations. This review provides "the basis for the Secretary's concurrence with the Agency Head's decision to proceed with the development of the regulation" (DOL, May 30, 1979).

Action Plan

If the proposal to develop a regulation is approved, the initiating official must decide if the proposed regulation may be significant (see later for definition). If it appears that it might be significant, he must prepare the second part of the development plan, that is, the "action plan."

The action plan includes the following items:

- (1) a judgement regarding the significance of the regulation;
- (2) a judgement regarding the necessity of a regulatory analysis;
- (3) a tentative plan for obtaining early public participation;
- (4) steps required for developing the regulation; and

- (5) a projected timetable for the regulation's development.

The action plan is circulated and reviewed, like the concept paper, to all affected agencies. After the review, the plan must be approved by the agency head, or other person responsible for signing the regulation, with concurrence by the Secretary.

Identification of "Significant" Regulations

A regulation is considered significant if it qualifies as a major regulation (see later) or if it "directly or indirectly...

- (1) affects the health or safety of employees;
- (2) affects standards for determining the amount of or conditions under which benefits are payable to individuals or the eligibility of individuals to participate in various programs;
- (3) affects the operations or responsibilities of a particular industry or business, or group of industries or businesses, or public or private organizations, or of state or local governments....
- (4) increases existing reporting or compliance requirements or establishes substantial new reporting or compliance requirements for any public or private group;
- (5) affects competition within a particular industry or business;
- (6) affects any program of a state or local government or of any other federal agency; or
- (7) affects equal employment opportunities...

Even if a regulation does not meet the standards described above, it may still be appropriate to subject it to the requirements which apply to significant regulations,...particularly...if the regulation is likely to arouse considerable public interest...(DOL, Jan. 26, 1979).

Identification Of Major Regulations Requiring A Regulatory Analysis

A regulatory analysis is required for all proposed regulations expected to have a major economic impact. A proposed regulation may be considered to have a major economic impact if it is likely to cause:

- "(1) an increased cost of \$100 million or more in any one year for the national economy;
- (2) a \$50 million or larger increase in costs or total revenues in any one year for a specific segment of the economy...
- (3) a direct dislocation of 10,000 jobs or more;
- (4) a substantial limitation on competition, marketing, market-information or an increase in concentration in a market doing \$100 million of business a year or more" (DOL, May 30, 1979).

These criteria are to be regarded as guidelines rather than precise standards. Their purpose is to indicate a rough order of magnitude of impact. Accordingly, the Department's procedures will not ordinarily require a complex analysis to determine whether a proposed regulation meets these criteria.

Public Participation

The initiator of a significant regulation is required to develop a plan that maximizes early public participation in the development of the regulation. Since no single plan is clearly most effective for all cases, an approach is to be selected that most suits the project under consideration. Among the approaches which are to be considered are the following:

- (1) publication in the Federal Register of a notice or advance notice, inviting public comment;
- (2) public hearings;
- (3) conferences or meetings;
- (4) direct notification of potentially affected parties;
- (5) distribution of notices, press releases, or statements to trade journals or other publications;

- (6) submission of the proposal to advisory committees;
- (7) communication with appropriate federal, state, or local agencies (DOL, Jan. 26, 1979).

DEVELOPMENT OF SIGNIFICANT REGULATIONS

After approval of the action plan for a significant regulation, the person responsible for signing the regulation (or the appropriate agency head) designates a project manager, or managers, to assure that the development proceeds in a proper and timely manner. That person is responsible for considering all of the relevant issues and for developing a regulatory analysis, when required.

To receive approval from the responsible official, a proposed significant regulation and its development must satisfy the following criteria:

- (1) The regulation is needed and is consistent with the law and the legislative goal it seeks to fulfill.
- (2) The direct and indirect effects of the regulation have been considered and the least burdensome of the major acceptable effective alternative approaches has been selected.
- (3) Public comments have been considered and responded to.
- (4) The regulation is written in plain language that will be understood by those who must comply with the regulation; overly technical language, incorporation of other documents by reference, and complex procedures will be kept to a minimum.
- (5) Any new reporting or recordkeeping burdens are justified and kept to a minimum.
- (6) The name, address and telephone number of an agency official who may be contacted by members of the public have been included.
- (7) A plan for monitoring and evaluating the regulation after issuance has been developed.

- (8) If required, a regulatory analysis has been prepared, a summary of which is included in the NOPR. A statement of how the public may obtain a copy of the initial regulatory analysis will also be included (DOL, Jan. 26, 1979).

Regulatory Analyses

The purpose of the regulatory analysis is to be a useful tool in the decision-making process. The following items are to be covered in such detail as is practical:

- (1) a statement of the problem and regulatory objectives;
- (2) a brief description of the parties most likely to be affected;
- (3) a description of the major acceptable alternative regulatory actions under consideration and a discussion of the effectiveness of each of those alternatives in achieving the regulatory objectives;
- (4) an estimate of the economic effects of the major acceptable alternative actions, which indicates the limitations of accuracy attached to such estimates;
- (5) an explanation of why a given alternative was selected for proposed regulatory action;
- (6) a brief description of assumptions, methods and important source material relied upon in performing the analysis (DOL, Jan. 26, 1979).

The Office of Policy, Evaluation and Research has been directed to assist the agencies in the design of regulatory analyses.

APPROVAL AND PUBLICATION

Before a significant regulation is published, a draft of the proposed regulation is sent to the Secretary and the Under Secretary; this draft must be accompanied by written statements by the signing official to the effect

that the regulation is deemed to be significant and that the criteria for approval have been met. In addition, the Office of the Solicitor must clear all proposed and final regulations.

In cases where a regulatory analysis is required, a copy of the same is transmitted to the Secretary, with a recommendation by the agency head, indicating whether special consideration by the Secretary is needed. Approval of the regulation by the Secretary and the Under Secretary is required, prior to publication, for both proposed and final regulations.

"The Secretary's immediate staff does a detailed assessment of the proposed regulations and the regulatory analysis and advises the Secretary before he approves the regulation (OMB 1979).

Each NOPR published in connection with a significant regulation is to provide, where possible, at least 60 days for public comment and participation. When a shorter period is necessary, the notice must provide an explanation.

EXEMPTIONS FROM THE REGULATORY DEVELOPMENT PROCESS

Although the Executive Order contains certain exemption provisions, it is the policy of the Department that the guidelines be followed "to the extent they are practicable and useful in particular situations, without compromising applicable policy and legal requirements" (DOL, Jan. 26, 1979).

REGULATORY REVIEW PANEL/SEMI-ANNUAL AGENDA

A Regulatory Review Panel has been established to review proposals to develop regulations, and compile from them the Department's semi-annual agenda of regulations. The Panel is also authorized to receive petitions for regulatory action from the public. Final decisions on the agenda are made by the Secretary. Panel membership includes the Under Secretary, the Assistant Secretaries, and the Solicitor.

The Panel is also authorized to make "recommendations concerning the review of overlapping and common subject matter regulations in force in different agencies within the Department" (DOL, Jan. 26, 1979).

REVIEW OF EXISTING REGULATIONS

Each agency is to select for review significant regulations within its jurisdiction, which are submitted to the Regulatory Review Panel for inclusion in the semi-annual agenda. The Panel transmits the list to the Secretary for approval.

Regulations are selected for review based on the following criteria.

- (1) The regulation continues to be necessary to achieve statutory or policy goals.
- (2) The regulation has been the subject of significant public controversy, complaints, or suggestions.
- (3) The regulation is particularly burdensome for some segment of the public.
- (4) The regulation is confusing, difficult to interpret, or unnecessarily complex.
- (5) The regulation is duplicative or inconsistent with other DOL or other agency regulations treating similar subjects.
- (6) The regulation is consistent with recent technological advances.
- (7) A revision of the regulation needs to be considered in the light of changed economic or other conditions.
- (8) The regulation has been or probably will be subject to change as a result of legislative action.
- (9) Court decisions have changed the meaning or effectiveness of the regulation.
- (10) Agency operating personnel consider the regulation inefficient, burdensome, or a proper subject for revision.
- (11) The length of time since the regulation has been evaluated makes it a reasonable time for review.
- (12) The regulation is discriminatory.

Agencies are also directed to attempt to identify outdated minor regulations for inclusion on the semi-annual agenda. The review process is similar to that for the development of new regulations.

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APPENDIX D

ENVIRONMENTAL PROTECTION AGENCY'S PROCESS FOR DEVELOPING REGULATIONS

APPENDIX D

ENVIRONMENTAL PROTECTION AGENCY'S PROCESS FOR DEVELOPING REGULATIONS

This report examines the regulatory process within the Environmental Protection Agency (EPA). The report describes the development process and issues of particular concern, and then addresses EPA's procedures for analyzing regulations during the regulation development process. Of particular concern are: how the regulatory process varies for different levels of regulatory impact, how impact analyses are conducted, how EPA has responded to Executive Order 12044, and whether EPA has reviewed its regulatory process.

Created in 1970 by an Executive Order of President Nixon, EPA brought a number of Federal pollution and environmental programs together under a single aegis. In the ten years since, Congress has placed further duties on EPA; today the Agency is responsible for implementing and enforcing a number of Acts of Congress. Its programs cover many different subject areas--toxic substances, noise pollution, atmospheric emissions, etc.--and in this sense, the Agency is a collection of "mini-agencies," each with its own mission, programs, and expertise. At the same time, its programs are fundamentally interdependent. Regulations promulgated in one area not only may, but probably will, affect other areas.

EPA has a central office in Washington and ten Regional Offices throughout the country. The entire Agency is headed by an Administrator. Six Assistant Administrators are responsible for program areas and special concerns of the Agency. Figure D.1 shows EPA's organizational structure.

BACKGROUND

Douglas Costle, appointed Administrator in 1976, brought with him an interest in regulatory reform and several staff members committed to improving EPA's regulatory process. The Agency developed a new process that eventually served as a partial basis of Executive Order 12044. The same process,

STRUCTURE OF DOT

FIGURE D.1. Organizational Structure of EPA

somewhat modified as a result of Executive Order 12044's other formal requirements, persists today. It is this model that is described below.

Agenda of Regulations

Although Executive Order 12044 only requires semi-annual publication of an agenda of upcoming regulations, EPA publishes its Agenda four times a year. The Agenda serves two functions. It lists all "significant" regulations that EPA expects to publish within the year, and it lists only proposed major policy actions (e.g., EPA guidelines or Presidential guidance). A regulation is placed on the Agenda once a Start Action Notice (SAN) is circulated during Stage 1 of the process, which is described later.

As it appears in the Federal Register, the Agenda has four columns providing the following information. Column 1 contains the title of the regulation, the agency identification number (for internal tracking), statutory authority for the regulation, the planned location of the regulation in the Code of Federal Regulations (CFR), a short description of the regulation, an indication (asterisk) of whether the regulation requires an RA and an indication (bullet) of whether the regulation needs an Urban and Community Impact Statement. Columns 2 and 3 contain the actual or proposed publication dates of the proposed regulation (in Column 2) and the final regulation (Column 3). Column 4 contains the name, address, and phone number of the agency official who can provide further information.

Interagency Coordination

EPA uses three devices for coordinating its activities with those of other agencies: the Interagency Regulatory Liaison Group (IRLG), the Regulatory Council, and informal coordination.

Composed of EPA, the Occupational Safety and Health Administration, the Consumer Product Safety Commission, the Food and Drug Administration, and the Food Safety and Quality Service of the Department of Agriculture, the IRLG coordinates regulations dealing with hazardous substances. IRLG attempts to create joint action on the part of the member agencies, and to reduce overlap, inconsistency, and duplication. The lead office is encouraged to contact IRLG if it believes a regulation it is considering might affect another agency.

Thirty-five agencies are members of the Regulatory Council, which publishes the Calendar of Federal Regulations and is supposed to initiate mechanisms for interagency coordination. To date the Council has done little of the latter, and is primarily a repository of information.

The lead office of EPA is supposed to contact other agencies it believes may be affected by or interested in the contemplated regulation. When the lead office prepares the Development Plan, it is supposed to describe what outside agency participation may be necessary. If conflicts with other agencies develop, the Steering Committee can help resolve them. Two EPA offices--the Office of Environmental Review and the Office of Intergovernmental Activities--can assist the lead office in coordinating its actions with other agencies and State governments, respectively.

Screening Old Regulations

EPA has recently completed a year-long review of existing regulations, in line with Executive Order 12044's mandate. EPA screened the regulations to determine if each was acceptable as is, in need of short-term improvement, and in need of long-term evaluation.

EPA is now in the process of revising regulations in need of short-term improvement. Those long-term evaluations now under way should all be completed within 5 years. Any time a regulation is revised, it must follow the full process described in the following section (unless the revision is minor).

THE PROCESS

Unlike any other federal agency examined in this study, the EPA has a remarkably unified, coherent, and well-structured policy for developing and promulgating regulations. EPA develops regulations through a complex but integrated five-stage process (Figure D.2).

Stage 1: Notification (3 to 8 weeks)

Three tasks must be accomplished at this stage:

DIAGRAM OF EPA'S PROMULGATION PROCESS

FIGURE D.2. Diagram of EPA's Promulgation Process

1. The lead office (i.e., the relevant Assistant Administrator) must determine whether the regulation is "significant" or "specialized."
2. The lead office must notify senior management that it intends to begin action on promulgating a regulation. This is accomplished through a Start Action Notice (SAN).
3. The lead office must coordinate the creation of a Work Group, which will have primary responsibility for developing the regulation. Work Group members are drawn from all parts of EPA, including the lead office.

At the outset, the lead office must designate a regulation "significant" or "specialized." If a regulation is considered specialized, it need not follow this model for promulgation, and undergoes a different set of procedures, which are described later.

EPA regards all regulations as significant unless they qualify for exclusion based on one of the following criteria:

- They are administrative or procedural in nature and do not affect compliance costs, stringency, or the environmental/health benefits of EPA programs
- They are minor amendments to existing regulations
- They are the result of detailed Congressional mandates that have no discretion
- The lead office regards the regulations as minor
- EPA is simply acting in response to State or locally developed regulations, such as those associated with State Implementation Plans, State-established water quality standards, and pesticide tolerances.

As a check on this designation, any Assistant Administrator's Office (AAO) may request the lead AAO to reclassify a regulation from specialized to significant.

The responsible person in the lead AAO fills out a SAN form, which is distributed to senior management, including Regional Offices; Offices of Air, Noise and Radiation; Enforcement; Toxic Substances; Water and Waste

Management; Administrator's Staff Offices such as Counsel, Office of Legislation, and others; Office of Planning and Management; and others who may wish notification. The SAN informs its recipients that action in a certain area is contemplated, and requests those interested to serve on the Work Group.

The purpose of the Work Group is to plan the development of the regulation with the full cooperation and input of other parts of the Agency. Usually the lead AAO will choose several of its own staff for service on the Work Group. In addition, other AAOs or interested offices may be members of the Work Group simply by asking. In fact, EPA encourages lead offices to actively solicit the participation of other offices they believe should be members of the Work Group. The Work Group usually consists of 8 to 12 members. For those regulations that are controversial or have an extensive impact, the Work Group may be larger. The lead office usually has three or four representatives on the Work Group.

Stage 2: The Development Plan (2 to 6 months)

After the Work Group has been formed, the lead office and Work Group collaborate in the production of a Development Plan. This planning document describes what actions the Work Group will have to undertake to promulgate the regulation. It contains ten elements: 1) the purpose of the regulation; 2) schedule for completion; 3) an ANOPR; 4) a priority classification if the regulation is "major;" 5) a list of issues to be resolved; 6) a summary of major alternatives to be evaluated; 7) a list of exclusions (actions that normally would be taken but will not be in this case); 8) a summary of expected EPA participation; 9) an external participation plan that describes the input of other agencies; and 10) EPA resources needed to develop the regulation.

To complete the Development Plan stage, five tasks must be carried out.

1. The lead office must determine whether a regulation is "routine" or "major." Major regulations receive more intense scrutiny from senior EPA management.
2. The Work Group and lead office must collaborate in drawing up the actual Development Plan, including an ANOPR.

3. The Steering Committee, chaired by the head of EPA's Standards and Regulations Division, independently evaluates the Development Plan and works to resolve concerns with the lead office.
4. The Development Plan is sent for "red border" review. All senior management personnel receive the Development Plan and are asked to state whether they concur. Nonconcurrence must be resolved before the Development Plan can be published. The lead office and Work Group must respond to these comments and prepare a mutually acceptable Development Plan.
5. The Development Plan is sent to the Administrator's office for review and approval. If approved, the ANOPR is published in the Federal Register.

Type of Regulation: Major or Routine? All significant regulations must follow the model described here. However, EPA also divides significant regulations into two kinds: major and routine. Major regulations receive extra scrutiny from EPA Senior Management.

A regulation is classified as major if it 1) addresses a major health, ecological, or economic impact, 2) has a significant urban impact, 3) initiates a new regulatory program or marks a change in EPA policy, 4) affects another agency or another EPA program, 5) has a disproportionate regional impact, or 6) is a program central to the purpose of the relevant statute.

Drawing Up the Development Plan. The Work Group is primarily responsible for the Development Plan and the final product should reflect a consensus of the Work Group. The lead office manages preparation of the Development Plan, and sees to it that all parts are completed. The plan includes an ANOPR, a clear and succinct notice to the public of the action contemplated. An ANOPR can discuss background and schedules, name liaison officials, and describe means for public participation. The more complex the contemplated regulation, the more detailed the ANOPR is. Members of the Work Group from other AAOs regularly inform their offices of progress and issues and receive guidance. In this way, these assisting offices have continuing input into the process.

After the Work Group is satisfied with the Development Plan, it prepares an Action Memo that briefly summarizes the Plan.

Steering Committee Review. The Steering Committee is a standing EPA committee composed of six AAs, the General Counsel, and the Administrator's Office Directors. It is chaired by the Director of the Standards and Regulations Division (SRD). The Steering Committee is supported by its own technical staff, drawn from SRD divisions.

Once the Development Plan is completed, the Steering Committee receives the whole package. The Steering Committee (and ultimately SRD) exercises control over both form and content. It will examine the package for accuracy, clarity, completeness, and compliance with Executive Order 12044. Often the Steering Committee will use the SRD technical staff to conduct its own evaluation of the Work Group's facts and conclusions.

The Steering Committee meets regularly. To schedule its Development Plan for the Committee's review, the Work Group must request the lead office AA (who is a member of the Steering Committee) to place it on the Committee's agenda. If the Work Group believes a regulation to be noncontroversial, it can request "Consent Calendar" review. In Consent Calendar review, the Development Plan is distributed to Steering Committee members, but they do not meet to discuss it. If any one of the Steering Committee members objects to Consent Calendar review, then a full meeting of the Steering Committee must be held.

At its meeting, the Steering Committee can take one of three actions (by majority vote). It can approve the package, request more time to evaluate the package, or ask for revisions. If revisions are needed, the Work Group and lead office AA must work to make the package satisfactory to the Steering Committee. Until the Steering Committee approves the package, it cannot be sent for the next stage of review.

"Red Border" Review. Once the Steering Committee is satisfied that the Development Plan has met its criteria, it is given to SRD, which circulates the Plan for "red border" review. (The Action Memo accompanying the review materials is bordered in red.) If the regulation is designated as major, the

ANOPR and the backup Development Plan are both circulated for red border review, and the Development Plan is sent to senior managers for their information.

Red border review involves the entire Agency in the promulgation process. All AAs and office Directors--and on occasion Regional Administrators--receive the Development Plan. Usually they have 3 weeks in which to respond with a "concur" or "nonconcur." In cases where the Steering Committee unanimously approves the package, an expedited review of 8 days is possible.

If all red border reviewers concur, the Plan can go directly to the Administrator for review and approval. If someone "nonconcur," then the lead office must respond and revise. If agreement cannot be reached, the issue will go to the Administrator for a decision. After all revisions have been satisfactorily made, the Development Plan is considered completed.

Administrator's Approval and Publication. The Administrator's Correspondence Control (AX) reviews all Development Plans for grammar and form. AX then gives the Deputy Administrator the Plan for his review, and it proceeds to the Administrator for approval. All ANOPRs must be signed by the Administrator before the Federal Register Officer of SRD can send it for publication in the Federal Register.

Stage 3: The Decision Package (8 to 20 months)

During Stage 3 the Work Group and lead office direct completion of most of the work on the regulation. A Decision Package is prepared that includes support materials, analysis of alternatives and costs, and a written preamble and regulation for publication in the Federal Register. The Decision Package contains an Action Memorandum that summarizes the Decision Package, documents for the Federal Register (the preamble and proposed regulation), as many as five relevant analyses, an Evaluation Plan that describes how EPA will evaluate the regulation's effectiveness, and a Public Participation Summary of comments received and the Agency's response.

Completion of the Decision Package calls for the performance of three tasks, which are described in more detail below.

Public Participation. SRD encourages the Work Group and lead office to solicit public comment affirmatively, especially in complex or controversial cases. Requests for comment may be sent to Regional Offices, States, and localities. Public meetings may be held. All comments are collected by the lead office and ultimately integrated into preparation of the Decision Package.

A concern at this point is the effect of the Federal Advisory Committee Act, which imposes strict requirements on how and when EPA can involve outside people and groups. These limitations often discourage EPA from actively soliciting comments.

Preparation of the Decision Package. The Work Group and lead office cooperate in the preparation of the Decision Package. As in Stage 2, members of the Work Group apprise their respective AAs of progress and seek guidance. If the Work Group finds itself unable to agree on an issue, it will turn to the lead office--and, if necessary, the Administrator--for guidance.

Work on this task ideally proceeds in two steps. First, relevant analyses should be prepared. Then, after the analyses are nearly complete, the Work Group should draft the regulation. In practice, the two steps may be mingled, although EPA believes its subsequent review procedures will limit this.

Assistant Administrator Review. After the Work Group is satisfied with the Decision Package, it goes to the lead office's AA, who must review and approve the package. It is then considered complete by the AAO. Before it can be printed in the Federal Register, however, it must pass through Stage 4--internal review.

Stage 4: Internal Review (2 to 5 months)

The AA-approved Decision Package undergoes a review process similar to that of the Development Plan. The Internal Review Process proceeds in three steps: 1) Steering Committee review, 2) Red border review, and 3) Administrator's approval.

The Steering Committee receives the entire Package and examines it for writing quality, analytic quality, and compliance with Executive Order 12044.

The Committee and the SRD are responsible for ensuring that the Package is complete. The Steering Committee also clarifies and, with the cooperation of the lead office, resolves issues. If the Committee calls for revisions, the Work Group and lead office must respond to them.

All AAs and senior managers receive the Package for red border review. "Routine" regulations that received a consensus approval from the Steering Committee need only an eight-day review. If the Committee's decision was not unanimous, or if a senior manager requests it, full 3-week red border review occurs. The lead office AA can request expedited review, but extensions are readily granted by SRD if any other reviewer requests one. If the regulation is "major," it must undergo full red border review.

If any reviewer "nonconcur," the Work Group and lead office must seek to resolve the dispute. If this cannot be done, the Administrator may be called upon to resolve the issue. Once the regulation has satisfied red border review, it proceeds to AX.

The Administrator's Correspondence Control (AX) edits the Decision Package for grammar and form, and distributes it to the Deputy Administrator, who reviews it for content. When all is satisfactory, the Administrator receives the Decision Package for approval and signature. The signed NOPR, with its preamble, is sent to the Federal Register officer of SRD, who forwards it for publication.

Stage 5: Review for Final Promulgation

The NOPR is essentially a draft regulation. Executive Order 12044 requires a 60-day public participation period, after which EPA must respond to the comments and modify the regulation where necessary. The revised regulation then goes through the same kind of review process described in Stage 4 before it can be published as a final regulation in the Federal Register. Stage 5 is accomplished in the following five tasks.

Public Participation. The lead office makes active attempts to secure input from groups it believes to be affected by the regulation. Comments are solicited in a variety of ways, including direct mailings and public hearings. Public hearings must be announced at least 45 days in advance. All comments

received must become part of the public record. Some parts of EPA, including the Office of Public Affairs, have slight grant-making powers to pay for participation, but these are not widely used. The public comment period expires after 60 days, but may be extended if public interest is intense or the regulation is complicated. All background documents must be available to the public during the 60-day comment period.

Response to Comments. The Administration Procedure Act requires agencies to publish responses to all comments in the Federal Register and to revise the draft regulation where necessary. At EPA, the lead office and the Work Group take responsibility for responding and revising. Many times comments can be refuted or responded to without altering the draft regulation. Often, however, a revision must be made. The Work Group must prepare a list of all comments and its responses. This list will be published in the Federal Register at the same time the final rule is published. After the Work Group completes its duties, the lead office AA must review the final regulation and approve it.

Internal Review: Steering Committee, Red Border, Administrator. The completed final regulation undergoes an internal review process that follows the same procedure as Stage 4. After each group has reviewed the regulation and resolved its differences with the lead office, the rule and its attendant comment discussions are published in the Federal Register. The regulation takes effect no less than 30 days after publication.

ISSUES OF PARTICULAR CONCERN

How the Regulatory Process Differs for Different Levels of Regulatory Impacts

EPA follows different processes for regulations of different impact. Regulations initially are categorized as "significant," or "specialized." Significant regulations undergo the full promulgation process described in the preceding section. Specialized regulations undergo a quicker, less comprehensive, and less demanding promulgation process.

"Significant" regulations subsequently are categorized as "major" or "routine." Major regulations are more closely examined by top management, have

more detailed analyses, and involve a greater intra-agency effort than routine ones. Routine regulations follow the full but expedited development process. Major regulations then are classified as needing or not needing an RA. An RA provides an in-depth examination of alternative courses of action and must justify the chosen alternative as the least costly and burdensome available. All major regulations receive an Economic Impact Analysis, which measures the costs and impacts of the proposed regulation. Figure D.3 is a schematic diagram of this process.

If a regulation is significant, it follows the full development process described in the preceding section. The promulgation process for specialized regulations is much different from that for significant ones. To be promulgated, specialized regulations must meet the following requirements. The

FIGURE D.3. EPA's Different Processes for Regulations with Different Impacts

lead office must circulate a SAN. ANOPRs, NOPRs, and Final Rules must still be issued. A paragraph must be inserted with each Notice in the Federal Register to the effect that it is a specialized regulation not subject to Executive Order 12044's procedural requirements. And, the proposed regulation must still pass through red border review before the Administrator can sign it. Thus, specialized regulations do not require broad intra-agency participation, extensive analysis, or Steering Committee review.

EPA is aware that classification of regulations as routine or major is subjective, which is why it is easy to change the classification: the Administrator may order the change if another office requests it.

Major regulations are treated differently from those designated routine. If a regulation is major:

- The Development Plan is subject to red border review (routine regulations are only reviewed by the Steering Committee and the Administrator receives a copy for his information).
- The lead office must provide progress reports to the Administrator. The regulation is prominently displayed in the Administrator's regulation tracking system.
- Analyses are expected to be more detailed.
- Other offices will contribute more time and resources to helping the lead office prepare the regulation.
- The Decision Package must pass through a full 3-week red border review, unless the Steering Committee unanimously approves the package, in which case red border review lasts 10-days.

An RA must be prepared if the proposed regulation meets the following EPA criteria:

- Additional annual costs of compliance, including capital charges (interest and depreciation), total \$100 million (1) within any one of the first 5 years of implementation, or (2) if applicable, within any calendar year up to the date by which the law requires attainment of the relevant pollution standard.

- Total additional cost of production of any major industry product or service exceeds 5 percent of the selling price of the product.
- The Administrator requests such an analysis (for example, when there appear to be major impacts on geographical regions or local governments).

Regulations requiring an RA are treated the same as all major regulations, with three exceptions: The preamble of the NOPR must contain the draft RA. The preamble of the final rule must contain the final RA. The regulation is subject to review by the Regulatory Analysis Review Group (RARG). The analysis of economic effects must analyze the effects of options aside from the one EPA expects to adopt.

How EPA has Responded to Executive Order 12044

Much of EPA's process for developing regulations served as a model for Executive Order 12044. Thus, changes since the Executive Order for the most part have been "largely incremental," according to OMB. For example:

- EPA's process incorporates a great deal of top management policy oversight and intra-agency coordination.
- Public participation has expanded somewhat since the Executive Order, and through such devices as a required ANOPR has gone beyond OMB's requirements.
- EPA has strong analytical resources, although since the Executive Order it is unclear that more extensive analysis of alternative has been done than before.
- EPA is now in the process of reviewing its old regulations in compliance with the Executive Order.
- With the Executive Order, the agency instituted a number of Plain English requirements, including centralized control by the Steering Committee.

Whether EPA has Reviewed its Regulatory Process

EPA seems satisfied with the basic model it uses to develop regulations. To date, no true internal review of the process has been conducted, although OMB has conducted its own review (as it did with all agencies). Interviews with members of the SRD (which is responsible for the process) indicate that SRD continuously monitors the process. The following concerns have been expressed.

- The EPA process can be cumbersome and time-consuming.
- Red border review on occasion does not receive adequate attention from offices other than the Head office.
- Analyses often overlap; the Integrated Assessment is not well integrated in practice.
- Analyses often are ignored, or take place after the decision already has been made on what alternative to adopt.
- Different branches of EPA have shown varying degrees of enthusiasm for the process.
- Although policy oversight levels of EPA are committed to the process, lower Work Group levels often have not changed old patterns of behavior.

THE REGULATORY ANALYSIS: ANALYTICAL DECISIONMAKING AT THE ENVIRONMENTAL PROTECTION AGENCY

The RA and other analyses are an integral part of EPA's regulatory process. This section examines the analyses from two broad perspectives. We first describe EPA's own guidance of which analyses are to be prepared, the circumstances that call for their use, how they fit within the regulation development process, what role the analyses play in development of regulations, and how they should be conducted. We then evaluate and discuss how the EPA analyses are used in practice. For this part of the report, we traced through the RA of one particular regulation: The Hazardous Waste Management

System, subtitle C of the Resource Conservation and Recovery Act (RCRA). A summary of the Regulatory Analysis can be found in 45 Federal Register 33066 (1980).

The EPA Model of the Regulatory Analysis

Executive Order 12044 confirmed for EPA the importance of integrating an analytical approach into the development of regulations. The Executive Order called for a "Regulatory Analysis," which would examine the economic costs and benefits of alternative means of promulgating a particular regulation. The rulemaking agency was then to choose the least burdensome alternative as the regulation it would adopt. At the same time, EPA and OMB were creating other types of analyses--for example, the Urban and Community Impact Analysis--that EPA also wanted to use as decision-making tools. At this point, six different analyses can be used by the Agency, including the Executive Order's original requirement of the RA.

In response to these new developments, EPA is currently reorganizing its analytical structure. The Agency hopes to make its RA a statement that integrates all of the other analyses it has taken upon itself to conduct. That which is now termed the Regulatory Analysis (in Executive Order 12044) will be the economic assessment portion of the integrated statement. As discussed in later sections, this change represents a major policy shift for the Agency. However, since that policy is not yet in effect, and for the sake of clarity, this report will use the term "Regulatory Analysis" as it is presently defined: an economic assessment.

Focus of the Analyses

EPA currently relies on six different analyses to support their regulation development. Others are also being considered, including statements on the impact of a proposed regulation on small businesses, on productivity, on farmland, on innovation, and on the American family.

The RA, Economic Impact Analysis (EIA), and Economic Assessment (EA) focus on the economic impacts of a proposed regulation. Executive Order 12044 requires the RA for significant (over \$100 million impact) regulations. EPA's own internal policy requires an EIA or EA for regulations with lesser impact.

The three analyses differ from each other in intensity and thoroughness. The RA, the most thorough, fully assesses a variety of alternative means of accomplishing the regulation. The EIA may look at fewer alternatives, and with less detail. The EA is a more cursory study. The Economic Analysis Division within EPA serves as an information and guidance source for those involved in writing the regulation.

Environmental Impact Statement (EIS). The 1970 National Environmental Policy Act (NEPA) initiated the requirement for the EIA, which assesses environmental costs and benefits of a major federal action, including regulation. Although EPA itself is not required by law to perform EISs, it voluntarily performs them in a number of instances. The Agency often combines the EIS and EIA into a unified analysis, performing both together. The Office of Environmental Review within EPA oversees the EIS, providing guidance and sometimes funding to those developing the regulation.

Urban and Community Impact Analysis (UCIA). OMB Circular A-116 requires the UCIA, which examines population shifts; per capita income changes; employment changes; and fiscal impacts of a proposed regulation on cities, suburbs, and nonmetropolitan areas. The Deputy Administrator's office presently has responsibility for the UCIA. The specific requirements of the analysis have not yet been made final.

Reporting Impacts Analysis (RIA). The RIA evaluates the administrative burden of complying with a regulation. The Program Reporting Staff at EPA provides assistance on this analysis to those developing regulations.

Operations and Resource Impact Analysis (ORIA). The ORIA evaluates the amount of resources that EPA and other federal government, state, and local entities will need to implement the proposed regulation. It also serves as an aid to EPA in its budget programming for the Zero Based Budgeting (ZBB) process. The Program Analysis Division at EPA can assist those working on the ORIA.

Evaluation Plan (EP). All significant regulations must have an EP that indicates when and how an evaluation of the implemented regulation will be conducted. The EP is under development by SRD.

Under What Circumstances Is Each Analysis Required?

The way in which EPA categorizes its regulations determines which particular analyses are required. All regulations are deemed either "significant" or "specialized." Specialized regulations are procedural, administrative, or otherwise minor in nature. All other regulations are termed significant, and receive some type of assessment. Significant regulations are further subdivided into "major" or "routine" regulations. EPA classifies regulations as major if they address a serious problem, mark a change of policy, or have significant impact. Figure D.4 illustrates this hierarchy, and shows which categories receive each type of analysis.

FIGURE D.4. Relationship of Required Documentation to Regulation Classification

The RA is applied to major regulations; Executive Order 12044 requires that it be performed if the regulation has a projected impact of more than \$100 million. The EIA analyzes major regulations that do not need an RA. It is conducted for EPA purposes and is required by EPA procedures. Although it does not have to provide as much detail as the RA, it does follow the same approach. The EA is used for routine regulations; its focus is the same as that of the RA/EIA, but its procedures are much less sophisticated. EPA does not have to perform EISs. However, the Agency does select regulations for an EIS on the basis of a list of statutory sections which require one (e.g., Sections 109, 111, 112, 202 and 211 (c) of the Clean Air Act). All significant EPA regulations require an ORIA, although the level of analysis depends on the projected size of the program. As of this writing, EPA has not yet developed criteria for designating which regulations will require a UCIA. All regulations that impose reporting or recordkeeping requirements must have an RIA. The EP must be performed for all significant regulations.

What is the Role of Analysis?

EPA believes that the analyses should serve as decision-making tools. EPA guidance proposes three ways in which to integrate analyses into the decision-making process:

1. Alternatives should be analyzed early in the development process, before critical choices are made.
2. The analyses should be incorporated into the thoughts of staff members in the Work Group and the lead office. Even though the draft analyses are not completed until the NOPR is published, ongoing briefings, distribution of summaries, and progress reports should be used to help Work Groups and lead offices use the analyses in their decision-making.
3. Senior managers and other divisions within EPA should be consulted as to the design of alternatives.

It is crucial to understand that the utility of the RA as a decision-making tool depends upon the receptivity of the Work Group and lead office staff members. They must be willing and able to integrate the analysis into their thought processes.

How Does EPA Conduct Analyses?

The analytical process can be broken down into three component parts: (1) identifying the alternatives to be evaluated, (2) examining each alternative using the various analyses available, and (3) choosing the best alternative. Each of these is discussed in more detail in the sections that follow. A fourth section addresses EPA's requirement for an "Integrated Assessment," which ties the various analyses together and presages an important shift in policy at the Agency.

Identifying Alternatives

EPA believes that "careful consideration of alternatives...is perhaps the central thrust of the government-wide regulatory reform effort of the past few years." Regulation imposes potentially large costs on the economy. Careful consideration of alternatives encourages the adoption of cost-efficient regulation mechanisms. Also, regulators, academicians, and others are becoming increasingly aware of the limitations of traditional "command-and-control" regulation and the feasibility of non-regulatory alternatives.

EPA guidance directs the Work Group and lead office to identify alternatives early in the regulation development process. At its first meeting, the Work Group should begin to compile a list of reasonable alternatives for the regulation under consideration. This list can be drawn from the following sources:

- Checklists of Alternatives. The Regulatory Reform Staff, part of EPA's SRD, has prepared checklists of innovative alternatives.
- Office of General Counsel. The OGC will aid the Work Group in identifying any statutory constraints of a particular alternative.
- Office of Planning and Evaluation. OPE can provide the Work Group with information and analyses of the various available techniques.
- Senior Managers, Work Group Members. EPA encourages suggestions from all participants regarding approaches that might be considered.

The following is a general listing of alternatives that Work Groups should consider:

1. Alternative types of regulations

- Not taking any regulatory action
- Relying on the marketplace (e.g., marketable rights approaches)
- Requiring those regulated to disclose information about a product (e.g., energy efficiency) that could activate market factors
- Specifying performance levels only, but allowing the regulated person or industry to choose method of compliance
- Using engineering design approaches that detail how to achieve an outcome

2. Alternative stringency levels

- Making the standard of the regulation more or less stringent
- Tailoring the degree of stringency to stages of processing in industries or other relevant groups

3. Alternative timing

- Using different effective dates
- Having a more or less rapid phase-in

4. Alternative methods of ensuring compliance

- Using economic incentives
- Employing various enforcement options (e.g., on-site inspection, periodic reporting, sharing responsibility among various levels of government)
- Using different compliance methods for different industrial segments or types of economic activity (e.g., treat large and small firms differently).

The analyses described below must consider each of the alternatives. However, EPA guidance notes that some alternatives--presumably those that represent a less feasible or realistic approach--do not need as detailed an analysis as other, more important alternatives.

Analyzing Alternatives

Ideally, each analysis performed should examine each alternative being considered. Because of the Executive Order, and the Agency's own early concern with the subject, the RA/EIA is the most developed analysis.

The Regulatory Analysis/Economic Impact Analysis. Both the RA and the EIA (used for major regulations) follow similar methodologies. EPA recommends that the structure of the RA or EIA contain: 1) a statement of the problem and the purpose of the regulation, 2) an identification of available alternatives, 3) an analysis of the cost-effectiveness of each alternative, and 4) a justification as to why the alternative selected is the the least burdensome way to achieve environmental goals (or an explanation of why the least burdensome means was not chosen).

The description of the RA/EIA's approach to analysis, presented below, is a general model. The Work Group and lead office can alter the model to suit particular circumstances as they see fit. The analysis proceeds in four stages. First, an outline or economic profile of affected sectors is developed. The profile includes factors such as industry structure, type of competition, and performance trends. Second, the industry is segmented into similarly affected economic units (e.g., by size, age, pollution control process). Third, marginal (incremental) cost-effectiveness curves are developed for each process/strategy for each affected industry segment. And fourth, the economic impact of each alternative is analyzed, using, price effects, production effects (as well as secondary impacts), industry growth, profitability, capital availability, employment effects, community effects, balance of trade effects, and energy impacts.

Analysis of these factors should enable the RA/EIA to describe:

- Distributional and secondary impacts of each alternative on producers and consumers (i.e., who pays, who benefits)
- The market effect of an increase in price on the sales and revenues of firms and industries.
- The market effect of an increase in price on cost or supply flows.

Economic Assessment. EPA uses the EA for routine regulations. The EA covers the proposed regulation and some alternatives. The alternatives, however, can be analyzed in less detail. The EA contains the following information:

- The number of establishments affected
- An estimate of total costs borne by each affected industrial segment
- An estimate of the price impacts of the regulation, assuming that cost changes will be reflected in prices
- An estimate of the revenue changes caused by the regulation, assuming that additional costs will not be reflected in prices
- An estimate of employment gains and losses
- Energy impacts
- An estimate of the impacts of the regulation on any particular region.

Environmental Impact Statement. The EIS examines not only environmental impacts, but also economic, social, health, regional, and local impacts. Thus, the EIS and the RA/EIA can overlap to a large degree. The EIS includes:

- A statement of the problem
- An identification of alternatives
- An analysis of each alternative
- Cost-benefit figures for various alternatives.

Urban and Community Impact Analysis. The UCIA, which is still under development at EPA, should:

- Describe the differential impacts of proposed regulations as they relate to central cities, suburbs, and nonmetropolitan areas, as well as to minority and low-income groups
- Examine price, production, and employment effects of the proposed regulation in the three areas
- Determine the impact of the proposed regulation on income, employment, population change, and the area's fiscal condition.

Operations and Resource Impact Analysis. An ORIA should help orient the Work Group toward the practical question of how the regulation will be implemented and whether EPA's resources, as well as those of other federal, state, and local entities, are sufficient and available for the task.

An ORIA is essentially a budgeting statement that prices activities required by the regulation according to the following simple formula:

$$\text{Price of the activity} \times \text{frequency} = \text{cost}$$

By totaling the costs of individual activities, an aggregate cost can be determined. Because they must price each individual activity, it is clear that those staff members conducting the ORIA must think through every operational detail of the regulation. To do this, they must identify:

- The goals to be met
- The activities needed to meet those goals
- The personnel needed to perform the activities
- The cost associated with each activity and the person undertaking it.

Reporting Impact Analyses. EPA has taken a number of initiatives to reduce reporting burdens. For example, it has instituted a "sunset policy," under which after 5 years, reporting and recordkeeping requirements must be rejustified or terminated. If the lead office wishes to keep the requirement, EPA will conduct a 6-month internal review, with public comment. EPA will retain only those requirements justified by the review.

Other steps that have been taken include requests for public comments on reporting burdens, which are made in the Federal Register whenever a regulation is proposed; an EPA screening process that examines reporting requirements; and the requirement for a Reporting Impact Analysis (RIA) for all significant regulations.

The RIA, which is part of the Decision Package, must contain the following information:

- Reason for the reports or records
- Alternatives that would circumvent or mitigate the need for reports or records (including existing sources of information)

- An outline of information requested and the form of the report
- An estimate of how costly the requirements are to the Agency and to those reporting.

Evaluation Plan. EPA is beginning to regard the evaluation plan (EP) as one of the most integral parts of the analysis process. The reasons for this are that the EP:

- Will provide a structure for describing the intended regulatory activities and identifying key issue areas
- Will improve the relevance and adequacy of data collected and analyses performed
- Can tie into the RA and other analyses by catching problems that may have been missed in preliminary analysis
- Can, when planned early, serve as an extra check on the other analyses, since it forces a closer examination of which activities and results the regulation should and would require. There is some concern that other analyses may get so bogged down in quantification that operational goals may be ignored.

EPA guidance directs that an EP be prepared for all significant regulations. The plan consists of a framework for defining evaluation measures and uses, the Agency's resource needs for carrying out the evaluation, a data collection and analysis process, and a schedule for implementing the EP.

In developing the EP, the Work Group should take care to structure it so that it will ultimately answer the following questions:

1. Is the regulatory program operating as planned? Has the Agency met its planned deadlines and taken needed actions? Is the program fully implemented?
2. Are the regulated industries, groups, or person responding as desired? Have they adopted the desired practices?

3. Are the regulations adopted resolving the original problem adequately? Is the condition of the environment improving?

The EP is still in a state of flux at EPA; in fact, the purpose of the RCRA evaluation plan was not only to fulfill the RCRA analysis requirements, but also to create a model for future EPs.

Choosing an Alternative

With the above information on each alternative in hand, the Work Group and lead office should choose the "least burdensome" alternative. Alternatives are evaluated based on the following criteria.

- Is the program administratively feasible? To answer this question, analyses should examine: 1) strategy design, 2) ability to monitor for compliance, 3) enforceability, and 4) ability to evaluate performance or regulation.
- Is the regulation flexible? In other words, does it allow firms alternative ways of complying?
- Is the regulation cost-effective? Will the projected benefits exceed projected costs?
- Is the regulation fair? Is any one industry, group, or person particularly hard hit?
- Does the regulation promote technological innovation?

Preparing an Integrated Assessment

At EPA, many of the required analyses are prepared separately from each other. Such an approach leads to inconsistent assumptions, different approaches, and overlap. EPA is currently preparing to modify its policy to require common assumptions, methodologies, and data bases. As part of its new policy, EPA will call all of the analyses together the Regulatory Analysis. The new Regulatory Analysis will be a "true" Integrated Assessment. We expect, however, that the new policy will rely on the guidance which EPA's SRD already has provided for the Integrated Assessment. This discussion is based on that guidance.

The IA is a document of 40 to 100 pages that summarizes the analyses EPA performed for the regulation in question. At times the IA actually will include some of the other analyses within it; most of the time it simply refers to them. Its purpose is to present a comprehensive and comprehensible summary of the relative merits of reasonable alternatives.

Unlike other analyses, which often are partially contracted to outside consultants, the IA must be prepared solely in-house, thus keeping policy-making decisions within the Agency. The "Green Paper"--an initial draft of the IA--is prepared as part of the Development Plan. The final version of the IA--the "White Paper"--must be completed by the time the final rule is completed. Often the Green Paper is printed in the Federal Register as part of the preamble to the NOPR, and later, the White Paper is printed as part of the preamble to the final regulation.

The IA's format is somewhat similar to that of the RA. It has five components.

1. Executive summary
2. Statement of the problem and proposed solution
3. Summary of favored options
 - Linkage of the option to the stated problem
 - Relative contribution of the regulatory action to solving the problem
 - An indication of other actions within and outside EPA that may be needed to solve the problem
4. Statement of alternatives
 - Only the top two to four alternatives should be discussed (the "meaningful" alternatives)
 - Brief account of other alternatives considered and why they were abandoned
5. Discussion of impacts
 - Benefits of the regulatory action (i.e., public health, environmental, economic, and social/aesthetic)

- Costs of the regulatory action (i.e., public health, environmental, economic, social--including effects on population in communities, reduced consumer choice, and inconvenience--administrative, and paperwork)
- Distributional Implications (i.e., lists groups, regions, community types, and government levels that receive a disproportionate share of benefits or costs).

The IA should provide a coherent rationale for the regulatory alternative EPA has chosen. EPA guidance suggests that the IA should:

- Quantify whenever feasible
- Express uncertainty in ranges of estimates
- Follow prevailing Agency practices in assessing risks
- Cite sources
- (Optional) distinguish short-term from long-term tradeoffs
- (Optional) distinguish direct and indirect efforts
- (Optional) annotate irreversible or irretrievable impacts.

CASE STUDY

The discussion and evaluation within this section is derived almost solely from a series of interviews conducted with EPA staff members involved in preparation of RA documents for the regulations promulgated under authority of Subtitle C of the Resource Conservation and Recovery Act (RCRA).

Background

Congress passed RCRA in 1976 and directed EPA to prepare regulations by 1978. However, the final regulations for RCRA were not issued until May 19, 1980 (FR 33066 et. seq.). RCRA was Congress' first major attempt to deal with the hazardous waste problem. It mandated a "cradle-to-grave" monitoring of hazardous wastes. The RCRA regulations promise to have an enormous economic impact on the industries affected and will force fundamental changes in their methods of operation. At the same time, environmental groups insist that the regulations are not strict enough. The regulations are being challenged in court by both industry and environmentalists.

In early 1978, President Carter issued Executive Order 12044, requiring RAs for significant regulations. EPA had already adopted most of the

procedures called for in Executive Order 12044 (which was, in fact, modeled after EPA's process). Since it was obvious that the RCRA regulations would have an impact greater than \$100 million, a complete RA was prepared.

EPA failed to issue the regulations by 1978, as directed by Congress, thus finding itself vulnerable to lawsuits, which were initiated by environmental groups. The agency missed the first deadline set by the courts and, with Administrator Douglas Costle facing contempt of court charges, rushed to issue the regulations.

The RCRA regulations present an excellent case example of the RA. The regulations were large, complicated, costly, and controversial. EPA, as DOE often is, was under great public, internal, and legal pressure to issue them. In effect, RCRA provided one of the toughest tests possible for Executive Order 12044 and the RA.

Analyses Performed

EPA performed five separate analyses as part of the RA: Economic Impact Analysis (EIA), Environmental Impact Statement (EIS), Operations and Resources Impact Analysis (ORIA), Evaluation Plan, and Reporting Impact Analysis (RIA).

The Hazardous Waste lead office assigned the Division Director of its Economic Analysis Branch to manage the full RA. The Division Director also prepared a final statement that summarized the five separate analyses and tried to present an overview analysis of the regulations. This summary was presented along with the regulation in the Federal Register.

Two other possible analyses, UCIA and a Benefits Analysis, were never performed. EPA did not conduct a UCIA because the OMB circular requiring the analysis had not yet been issued, and EPA did not feel that it was pertinent. The Benefits Analysis presented a greater problem to EPA. As discussed below, benefits are felt to be particularly hard to quantify and easily susceptible to manipulation. Usually, the Benefits Analysis should be part of the EIA. In this case, the Program Office merely listed expected benefits but did not quantify them and did not try to compare them against costs.

Economic Impact Analysis (EIA). The EIA cost EPA approximately \$2.5 million to prepare: it was the most expensive of the analyses performed. The

lead office allocated four staff members to manage and provide guidance to contractors. The contractors performed most of the data gathering and model building. EPA, however, retained the responsibility of performing the actual analysis. The analysis first began in 1977 and was accelerated in early 1979 to meet the new court-imposed deadlines.

Although the major purpose of the EIA is to examine the economic impacts of alternative regulatory approaches, EPA had a great deal of difficulty coming up with realistic alternatives. Most of the alternatives examined in the EIA were created to "fill out" the analysis, and were never taken seriously. Some EPA officials were openly critical of this approach. The major reason given by EPA officials for not fully examining alternatives was that the lead office did not believe that realistic alternatives were available. The size of the program, and its "cradle-to-grave" nature, meant that each part of the regulatory scheme had to mesh with each other. This reduced the number of alternatives that could be realistically considered.

Although major, or "macroscopic," alternatives were not examined, the EIA did consider "microscopic" alternatives: differing enforcement techniques, compliance deadlines, reporting requirements, etc. The EIA also focused on the effect of the regulation on selected firms. In this way, its methodology was similar to that a business might employ in examining costs: using a ledger book.

Operations Resources Impact Analysis (ORIA). The ORIA was not prepared by the Hazardous Waste lead office. Instead, the Program Analysis Division (PAD), EPA's budget office, conducted the analysis after the lead office requested its help. In theory, the lead office promulgating the regulation is supposed to conduct the ORIA. In this case, the agency was well behind its court-imposed deadline to promulgate, and the lead office began to shift off work onto other EPA branches.

PAD did not begin work on the ORIA until January 1980. The first draft was completed by March, and the final draft by May, when the final regulations were published. Although the ORIA took two calendar months to prepare, more person-hours than that were spent. PAD estimates that one full and two

half-time persons worked on the ORIA with additional agency time spent by other offices reviewing and commenting on PAD's pricing assumptions.

The ORIA did not examine alternatives and, as a result, was largely after the fact. In fact, it is likely that EPA disregarded the ORIA entirely, since the agency was under such great pressure to get the regulations out. In other words, even if the ORIA had shown a high impact, EPA would have promulgated the regulations anyway.

However, it is erroneous to describe the ORIA as an irrelevant exercise. The process of performing the ORIA meant that day-to-day operations of the regulation were "mapped out." Thus, the ORIA interacted somewhat with preparation of the regulations and the agency's understanding of how the regulations would be implemented.

Evaluation Plan. The Evaluation Plan was prepared by the SRD, not the lead office, at a cost of \$45,000. Most of the work was done by a contractor, with two SRD staff persons spending 1/4 and 1/10 of their time on it for 3 months.

The EP was viewed as a separate document rather than as a part of the RA. Present EPA policy is to have the EP prepared by the lead office promulgating the regulation and fully integrated into the RA. The EP, as produced by SRD, is intended to be used as a model for future EPs prepared by EPA lead offices.

Major Findings and Conclusions

The RCRA Regulatory Analysis appears to have failed to meet the standards EPA has set for performing an RA. However, we can not conclude that this is indicative of all RAs done for proposed regulations at EPA. The complexity of the RCRA regulations presented EPA with an enormous task in preparing the RA, and is illustrative of the problems that may arise when preparing the RA. The following is a list of concerns and difficulties identified with the RCRA Regulatory Analysis:

- Integration of the Analyses: The SRD believes that EPA's present policy of performing each analysis separately produces inaccurate and often unusable RAs. When analyses are performed separately,

different assumptions, methodologies, and data bases are used, resulting in analyses that are inconsistent and incomparable. The RCRA RA had this problem, since its analyses were performed separately. The result is that the final RA fails to be an all-inclusive statement of costs and benefits. SRD has proposed that EPA standardize the analyses, have the same people perform all the analyses, and then integrate them into one final statement called the RA. The agency has not yet approved this proposal.

- Failure to Examine Alternatives: Given that Executive Order 12044's primary purpose was to induce examination of alternatives, it seems ironic that none were examined here. Several factors appear to account for this. Time pressures forced much of the analysis to become "after-the-fact." The nature of the regulations, i.e., the complexity and "cradle-to-grave" quality of RCRA, meant that few realistic alternatives could be explored. Internal agency goals--such as encouraging recycling of wastes and state participation--further reduced the alternatives that could be explored. And, lack of commitment by some lead offices.

With the exception of the latter factors, the problems encountered by EPA seem to be somewhat unavoidable. They call into question the utility of an RA in all cases. However, it does appear that "microscopic" alternatives can be readily examined through the analytical process.

- Theoretical Difficulties: Two major difficulties were pointed out. The EIA is not a true economic analysis, and hence inaccurately assesses costs. Secondly it seemed impossible to quantify benefits.
 - 1) "True" Economic Analysis: by focusing on economic effects of a regulation on firms, the EIA makes at least three fundamental economic errors: 1) By looking at only one sector, it ignores shifts in costs and reduced costs in other sectors. For example, the present EIA will count as a "cost" an event that really is only a wealth transfer. 2) The EIA does not relate

the effects it sees against a normative model of economic efficiency. For example, the EIA regards a firm closing as a cost, even though in economic terms the firm should have closed because it was inefficient (once all costs were internalized).

3) The EIA ignores some rather commonplace methodologies such as the relationship between price and quantity (elasticity) and the effects on technological change. The result is that the RA usually overestimates costs.

2) Benefits Analysis: this is particularly controversial at EPA, and currently is under study. It may be that the analysis needed to quantify benefits is so massive that, for all practical purposes, it is impossible. Yet a failure to quantify benefits means that informed trading off of costs and benefits becomes impossible.

● Pragmatic Difficulties: Several more pragmatic difficulties hampered the RCRA RA:

- Data gaps and inaccuracies. Data presently used, while probably better than many other agencies, still is often not "real world."
- The use of contractors, while time-saving for EPA, may be counter-productive. Many of those we spoke to commented that much of the value of the RA lay in the program office doing the work itself and using its ongoing results to help it think about how to construct the regulation. The same holds true when, for example, PAD, instead of the program office, conducted the ORIA.

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APPENDIX E

DOT's PROCESS FOR DEVELOPING REGULATIONS

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DOT'S PROCESS FOR DEVELOPING REGULATIONS

This report examines the regulatory process within the Department of Transportation (DOT). Our intention has been to present a thorough description of DOT's promulgation process and to evaluate and analyse the processes described here.

OVERVIEW OF DOT'S ORGANIZATION

The DOT comprises eight administrations: Coast Guard, Federal Aviation Administration, Federal Highway Administration, Federal Railroad Administration, National Highway Traffic Safety Administration, Urban Mass Transportation Administration, ST. Lawrence Seaway Development Corporation, and the Research and Special Programs Administration.

The administrations are organized generally by transportation mode and carry out the related operating programs. Although the head of each administration reports directly to the Secretary of DOT, each retains a high level of autonomy. The Office of the Secretary (OST) is responsible for overall planning, direction, and ultimate control of all department activities.

Due to the relative autonomy yet sometimes overlapping jurisdiction of each administration, Department-wide coordination is difficult. At the same time, it is essential to effective regulatory promulgation. The Department has chosen to address this problem through creation of a Regulations Council and an Office of Regulation and Enforcement. The Regulations Council, consisting of key officials from all administrations, oversees the regulatory process and resolves conflicts arising from overlapping jurisdictions of the administrations. The Office of Regulation and Enforcement has been established within the General Counsel's office to coordinate the regulatory processes of the administrations. The Office of Regulations and Enforcement

also distributes all regulatory documents of substantive significance to members of the Regulations Council and other appropriate officials for review at various stages of the regulatory process.

DOT'S PROCESS FOR PROMULGATING REGULATIONS

For the past several years, DOT has sought to improve regulatory oversight and coordination by means of a program that embodied many of the concepts later mandated in Executive Order 12044. An internal memo entitled "Policies and Procedures for Simplification, Analysis, and Review of Regulations" was issued in January 1978 in anticipation of President Carter's directive on the subject. The purpose of the memo was to improve the Department Staff's working knowledge of procedures. The earlier program served as the framework within which subsequent modifications in response to Executive Order 12044 were made.

Most of the activities involved in DOT's regulatory process are the responsibility of the lead offices within the appropriate administrations. The Secretary and the head of the lead office provide ongoing policy and process oversight. Actual implementation of the regulatory process is not as formalized a procedure as that used by the Environmental Protection Agency. However, general steps can be conceptualized. The discussion that follows employs these as a framework.

Regulations Report and Agenda

The lead office presents the proposed regulation in its Regulations Report, which is then submitted to the Regulations Council through the Office of the General Counsel (GC). At the same time, a Regulations Officer is appointed within the lead office to act as a liaison between the lead office and the OST on matters of procedure.

The Regulations Report consists of all proposed and final regulations being considered for issuance within the next 12-month period (although a regulation that will take longer than a year to finalize may be listed as well). This report, prepared by the initiating office twice a year and updated bimonthly, contains the following information about each proposed regulation:

- Its title
- A description (including information on how to obtain referenced documents)
- Earliest expected decision date
- Name and telephone number of the lead office official
- Whether the proposed regulation is significant or nonsignificant.

If the proposed regulation is designated as significant, the following additional information must be included in the Regulations Report: 1) reason for classification as significant, 2) past and anticipated timetable for development of the proposed regulation, 3) need for the regulation, 4) legal basis for any action, and 5) whether a Regulatory Analysis is required. For proposed regulations designated as nonsignificant, the following information must be included in the Regulations Report: 1) general category of the proposed regulations, 2) identity of the contact official, and 3) indication of the expected volume of issuance (individual regulations are not listed).

The General Counsel receives Regulations Reports from all lead offices and consolidates them into the semi-annual departmental Regulations Agenda. The Agenda is circulated to the Regulations Council and the Secretary for review. This provides the opportunity for the Secretary to reclassify a regulation as significant or nonsignificant if necessary. The Agenda is published in the Federal Register.

The Work Plan

Lead office staff members and the Administrator discuss the proposed regulation, the issues involved, and possible alternatives to be considered. The lead office then drafts the Work Plan, which must contain the following information:

- The need for the regulation
- Objective(s) of the regulation
- Legal authority for the regulation

- Names of individuals or units responsible for developing the regulation
- Whether an RA is required, as well as how and where it will be produced
- Probable reporting requirements that will result from issuance of the regulation
- Tentative plan of participation by Congress in the regulatory process
- Tentative target dates for completion of each step in developing the regulation.

The Work Plan is reviewed by the head of the lead office, and if this individual approves it, work proceeds on the regulation and its analysis. The Work Plan is also submitted to the GC and the OST for their information and comment.

The Regulatory Analysis or Evaluation

A draft RA is required for all non-emergency* regulations that meet any of the criteria listed in a later section. If the head of the lead office determines that the proposed regulation does not meet any of the criteria that demand a draft RA, then a draft Evaluation is prepared. However, the final decision for the extent of analysis rests with the Secretary, who is advised by the Office of Regulations and Enforcement. The draft Evaluation includes an analysis of (1) the economic consequences of the proposed regulation, quantifying, whenever possible, its estimated cost to the private sector, consumers, and government; and (2) anticipated benefits and impacts. The degree of detail required in the Evaluation depends upon the regulation's importance, which is determined by the head of the lead office.

* An emergency regulation is defined as a regulation that, in the judgment of the head of the lead office, is required under the circumstances to be issued without notice and opportunity for public comment or to be made effective in less than 30 days after publication in the Federal Register. Regulations governed by short-term statutory or judicial deadlines are also classified as emergency regulations.

Public Response

The draft RA or Evaluation is placed in the public docket for review and comment. Limitations of the draft analysis (e.g., lack of data or uncertainty over how to determine and analyze specific issues) are noted in the text itself. They are also pointed out in the ANOPR or NOPR to elicit public response. Ideally, the ANOPR garners response to controversial matters, or solicits ideas on developing regulations. The ANOPR may be foregone, however, if demanded by time constraints. In such a case, only the NOPR is published, and it may also solicit particular information from the public.

The ANOPR or NOPR is prepared in the lead office and submitted to the GC. Either type of notice will contain (1) an explanation of the regulatory approach being considered or proposed, (2) a short description of the alternatives, and (3) an explanation of how the public can obtain a copy of the draft analysis. An approved Work Plan, a draft analysis, and a summary of the results of coordination efforts outside the lead office must accompany the ANOPR or NOPR to GC. The GC distributes the package to all appropriate staff officers for review, coordinates their comments and recommendations, and transmits the entire package through the Deputy Secretary to the Secretary. Upon concurrence by the Secretary, the ANOPR or NOPR is published in the Federal Register

The public is given 60 days in which to comment on a proposed significant regulation, and 45 days in which to comment on a proposed nonsignificant one. When the lead office determines that pressures of time preclude this period of consideration, the proposed regulation must include a statement explaining the reason.

A number of mechanisms exists by which the Department can solicit public response: public hearings, interviews, or questionnaires. DOT is also interested in establishing a system of individual financial assistance to encourage people to participate in the regulatory process who otherwise would lack the resources to do so.

Coordination with Other Agencies

Certain types of regulations, because of the nature of their impacts or controversy surrounding them, call for interaction with other entities both

within and outside DOT. For example, if a significant proposed regulation is determined to have a major intergovernmental impact, the lead office must develop a plan, in conjunction with the Assistant Secretary for Governmental Affairs, for cooperation with State and local officials in development of that regulation.

The Regulations Council is particularly useful in resolving inter-administration conflicts. At any time in the process, a proposed regulation can be referred to the Council by the Deputy Secretary or GC for arbitration or review. In addition, the Council may assist the Secretary in determining whether to concur in its issuance. (Inter- and intra-agency cooperation is chiefly the responsibility of the lead office, although OST assists in the coordination efforts).

Final Regulation

After assessing public input and in-house recommendations, the lead office prepares the final regulation and final RA or Evaluation. Before submitting the final regulation to the Secretary for concurrence, the head of the lead office reviews it to determine whether:

- The need for the regulation has been adequately addressed
- Direct and indirect effects have been sufficiently considered
- Alternative approaches have been considered and the most appropriate alternative has been accepted
- Public comments have been considered and responded to
- "Plain English" requirements have been met
- New reporting burdens and recordkeeping requirements have been estimated
- The name, address, and phone number of the contact has been included
- The plan for evaluating the regulation after issuance has been developed.

Once satisfied that these requirements are addressed, the head of the lead office sends the final regulation and its analysis to the GC, from whence the documents are distributed to all appropriate staff officers for further review and recommendation. During this process, the Office of Regulations and Enforcement reviews the documents for compliance with Executive Order 12044. If all is satisfactory, the regulation, its analysis, and the coordinated review comments are forwarded through the Deputy Secretary to the Secretary. The regulation must be submitted to OST for final concurrence at least 30 days before the desired date of issuance. The lead office must receive a positive concurrence before issuing for publication in the Federal Register any significant regulation. To receive Secretarial concurrence for a nonsignificant regulations, the copy of the notice must be submitted three days before the intended date of issuance and the GC can concur for the Secretary.

ISSUES OF PARTICULAR CONCERN

As requested by DOE, we focused on the four particular issues discussed below.

How DOT Varies its Regulatory Process for Different Levels of Regulatory Impacts

The initial step in determining the regulatory process to be used for a proposed regulation is to identify the regulation as "significant" or "nonsignificant." The lead office must consider the following factors (along with established criteria) in determining whether a regulation is significant:

- Type and number of individuals, businesses, organizations, and state and local governments affected.
- Reporting and compliance requirements
- Direct and indirect effects, including the effect on competition
- Relationship to regulations of other programs and agencies.

All significant regulations must go through the formal regulatory process with complete Secretarial oversight. Nonsignificant regulations do not require concurrence by the Secretary at every stage of the process.

The type of analysis used for a regulation depends upon its impact. If a regulation does not meet the criteria for requiring a full RA, an Evaluation is used. The Evaluation contains less than the RA and it is left to the discretion of the lead office head to determine the degree of detail in the Evaluation. If the head of the lead office determines that the expected impact is so minimal that the proposed regulation does not warrant a full Evaluation, a statement to that effect is included in the proposed regulation.

DOT has also established a 2-year tracking schedule of particularly costly and/or controversial regulations. This schedule will be carefully monitored to ensure effective implementation of major new legislation. After the Work Plan has been submitted, top level departmental staff meet with staff from the lead office to develop a timetable for key decisions and data collection. They establish a reporting system to ensure the timely gathering of necessary economic data. To date, only three regulations have been selected for monitoring.

Evaluation of Impacts, and Mechanisms for Re-Evaluation and Modification of Regulations after Promulgation

DOT realizes that there is often a "shakedown" period after implementation of a regulation, during which application of the regulation raises questions or problems that were not anticipated. The Department uses three procedures to counter this problem: writing letters of interpretation, issuing sub-regulatory guidance, and granting partial exemptions to specific parties.

Before the final regulation is sent to the Secretary for concurrence, a plan for evaluating the regulation after its issuance is developed.

If the problems encountered are of sufficient magnitude, a new NOPR or final rule can be issued to amend the regulation. The Department also has developed a built-in review mechanism, by which a request for comments on implementation is issued in conjunction with some final rules. An example of this is the final rule issued on Participation by Minority Business Enterprise in DOT Programs (45 FR 21172). The Department has kept the docket open for a year after the rule's effective date and encouraged recipients, contractors, and the general public to send comments in for the docket concerning their

experiences with implementation of the rule. At the end of the comment period, the Department will review the regulation and make any necessary modifications it deems necessary.

Changes in DOT's Regulatory Process in Response to Executive Order 12044

DOT had established many of the procedures called for in Executive Order 12044 several years before its issuance. These procedures were modified somewhat to comply with the Executive Order.

Regulatory Analysis or Evaluation

DOT has prepared RAs for approximately 70 rulemakings. Each RA is reviewed by several high-level officials and placed in the public docket early in the process. Regulations issued under emergency conditions undergo after-the-fact analyses unless exempted by the Secretary.

A Regulatory Evaluation examining economic impacts is required for every rule not undergoing an RA. The greater the complexity and cost of the regulation, the more extensive is the degree of detail demanded by the evaluation.

Top Management Supervision

The Department has developed a formal regulatory review process with direct involvement of the Secretary and top-level officials in the lead office. At each stage of the regulatory process, substantive documents are circulated for review by the Secretary and top officials. A Regulations Council has been established to oversee the regulatory process and advise the Secretary. The Council has the following duties:

- Monitors the lead office's programs for reviewing and revising existing regulations
- Considers certain significant regulations (usually controversial issues or those involving interagency conflict) and recommends concurrence or nonconcurrence to the Secretary
- Reviews departmental regulatory procedures and policies and makes recommendations to the Secretary

- Designates task forces and requires the preparation of any reports or analyses it deems necessary for proper consideration of any regulation matter referred to or initiated by the Council.

An Office of Regulation and Enforcement has also been established in the General Counsel office to ensure the Department's compliance with Executive Order 12044. This office has overall responsibility for central coordination of the regulatory process.

Public Participation

DOT has taken various steps to improve its "outreach" program. ANOPRs have been issued in some cases where a proposed regulation was controversial or expected to result in a high level of public interest.

Semi-annual agendas of all regulations under development or review serve as "early warning devices" for the public. For each proposed and final regulation the Agenda provides a title, summary, earliest expected date of action, name of a contact official, and the related regulatory citation in the Code of Federal Regulations. The Agenda also includes an appendix with instructions on how to be placed on mailing lists of copies of regulatory documents. The second part of the appendix contains names and phone numbers of officials to contact concerning general rulemaking procedure. DOT seeks suggestions from the public on existing regulations that should be included on the Review List of the Agenda, and provides a mailing address in the Agenda for this purpose.

DOT has increased the number of public hearings in a further effort to increase public participation. The National Highway Traffic Safety Administration initiated a demonstration program to provide financial assistance to individuals who would otherwise lack the means to participate in the rulemaking process. (Although funding for this program was eliminated in Appropriation cutbacks, the Department says it is committed to its continuance in the future.)

The Department has expanded a newsletter it prepares and sends out to consumers by including in it a list of items from the semi-annual Agenda that might be of interest to consumers.

The period of time allowed for public comment on most notices has been extended to the required 60 days, and in some cases up to a year.

Periodic Review of Existing Regulations

Each lead office has established a program of regulation review, using the same procedural steps used for development of new regulations. In identifying existing regulations for review the lead office considers:

- Nature and extent of complaints (including petitions for rulemakings) received
- Need to simplify or clarify language, with special consideration given to the number of requests received for interpretations or problems encountered in enforcing the regulation
- Need to eliminate duplicate or overlapping regulations
- Need to eliminate conflicts and inconsistencies in its own regulations or with those of other agencies
- Length of time since the regulations were last reviewed
- Continued importance and relevance of the problem the regulation addresses
- Burdens imposed on those affected by the regulations
- Change in technological, economic, or other factors in the area affected by the regulation
- Number of requests received for exemption from the regulations and the number granted.

Each initiating office prepares a list of existing regulations for review and submits it to the regulations Council, through the General Counsel's office. On the basis of this review, over 200 regulations have been scheduled to be revised, consolidated, or reworked to make them less burdensome or more effective.

Use of Plain English

DOT has taken a number of steps to improve the clarity and simplicity of its regulations. It devotes much attention to writing clear preambles to all

regulations and notices. The Office of Public Affairs, the Office of the General Counsel, and other Secretarial offices review regulations specifically for plain English. Each administration has an office responsible for clear writing review, and a writer/editor is used by the General Counsel's office to review all significant regulations.

Review and Evaluation of the Regulatory Process by DOT

At this time, DOT has not prepared a full review and evaluation of its regulatory process modified in accordance with Executive Order 12044. This report is scheduled to be prepared and made public in the near future.

THE REGULATORY ANALYSIS: ANALYTICAL DECISIONMAKING AT DOT

For its regulatory procedure DOT feels that it would be unwise to precisely define analytical methods to be used throughout the Department, because of the variety of regulating actions that must be handled. Thus, DOT has issued extremely broad guidelines for the administrations to use in preparing RAs and Regulatory Evaluations (RE). It has been left to the discretion of the individual administrations to develop further refined guidelines. As a result, when examining the process for preparing the RA and the RE at DOT, differences in methodologies and levels of success are apparent from one administration to another.

This report will examine the guidelines issued by DOT for conducting the RA and RE, and specifically, it examines the procedures used by the individual administrations, and identifies the problems encountered in the efforts to utilize the RA and RE as a decision-making tool.

DOT Guidelines and Criteria for Preparing the RA and RE

Lead offices within DOT are required to prepare an RA or RE for all non-emergency* proposed regulations. The Regulatory Analysis is required for each proposed regulation that meets any of the following criteria:

* An emergency regulation is defined as a regulation that, in the judgement of the head of the lead office, is required under the circumstances to be issued without notice and opportunity for public comment or to be made effective in less than 30 days after publication in the Federal Register. Regulations governed by short-term statutory or judicial deadlines are also classified as emergency regulations.

- Will result in an annual effect on the national economy of \$100,000 or more
- Will result in a major effect on the economy in terms of costs, consumer prices or production levels
- Will result in a major increase in costs or prices for individual industries, levels of government, or geographic regions
- The Secretary or head of the lead office determines that it deserves such an analysis.

These criteria have been applied liberally by most administrations in determining whether to prepare an RA. Of the 72 significant regulations listed in DOT's latest Regulations Agenda (2/28/80, 45 FR 41), 22 were determined to require the RA.

The only guidelines issued by DOT that address the content of the RA are that it must contain the items required by Executive Order 12044.

The Secretary's office intended that the broad guidelines provide the individual lead offices the needed leeway for developing RAs that best assist them in preparing their own regulations. However, most of the lead offices seem to have interpreted the broadness of the guidelines to indicate a low priority given to thorough preparation of the RA. Due to the absence of more substantial guidelines, both Department-wide and within each Administration, it is left to each lead office to determine much of the information needed and methodologies used in preparing the RA. While other agencies use a variety of analyses such as the Reporting Impact Analysis, Operations and Resource Impact Analysis, and the Evaluation Plan as part of their process for developing the RA, lead offices within DOT often approach these analyses perfunctorily, if at all.

Lead offices have been directed to use the ANOPR and NOPR for obtaining necessary public information for better preparation of the RA. Also to be included in the ANOPR or NOPR is an explanation of the regulatory approach being considered or proposed, a brief description of possible alternative approaches being considered, and a statement of how the public may obtain a

copy of the draft RA for review and comment. The final RA is to be placed in the public docket before or at the time its Final Rule is issued, and a statement to that effect is to be published with the Final Rule. However, these directives concerning availability of the draft RA and final RA are not strictly adhered to. The RA is often not included in the public docket (although it is available if tracked down through the lead office). Thus, the public is not afforded easy access to the RA.

A Regulatory Evaluation (RE) is prepared for all proposed, nonemergency regulations that do not require the RA. The RE is a "simplified" version of the RA. It includes an analysis of the economic consequences of the proposed regulation, quantified when possible; the estimated cost to the private sector, consumers, federal, state, and local governments; and anticipated benefits to all sectors. The scope of the RE is determined by the head of the lead office, with more detailed REs used for proposed regulations with greater economic impact. For proposed regulations with negligible economic impact, a statement to that effect is prepared and included, in lieu of the RE or RA, in the NOPR. A statement of availability of the RE is submitted by the lead office for inclusion in the ANOPR or NOPR. The final RE is also supposed to be placed in the public docket at the time the final rule is issued, although this is often overlooked.

DOT has not issued any substantive guidelines concerning the timing of the analytical process. The only required "milestone" is that the draft or final RA/RE must be included in the submission of the ANOPR, NOPR, or final rule for Secretarial concurrence prior to publication in the Federal Register. Thus, a lead office can prepare an extremely rough draft of the RA at the time the ANOPR or NOPR is prepared and a final RA at the time the final rule is published, and totally satisfy DOT's "time guidelines" for preparing the RA. This leads to the practice, common in most of DOT's administrations, of merely preparing the final RA as an additional requirement to be met before publishing the final rule. This is contrary to Executive Order 12044's intent of using the RA early in the regulatory procedure as a decisionmaking tool--and in determining the proper regulatory approach to take.

Although the Secretary can request that additional information be included in an RA when asked to concur with an ANOPR, NOPR, or final rule, that is the

rare exception rather than the rule. The Office of Regulations and Enforcement, with the General Counsel's Office, also may return an RA to the lead office for additional information as part of its role in reviewing a proposed regulation for compliance with Executive Order 12044. However, the Office of Regulations and Enforcement will generally approve an RA that follows the broad guidelines issued by DOT for preparing the RA.

Analytical Decision Making Within the Individual Agencies

This section describes the approach taken by each administration for preparing the RA, and briefly discusses some of the problems that have been encountered, as well as steps taken to solve the problems. Two of the administrations--Urban Mass Transportation Administration (UMTA), and St. Lawrence Seaway Development Corporation (SLSDC)--have not yet prepared an RA for any proposed regulation. SLSDC does not issue significant regulations due to the special nature of its mission. It is responsible for implementing a single set of permanent regulations that are updated once a year. UMTA is strictly a "grants agency" and UMTA officials state that they would not have a regulation that would require an RA. Therefore, there are no established guidelines for developing an RA.

Federal Highway Administration (FHWA)

Of the 19 proposed significant regulations listed by FHWA in the latest DOT agenda of regulations, eight require RAs. The determination for some of these RAs was made under the Administration's discretionary criterion, rather than the fixed dollar thresholds. In those cases, the Administration determined that the proposed regulations were of "considerable public interest" and therefore required an RA.

In FHWA, the Special Assistant to the Executive Director is the regulations officer for all proposed regulations developed by the lead offices. The Special Assistant acts as liaison between the lead office and the Administrator of FHWA. There is also an Office of Legislation and Regulations, within the Chief Counsel's Office, which assists the Special Assistant in monitoring the RA development process. However, most of the substantive work involved in the actual preparation of the RA is done by the lead office. By allowing the lead office to concentrate on the substantive work and relying on the overview

offices to coordinate the procedural aspects of the RA, FHWA officials believe that a more effective analytical process results. In addition, the Office of Management Systems provides administrative support for "coordinating" the entire regulatory "package," including the RA.

Initially, the Work Plan will state whether the RA will be used in the process of developing a regulation. At this time, the various alternative regulatory approaches that may be taken are considered. These include:

- No regulatory action--relying on market forces
- Informational requirements (e.g., tar and nicotine levels for cigarettes)
- Performance standards--allowing the regulated industry or person to meet those standards by any chosen method
- "Command" approach--designing exact procedures for achieving the desired outcome
- Delayed effective dates and/or gradually phased-in effective dates
- Alternative compliance methods, including economic incentives (e.g. tax credits) and various enforcement techniques (e.g. periodic reporting, on-site inspections, off-site monitoring).

These alternatives are among those that theoretically are to be examined at the initial stage of preparing the RA by all administrations within DOT. However, this list of alternatives was pieced together through interviews and does not exist in the form of written Departmental guidelines. It is difficult to assess the amount of effort spent examining each alternative. Although they are not specifically discussed in the text of the RA, DOT officials insist that they are considered in the informal discussions that take place in the initial stage of the process.

Before the Work Plan is submitted to the Office of the Secretary (OST) for concurrence, it is circulated to other lead offices and the Office of the Associate Administrator within FHWA to inform them of the proposed regulatory action. Other lead offices are asked to concur, but only the Associate

Administrator can require the RA if it is not included in the Work Plan. OST, through the Office of Regulations and Enforcement, may also require the RA at the time the Work Plan is submitted for concurrence.

Work on the draft RA or RE begins after approval of the Work Plan. The draft is prepared at an early stage and should be available for public comment at the time the NOPR is published in the Federal Register. However, the draft Ra or RE is seldom more than a "skeleton" analysis at this time and often is not placed in the public docket. This is sometimes due to a severe shortage of information, and in this case an ANOPR is used to elicit the needed information from industry and the public. For other proposed regulations, however, the information is readily available and there is no justification for such a limited RA or RE.

Work on the final RA or RE begins after reviewing public comment received as a result of the ANOPR or NOPR. Outside contractors are sometimes used for gathering and analysis of backup data required for complex proposed regulations. Although the Office of Program and Policy Planning is sometimes consulted in RA preparation, formal inter-office work groups are never used at FHWA (or for that matter, for all DOT). FHWA believes that, because of the relatively small size of the agency (approximately 1,400 employees at headquarters), they have the advantage of easy communication and would not benefit by the establishment of a formal work group process.

FHWA feels that they are severely limited by legislative mandates in considering alternative approaches in the RA process. Often, Congress mandates a specific program, such as size and weight limitations for trucks, and directs FHWA to implement the program. Thus, FHWA is limited to an analysis of alternative "micro" procedures such as enforcement techniques. FHWA's attitude toward RAs for proposed regulations such as these is one of resigned compliance with Executive Order 12044.

Although it considers the RA to be a waste of time when the regulatory approach has already been decided upon by Congress, FHWA "goes through the motion" of preparing the RA if it is required under DOT criteria. FHWA also pointed to time pressures due to legislative and judicial deadlines as a limiting factor in examining alternatives in the RA process.

The final RA is reviewed by the Special Assistant and Office of Legislation and Regulations before being submitted to the Administrator for approval. Special attention is given to the preamble of the RA. The preamble is used as a detailed explanation of how decisions were reached on the key issues. This is in contrast to the preambles for RAs prepared by other Administrations that are limited to a short summary of the RA with no explanation of the decision-making background. The final RA is sent to the Administrator for approval and then forwarded to OST for Secretarial concurrence. The final RA is then supposed to be placed in the public docket prior to publication of the final regulation.

National Highway Safety Transportation Administration (NHSTA)

Of the ten significant proposed regulations listed by NHSTA in DOT's latest agenda of regulations, six required RAs. The procedure for preparing the RA at NHSTA is similar to FHWA's procedure. The Office of Plans and Programs (OPP) is used to prepare all RAs for proposed regulations developed at NHSTA. The Program Analysis officer, within OPP, is charged with determining the necessity of preparing the RA.

NHSTA is somewhat unique as an administration in that it issues regulations based on research more than direct legislative mandate. Congress has charged NHSTA with carrying out programs of auto safety and fuel economy with extremely broad legislative guidelines. NHSTA employs a 5-year plan of activities to set general guidelines for the administration's activities. By including an issue in this plan, NHSTA can begin research and development activities, if a problem exists, before the formal promulgation process begins.

The Office of Research and Development (R&D) and the Office of Rulemaking (OR) prepare the Rulemaking Support Document (RSD) to initiate the regulation development process. The RSD is similar to a Work Plan, and includes a determination of whether the RA is to be prepared. The RSD is reviewed by all major offices within NHSTA and a consensus on all matters is necessary to begin further work on the RA (if required by the RSD). If a consensus is not reached, matters of disagreement, including the need for the RA, are decided by the Administrator.

After approval of the RSD, work on the RA is begun by OPP. Although contractors are sometimes used for data gathering, most of the preparation is done "in-house" by a staff of economists and engineers. The major problem cited by NHSTA staff in preparing the RA is the difficulty in quantifying indirect benefits and costs of proposed regulations. (This was a common complaint throughout DOT). One staff member indicated that the analytical process has changed little as a result of Executive Order 12044, while another staff member (within the same office) insisted that the RA is being successfully integrated into the decisionmaking process.

U.S. Coast Guard (USCG)

Four of the 14 significant regulations submitted by USCG for inclusion in DOT's agenda of regulations included an RA. None of the RAs were triggered by the dollar thresholds of DOT's and Executive Order 12044's criteria for conducting an RA. Due to the limited nature of the maritime industry subject to USCG regulatory jurisdiction, smaller impacts can trigger the RA. A regulation-by-regulation basis, using past experience as a guideline, is used to determine the necessity of RAs.

The RA is prepared within each lead office under the supervision of a Project Manager. Unlike NHSTA, there has been no office established within USCG responsible for preparing all RAs administration wide. The same people responsible for promulgating the rule are also responsible for preparing the RA. Work Groups are not used although sources outside of the lead office are consulted on an "as needed" basis.

The Marine Safety Council, a board of seven Admirals, is responsible for reviewing the Work Plan for the RA requirement. The Work Plan is also circulated to the major offices within USCG for review and comment, but only the Council can require the RA if it is not called for in the Work Plan. The Work Plan is viewed as a major management tool in allocating resources and setting milestones for all steps in the regulatory process, including the RA. The Work Plan may be reviewed several times by the Council, which meets monthly, to ensure proper compliance with data gathering requirements and deadlines. At any time, the Council can call for an RA on a proposed regulation that previously was thought not to need an RA if, during the course of the regulatory process, new or greater impacts are identified.

Although USCG does not make extensive use of analyses other than the RA, Urban Impact Analysis (UIA) and the Environmental Impact Analysis (EIA), an effort is being made to integrate all analyses into the same process and document. Officials feel that it is important to use identical data, assumptions, and methodologies to eliminate duplication and to increase the effectiveness of the analytical process.

USCG officials feel that a genuine effort is now being made to perform the RA early enough in the regulatory process to be an effective decision-making tool. This is in contrast to earlier regulatory procedures which used the RA only as a justification for a predetermined regulatory approach. There are still some problems, however, with rigid Congressional mandates that prevent the effective consideration of broad alternative regulatory approaches.

Federal Aviation Administration (FAA)

Of the 14 significant proposed regulations listed by FAA on DOT's semi-annual agenda, three are undergoing the RA. Sources at FAA stated that in the absence of any clear guidelines for preparing the RA, they have continued to use a "pragmatic problem analysis" approach as they had in the past. With this approach, FAA identifies the alternative solutions available for the problem under consideration. The changes that will result from each alternative are examined for direct and secondary impact costs, including possible aggregate costs to the aviation industry. Emphasis is placed on cost analyses, with benefit analyses done on a qualitative basis.

Changes that would result in operational procedure for FAA, industries, and aviation personnel are examined to determine burdens placed on affected parties by the proposed regulation. FAA performs an Operations and Resource Impact Analysis (ORIA) to determine the needs of the agency in implementing the proposed regulation. The ORIA is maintained as an independent document, and is not integrated into the RA.

FAA officials admitted that they have not been successful in performing the RA early enough in the decisionmaking process to make it an effective tool. They feel that this would only be possible through a gradual

"readjustment" by FAA staff that is accustomed to using an analysis as an after-the-fact impact assessment rather than a decisionmaking tool.

Federal Railroad Administration (FRA)

FRA has listed only two proposed significant regulations on DOT's semi-annual regulatory agenda and is conducting their first RA for one of them. Although work on the final RA has not been completed, the FRA official responsible for coordinating work on the RA feels that it is being used to effectively determine the regulatory approach being taken. The RA is being done because of the level of public interest rather than economic impact. An extensive draft of RA was prepared and placed in the public docket at the time the NOPR was published in the Federal Register. Much of the cost/benefit data were obtained through private contractors and an FRA Resource Allocation study was prepared by the Transportation System Center, and may be integrated into the final RA. The Resource Allocation study examines impacts on the financial and manpower resources of FRA that will result from implementation of the new regulation. Unlike any other administration within DOT, FRA is planning to prepare an Evaluation Plan (although it will be done separately from the RA process and may not be integrated into the final RA.)

A staff economist at FRA, who is not working on this RA, pointed out several problems that he has encountered in preparing Regulatory Evaluations for other proposed regulations. The most disturbing problem that he discussed was the tendency to fit in "indirect factors not easily quantifiable" when conducting a cost/benefit analysis to "steer" the analysis toward a predetermined regulatory approach. FRA also has serious problems in gathering accurate data and must rely extensively on industry for data that often are "exaggerated or prejudiced." Another problem concerned the inclusion of all considered alternatives examined in the RA. FRA might be somewhat reluctant to list all possible alternatives on the grounds that this will serve as "ammunition" for critics of the regulation who may not agree with the regulatory approach eventually taken.

Research and Special Program Administration (RSPA)

RSPA is presently not performing an RA for any of the three proposed regulations listed in DOT's latest agenda. RSPA is responsible for regulating

the transportation of radioactive and hazardous materials. Few of the regulations proposed by RSPA have significant economic impact, but three proposed regulations have been of sufficient public controversy to trigger an RA since the implementation of Executive Order 12044 began.

RSPA receives a large amount of petitions for rulemaking, and presently has a backlog of 400 petitions. The petitions are ranked according to safety impacts--the reduction of fatalities and injuries. This inventory of petitions is reviewed once a year by the Office of Program Support (OPS), and proposed regulations are prepared for the "top 60" petitions and placed in a regulations plan. OPS reviews all proposed regulations for significant impact (under DOT's suggested criteria) that would trigger an RA. If the RA is needed, work is begun by regulations specialists (writers). After an initial assessment of the impact of the regulation, risk/cost/benefit analyses are conducted. Because of RSPA's responsibility for regulating the transport of dangerous materials, special attention must be given to the measurement of risk factors. RSPA has encountered many problems with the use of risk probabilities and is presently trying to get a "better handle" on risk analysis.

A draft RA is prepared, in a very general way, at the ANOPR stage, and is constantly revised up to publication of the final rule and the placing of the final RA in the public docket. Much of the work for complex RAs is contracted out, although all policy decisions are made in-house.

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INTERVIEWS

Stan Abramson, FHWA, Office of Legislation and Regulations
Edward Gill, UMTA, Office of the Chief Counsel
Lynn Jackson, FAA, Office of Aviation Policy
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James Simons, NHTSA, Office of Plans and Programming
William Snow, FHWA, Transportation Specialist

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APPENDIX F

INTERVIEWS

APPENDIX F

INTERVIEWS

Interviews were conducted with DOE staff and other government agency personnel to obtain descriptions of how the regulatory process worked in their agency and what problems they had experienced. The interviews were semi-structured, that is, the interviewer had a prepared list of topics to insure covering all issues, however the exact format of the interviews varied. The problems noted in Chapter 4 and the recommendations in Chapter 6 are based primarily on these interviews.

APPENDIX F

EXHIBIT F.1

Outline of Typical Topics Discussed in Interviews

- I. Introduction to Our Project
 - A. Reason for project
 - B. Reason for interview
- II. Familiarity with Regulatory Reform Initiatives
 - A. Knowledge of Executive Order 12044
 - B. Knowledge of DOE Memorandum 2030 and its revisions
 - C. Knowledge of reasons why these documents were issued.
- III. Past, Present, and Future Regulatory Responsibilities
 - A. Current program(s) involvement
 - B. Nature of Involvement
 - C. Past experiences
 - D. Future regulations expected
- IV. Impressions of Rulemaking Process
 - A. Action Initiation
 - B. Working Group Coordination
 - C. Mandatory Concurrence
 - D. Regulatory Analysis
 - E. Action Coordination
 - F. Policy Oversight

APPENDIX F

EXHIBIT F.2. INDIVIDUALS INTERVIEWED

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