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# POLICY ISSUE

(NEGATIVE CONSENT)

May 23, 1994

SECY-94-141

FOR: The Commissioners  
FROM: William C. Parler  
General Counsel  
James M. Taylor  
Executive Director for Operations  
SUBJECT: IMPROVEMENT OF THE RULEMAKING PROCESS

PURPOSE:

To obtain the Commission's consent for implementing a plan for improvement of the rulemaking process.

CATEGORY:

This paper deals with policy issues requiring Commission consideration.

SUMMARY:

This paper contains proposed changes in the agency's rulemaking process. The changes being recommended are aimed at shortening rulemaking schedules, improving coordination among offices on rulemaking development, and making more efficient use of staff resources.

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SECY NOTE: In the absence of instructions to the contrary, SECY will notify the staff on Wednesday, June 8, 1994 that the Commission, by negative consent, assents to the action proposed in this paper.

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BACKGROUND:

Over the past 20 years, there has been a continual stream of commentary about the way in which agencies handle notice and comment rulemaking. The Regulatory Flexibility Act (5 U.S.C. §§ 601-612), enacted during the Carter administration in 1980, reflects an effort by Congress to address its interest in improving agency rulemaking. The Act does not mandate particular outcomes, but it encourages a number of techniques to make regulations less burdensome to small entities. Approaches suggested include modifying compliance or reporting timetables, simplifying requirements, using performance rather than design standards, and exempting small entities from certain requirements. It also calls for assessment of significant alternatives to the adoption of the rule. Of course, the Act's better known requirements call for the publication of an agency's regulatory agenda and the regular and systematic review of existing regulations to determine whether they can be simplified, modified, or removed.

Shortly after the passage of the Regulatory Flexibility Act, President Reagan issued Executive Order (E.O.) 12291 in 1981 and required Federal agencies to "set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future." In 1985, President Reagan characterized this Executive Order as making it "the personal responsibility of the head of each agency to determine at the beginning of the regulatory process, not at the end—whether a given regulatory venture is consistent with the goals of the Administration and whether agency resources should be committed to it." (President's Memorandum for the Heads of Executive Departments and Agencies, 21 Weekly Comp. Pres. Doc. 13 [January 7, 1985]). On January 4, 1985, E.O. 12498 was issued requiring agencies to initiate a "Regulatory Planning Process" to be submitted to OMB for review and approval.

Recently, President Clinton issued E.O. 12866 (58 FR 51735, October 4, 1993) on regulatory planning and review. It states:

"The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today. ... The objectives of this Executive Order are to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the

regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public. In pursuing these objectives, the regulatory process shall be conducted so as to meet applicable statutory requirements and with due regard to the discretion that has been entrusted to the Federal agencies."

This Executive Order, based in large part on draft recommendations of the Administrative Conference of the United States that were finalized in December 1993, is the latest in a long history of attempts to address continued interest in improving the way in which the rulemaking process responds to national goals and objectives. While it revokes E.O. 12291 and E.O. 12498, it continues to express similar goals for agency rulemaking.

"Generally speaking, regulators and Congress should employ regulations more selectively and sometimes use other approaches to accomplish their goals, such as providing more information to consumers. When opting for regulations, regulators should use market-based, performance-oriented or other innovative approaches, thus giving affected parties more freedom to meet the goals behind the rules. The government should better educate its regulators about possible tools at their disposal. And regulators should communicate more with the public and other interested parties and rely more heavily on scientific data."

Closely related to the Executive Order was the Vice President's Report of the National Performance Review (NPR) issued on September 7, 1993.<sup>1</sup> Appendix C of the NPR report contained 10 "Recommendations and Actions." Those recommendations were elaborated upon in detail in an "Accompanying Report" that was only recently released to the public. The supporting report relies heavily on the recommendations and reports of the Administrative Conference.<sup>2</sup>

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<sup>1</sup>Creating a Government That Works Better and Costs Less: Improving Regulatory Systems, National Performance Review, Office of the Vice President, September 1993.

<sup>2</sup>Recently, a bill was introduced in Congress by Senator Roth entitled "Results Based Regulations Act of 1994." According to Senator Roth's statement the bill would:

"... require Federal agencies, where practicable, to state what outcomes and results a proposed regulation is to achieve. It would then provide waiver authority for the agencies, to exempt from all or part of the regulation an applicant who convinces the agency that there is a less costly way for the applicant to achieve the results intended." [S. 1992, 141 Cong. Rec. S. 3962 March 25, 1994]

### NRC's Past Evaluation of Rulemaking

An examination of NRC's rulemaking activity from the Commission's creation in 1975 to the present shows that the Commission has expressed interest in improving the regulatory process for developing rules similar to that reflected in the Executive Orders and the NPR reports. Within 2 years of its creation in 1975, the Commission called for a critical examination of the petitions for rulemaking process and recommendations for improvement (SECY-77-526, October 7, 1977). Among the recommendations were "streamlining the decisionmaking process," "involvement of persons with ultimate decisionmaking authority as early in the process ... as possible," and assignment of higher "priority" to certain tasks. Attached to the paper were OGC/OPE (Office of Policy Evaluation) comments wherein OGC "recommended making a particular staff member accountable to the Commission and public." In addition, OGC recommended setting a "target schedule." Following the issuance of E.O. 12291, then Chairman Palladino sent a letter to the Vice President on September 21, 1981, that, while declining to submit to OMB reviews affirmed the Commission's view that the process for major rules required improvement:

"We support the purposes and objectives of the Order. We agree that there is a need for a better understanding of the benefits and costs of regulatory requirements. We have asked our staff to conduct a study to identify particular changes that ... would bring our procedures and practices more in line with ... the Order."

A memorandum from the Executive Director for Operations (EDO) on "Control of Rulemaking and Its Timeliness" was sent to office directors on June 12, 1985. It states its premise as assuring that "rulemaking is necessary, effective, efficient, of high quality and timely." The EDO indicates a particular interest in "identifying and taking action of those rulemaking action which are being excessively delayed because of failure to reach staff consensus." The memo sets out five actions that will be taken to ensure that rulemaking actions are finalized "within about 2 years of their inception." This memorandum was the impetus for the schedules and process currently specified in NUREG/BR-0053, last revised in December 1989.

### Current NRC Rulemaking Process

Currently, "The Regulations Handbook" (NUREG/BR-0053) serves as a basic guide to the staff in the development of NRC rules. It contains a description of the legal requirements for rulemakings and NRC's basic internal procedures. While the approach to various rules will differ depending on the circumstances, the staff generally follows the same basic steps for each rulemaking. As set forth in NUREG/BR-0053, rulemaking generally includes the following steps:

- (1) The EDO approves the commencement of the rulemaking;

- (2) The lead office develops a proposed rulemaking package that includes the draft regulation and rulemaking analysis, i.e., NEPA considerations, Paperwork Reduction Act considerations, regulatory impact analysis guidelines considerations, Regulatory Flexibility Act considerations, and possibly a backfit analysis;
- (3) The lead office develops a draft Commission Paper;
- (4) The lead office obtains comments from various staff offices;
- (5) The draft Commission Paper and rulemaking package are submitted for ACRS review;
- (6) The draft Commission Paper and rulemaking package are submitted for CRGR review;
- (7) The EDO approves the package and sends the Commission Paper and rulemaking package to the Commission;
- (8) The Commission approves the package or directs modifications to the proposed rule;
- (9) The rulemaking package is issued for public comments;
- (10) The staff resolves the public comments;
- (11) Steps 2-8 above are repeated for the final rulemaking package; and
- (12) The agency issues a final rule.

### OGC Analysis

Given the effort dedicated to the evaluation of the rulemaking process over the last decade, OGC reviewed the actual schedules of all rulemakings conducted since the adoption of the 1985 model schedules. There have been a relatively uniform number (45 to 50 per year) of proposed and final rules issued by the Commission since that time. A small fraction of the rulemakings conducted since the adoption of the 1985 reforms have deviated from the prescribed 2-year schedule. From that group, OGC analyzed in greater depth ten of the more significant rulemakings. Those rules involved complex regulatory issues. (Because it was obviously a unique case, the revisions to Part 20 were not included.) With each of the nine other rules, the specific delays were identified with particular attention to the steps in the process which caused delay or to substantial shifts in the policy assumptions in order to determine what changes, if any, might have improved the process.

In general, significant delays in schedule occurred in the rulemaking process for a variety of reasons. Some delays occurred because the Commission rejected or altered the staff's approach during the review of either the

proposed rule package or at the final rule stage. In several instances, such mid-stream changes in the general approach to particular rulemakings occurred after at least 9 months of development by the staff. Delays stemming from the Commission coincided, in one case, with a change in membership of the Commission. In another case, the EDO suspended development of a rule pending the resolution of a sensitive, high profile policy issue (i.e., the BRC Policy).

Delays have also resulted from legal challenges to final rules. Sometimes the internal agency concurrence process has caused significant delay. The resolution of significant issues raised by offices (including OGC) in later stages of rulemakings has contributed to the delay of several rulemakings. Finally, in some cases, delays occurred due to diversion of scarce staff resources to higher priority rulemakings.

These factors suggest some process improvements that could be made. The identified problems can be considered alongside the recommendations for streamlining and improvement described elsewhere in this paper.

#### Plans For Improving The NRC Rulemaking Process

On January 7, 1994 (SECY-94-003), the staff transmitted its plan for implementing the Regulatory Review Group recommendations. The plan called for, among other things, the staff to review the rulemaking process to identify improvements that could be made to accelerate rulemaking. This paper identifies and discusses a number of improvements in the rulemaking process that would accomplish that goal.

The objective of these improvements is to achieve better coordination among offices in the development of rulemakings and to make more efficient use of staff resources. In developing the plan, the staff relied on its general experience with the rulemaking process and the work of the Regulatory Review Group. It also benefitted from information in the December 15, 1993, memorandum from William C. Parler to the Commission; the December 7, 1993, letter to the Chairman from NUMARC; and the recommendations of the National Performance Review on streamlining of agency rulemaking procedures. Enclosure A summarizes the various recommendations noted above for improving rulemaking.

Additional actions for improving rulemaking are also underway or under consideration. One action is the development of specific criteria for petitions for rulemaking (SECY-94-003); the Commission approval of staff plans in this regard was requested in a subsequent paper (SECY-94-090). In addition, the staff will continue efforts to identify further initiatives that could improve the rulemaking process. As the staff determines that additional measures are warranted the Commission will be informed.

DISCUSSION:

The staff has examined individual aspects of the rulemaking process in order to assess the potential for improvements to shorten schedules, improve coordination, or reduce staff resources. The results of this review are discussed below for each area considered.

## I. Improved Rulemaking Planning

The Office of Nuclear Regulatory Research has already taken steps to emphasize greater planning at the earliest stages of a rulemaking, with the objective of saving time and resources at later stages. One major step has been the development of options papers for planned rulemakings. Options papers are designed to define the problem, identify why NRC action is necessary, outline alternatives, and obtain early management consensus on the direction of the rulemaking.

The staff proposes to move even farther along the same path by augmenting the information now considered by the EDO prior to approving rulemaking initiation packages. The degree and depth of planning will be commensurate with the complexity of the rule. The new and improved EDO initiation package would also include a proposed detailed plan for each rulemaking and draw heavily from the options paper concept. As a result it would include much of the information now contained in the regulatory analysis, such as assessing whether the rule is likely to be cost-effective and meet applicable criteria for backfit and safety goals. It would better define the regulatory problem in terms of the existing regulatory framework, Commission policy goals, the need for NRC to solve the problem, alternative ways of solving the problem, and the rationale for any preferred alternative. When practical, a "preliminary proposed rule" would specify the intended text of the rule language. The plan would also discuss potential legal issues and Agreement State implementation issues.

More detailed planning would also be done on how the rulemaking would be developed by the staff. Staff resources from participating offices to be dedicated to the rulemaking would be identified. The level and type of management oversight of the rulemaking process would be discussed and a recommendation provided on whether or not a management steering group should be established. The plan would add a CRGR review milestone for rulemakings of a particularly controversial nature or involving a definition or redefinition of adequate protection. A priority and schedule for the rulemaking with attention to the risk significance of the action would be established. Specific milestones in the development of each rule will be established based on consideration of the time nominally expected for each major step in the rulemaking process, but also taking into account special circumstances or the degree of complexity of the particular rulemaking being planned. Special considerations, such as whether enhanced public participation should be sought or a negotiated rulemaking should be pursued, would be addressed.

Improvement in planning should minimize some of the difficulties which have been experienced in previous rulemaking actions. Delays in rulemaking schedules have often occurred due to inadequate definition of the problem the rulemaking is addressing, failure to anticipate some legal or Agreement State implementation obstacle, inadequate information on cost-effectiveness, lack of sufficient resource planning for the rulemaking, and inadequate consideration of how licensee compliance is to be demonstrated.

One of the most important benefits of improved rulemaking planning is that it will focus the attention of senior agency policymakers on the objectives of each rulemaking and the projected costs, benefits, and implementation issues early in the process. Office directors will be expected to concur in each rulemaking plan involving their sphere of responsibility, the General Counsel will conduct a preliminary assessment of the legal implications of the rulemaking, and the EDO will make a decision on whether the case has been made to proceed with the rulemaking. The EDO would have the option to seek input from ACRS or CRGR before approval of any rulemaking initiation plan. The rulemaking initiation plan would be provided to the Commission as an information memorandum when approved by the EDO. Advisory committees will be able to determine their degree of interest in reviewing the rule or making comments at an early stage of rule development.

The involvement of the key agency managers in the rulemaking planning process is expected to facilitate consensus and concurrence on the rulemaking at both the proposed and final stages.

Although the Commission would not be requested to approve the rulemaking plan prior to implementation, the availability of a document containing the information described above would allow the Commission to determine early in the process whether the staff plans should be modified to incorporate Commission policy objectives.

Development of plans for each rulemaking would require a relatively larger commitment of resources at a very early stage than is current practice, but since the information to be developed will be the basis for the "Supplementary Information" portion of the Federal Register Notice for the proposed rule, considerable time and effort will be saved later in the process. Also, the degree of detail included in the plan would be commensurate with the complexity of the rulemaking action, with relatively simple and straightforward rules having relatively simple plans to avoid an undue expenditure of resources on unnecessary planning.

More detailed information on what would be included in the rulemaking plan is included in the draft management directive on rulemaking (Enclosure B). A subset of this information would be used to develop input to the Regulatory Agenda and to the Agency Regulatory Plan to be submitted annually to OMB in conformance with E.O. 12866.



## II. Greater Use of Working Group/Steering Committee Approach

The existing practice of using a staff level working group to draft rules will be continued, but when needed will be augmented with a management level steering committee.

The use of a management steering committee for selected rulemakings has the potential for greatly expediting the identification and resolution of issues, decisionmaking, and the office concurrence process. Thus, this approach has proven extremely effective in accelerating rulemaking schedules. Experience with rulemakings that have used this approach, such as the enhanced participatory rule, the new 10 CFR Part 20, the maintenance regulatory guide, and the license renewal rule, has been excellent. Additionally, this approach is consistent with the National Performance Review that recommends early input from top policymakers on the choice of regulatory approach.<sup>3</sup> The steering committee approach helps to ensure that senior management is routinely and fully involved, and policy objectives are effectively represented, from the earliest stages of a rulemaking to completion. A key factor in the effectiveness of the steering committee approach is the delegation of authority to steering committee members to deliver the views and concurrence of the participating offices.

The staff proposes to use a management steering committee for rulemakings that involve matters of urgency, or complex and controversial issues, taking into account potential benefits vs. the limited availability of management time.

## III. Improved Concurrence Process

Some improvements that will shorten the time for concurrence have already been noted. These include the early involvement of key agency managers in the formulation of the rulemaking plan, the designation of an office representative (and alternate) who would have responsibility for overseeing and obtaining office concurrence for a specific rulemaking, and establishment of an interoffice management steering group for certain rulemakings.

Each designated office representative would keep his or her office management informed of the issues that could affect office interests or constitute a basis for legal objection, and the representative's proposed position on these issues. The representative would assure appropriate office review and relay concurrence for the office.

Additional clarifying changes to the concurrence process are proposed to effectively implement the guidance furnished in the EDO's memorandum to all SES managers, dated April 23, 1992. This guidance states that: "While it is important that our documents be of the highest possible quality, those concurring should focus on the accuracy and clarity of the information rather

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<sup>3</sup>National Performance Review, p. 44.

than non-substantive editorial changes." For rulemakings, office concurrence would mean that the office agrees:

- (a) With the overall approach, objective, and technical content in the Commission Paper/rule;
- (b) That the documents do not or will not adversely impact or conflict with other NRC programs and policies; and
- (c) That the material presented is factual and consistent with the office's programmatic basis for judging the material.

The OGC study indicates that concurrence is a minimal time component of most rulemakings. For example, the normal time for all Office comments/concurrence is one month, and seven of the ten rulemakings extensively reviewed by OGC took that amount of time or less. Nonetheless, the staff believes that there are efficiencies to be gained by implementing these new procedures.

The Office of General Counsel's review of rulemaking actions will be consistent with OGC Policy and Procedure Directive No. 14, which governs OGC review and sign-off of papers. It provides for either "concurrence" or "no legal objection." Concurrence means, that from OGC's standpoint, the recommended action is legally sufficient, is consistent with existing Commission policy (or sound future policy), and is supported by OGC. A "no legal objection" means that either (1) OGC has no particular interest in or contribution to make to the policy aspects of the recommendation, or (2) the reviewing attorney disagrees with the recommendation on policy grounds. In the latter case, the attorney will formally communicate the policy disagreement with supporting reasons to the originating office (branch chief or above) or to the proposed signer of the paper as appropriate. OGC review and processing will not be held up because of non-legal policy disagreements. A paper is considered legally sufficient where all relevant, significant facts are presented and the facts considered in light of applicable laws (constitution, treaties, statutes, regulations, executive orders, judicial decisions, agency adjudicatory decisions, contracts and agreements, and binding Commission policy and SRMs). OGC will not return papers or withhold a determination of "no legal objection" for reasons of editorial style.

The Office of the Controller (OC) will specifically focus its review on the resource implications of the actions proposed in the Commission Paper.

The above elaborations are to clarify that office concurrence should not be withheld, either for editorial style or manner of presentation that do not impact policy recommendations or for matters that are normally outside of an office's responsibility. This does not mean that concurring offices cannot suggest editorial changes for the originating office to consider, or raise questions regarding policy or technical aspects. Such comments are encouraged; however, the originating office is to have responsibility for editorial style and manner of presentation.

The EDO's office will also be more directly involved in the concurrence process in order to help ensure that rulemaking schedules are maintained. The EDO's office will be kept informed of the status of concurrence for each rulemaking by a note on the Internal Electronic Bulletin Board described below, and will be given immediate notice of issues which prevent concurrence. As a result, the schedules for concurrence are proposed to be shortened. Under the proposed changes, rulemakings will be transmitted to all concurring offices simultaneously, both by hand-carried copy and electronically. The review period will be no longer than 20 calendar days. A response, hand-delivered and transmitted electronically on the internal rulemaking bulletin board described below, is to be made within this period indicating:

- (a) Concurrence or no legal objection (NLO), or
- (b) Concurrence or NLO provided certain policy, legal, or technical objections are accommodated, or
- (c) Reasons for non-concurrence or legal objection and possible proposals for resolving objections, or
- (d) Reasons for being unable to respond on schedule.

If the originating office cannot provide the EDO with an agreed-upon rulemaking package on schedule, a meeting will be held between the participating offices and the deputy EDO to resolve issues preventing concurrence.

In addition, an Internal Electronic Bulletin Board (IEBB) will be established to facilitate and monitor the concurrence process. The lead office will put the proposed rule and supplementary information on the IEBB. Participating office responses will be posted, and after the lead office has resolved the comments, a revised version of the rulemaking will be posted. This will have several benefits:

- (a) Each participating office would be able to immediately review the body of comments from participating offices, and any revised version of the rule.
- (b) Immediate feedback can be provided from the participating offices via the IEBB on the acceptability of changes, which should accelerate final consensus.
- (c) If consensus cannot be quickly reached, the need for a meeting with the deputy EDO will be apparent and available to all offices.
- (d) At any time during the process, participating offices and other interested parties within NRC can have access to a current version of the rulemaking.

- (e) Faster delivery of documents would be possible, and clerical resources and paper generation will be reduced.

Details of the concurrence process are included in the draft Management Directive on rulemaking included in Enclosure B.

#### IV. EDO Publication of Rules

Under the current system, the EDO is authorized to issue rulemakings that are of minor policy significance and with the negative consent of the Commission. A relatively small number of rulemakings, less than 25 percent of all rulemakings promulgated, have been issued by the EDO.

The staff is recommending that authority be given to allow the EDO to issue proposed rules that may have major policy significance, but for which Commission involvement could reasonably await the results of public comment. While the Commission may wish to review rulemakings that are particularly complex or controversial at the proposed rule stage, the staff believes that, for most rulemakings, Commission review can be deferred until public comments on various rulemaking options are available to the Commission. The Commission would have available the rulemaking plan and could determine at any time during the proposed rule development stage if staff plans should be modified to incorporate Commission policy objectives. The Federal Register Notice for proposed rules issued by the EDO would include a proposed rule and, when appropriate, alternative options. Public comments would be requested on whether these options would be preferable to the proposed rule. When public comments have been received and analyzed, the Commission would be requested to decide on proceeding with a final rule in light of the comments on the options. This approach would permit flexibility to the Commission to select an alternative rule without the need to repeat the public comment process.<sup>4</sup> The fact that the Commission might select one of the alternatives to the proposed approach would be highlighted in the Federal Register Notice requesting public comment.

Whenever the EDO intends to issue a proposed rule for comment, the Commission would be fully informed of the EDO's intention via a negative consent Commission Paper. To allow adequate time for Commission consideration on the matter, the negative consent review period would be increased from 5 days to 10 days.

The practice of publishing alternative options to proposed rules and requesting comments on preferences has been followed successfully in past rulemakings where there was some uncertainty about the optimum resolution of the

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<sup>4</sup>This procedure also would apply to rulemakings where an advance notice is issued. The advance notice could be issued by the EDO, with the proposed rule being issued by the EDO or Commission, if warranted by specific circumstances.

rulemaking issue at the proposed rule stage. The benefit of this approach is that it allows the process to move forward to the public comment stage and takes advantage of the public comments in arriving at a final decision. Furthermore, based on past experience, consensus can be reached more rapidly on issuing proposed rules where a range of final outcomes is possible. The staff believes that allowing the EDO the flexibility to follow this approach in issuing proposed rules would substantially reduce the burden on the Commission and their staffs, promote sound decisionmaking using public comments, and reduce the time required to develop and publish rules.

The Commission may determine that it, rather than the EDO should issue a proposed rule. In such cases the staff recommends that when the public comments do not warrant any significant change in the proposed rule, the EDO be permitted to issue the final rule. The same requirements noted above for informing the Commission and allowing Commission review under the negative consent mode would be established.

A proposed revision of Management Directive 9.17 implementing this approach is included in Enclosure C for Commission approval.

#### V. Use of Direct Final Rulemaking

The staff believes that a reduction in time for a limited set of rulemakings can be achieved by usage of direct final rulemaking for noncontroversial, routine rule changes. This approach is recommended in the National Performance Review (and is discussed more fully in Enclosure A).<sup>5</sup> Under this type of rulemaking, an agency can publish a direct final rule that would become effective in a certain number of days unless the agency received notice that adverse comment(s) would be submitted. If any adverse comments are received, the direct final rule would be withdrawn, and the rulemaking would revert to the normal proposed and final rulemaking process. Thus, direct final rulemaking avoids the double review--once at the proposed stage and again at the final stage-- which is often unnecessarily duplicative and time consuming. The National Performance Review notes that the Environmental Protection Agency uses this method with success.<sup>6</sup>

The staff believes that there is some potential for time and resource saving for selected rulemakings using this approach. The downside risk with this approach is that if a rulemaking receives notice of adverse comment it will have been slowed down by the duration of the public comment period. To minimize such occurrences, the staff will be selective in using direct final rulemaking, and will be prepared to alter its selection criteria as it gains experience.

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<sup>5</sup> National Performance Review, p.44.

<sup>6</sup> National Performance Review, p.42

## VI. Interaction with Advisory Committees

The staff considers advisory committee input on rulemakings to be highly useful and proposes to enhance the efficiency of receiving this input.

Currently, review of rulemakings by the cognizant NRC advisory committees, such as the Advisory Committee on Reactor Safeguards (ACRS), Advisory Committee on Nuclear Waste (ACNW), Advisory Committee on the Medical Uses of Isotopes (ACMUI), and Committee for Review of Generic Requirements (CRGR), first occurs after considerable staff effort has been expended in developing a complete set of rulemaking documents. This review typically consists of providing the advisory committee with a copy of the draft rule, followed in 30 days or so by a presentation to the Committee at one of its periodic meetings. Any formal meeting with the committee must be scheduled during the last stages of the concurrence process and must occur at one of the regularly scheduled committee meetings.

For the ACRS and ACNW the proposed revised procedure would be as follows. The EDO initiation package, including the rulemaking plan, the conceptual rule, and the rationale for the rule, would be provided to the advisory committee as soon as it is approved by the cognizant division director. Comments on the conceptual rule from the advisory committee or individual committee members would be incorporated with those from NRC offices at this early stage. The proposed rule would also be provided to the advisory committee when circulated for internal division review and later when issued for public comment. The evolving rule would also be available to the committee through the Internal Electronic Bulletin Board discussed below. The staff would provide a briefing for the committee at any time the committee makes such a request. Subsequent committee comments or individual member comments and the staff response would be highlighted in a separate section of the Commission Paper.

The objectives of this change are several. For those rulemakings in which the advisory committee does not wish a presentation, both staff and advisory committee time and resources would be saved. For other rulemakings, schedules would be expedited since the meetings would not be sequential and the 30-day review period before a meeting would be eliminated. However, in all cases where the advisory committee wishes, a meeting would take place and the resulting comments would be factored into the rulemaking package considered and approved by the EDO and/or the Commission.

For rulemaking plans not including a CRGR and ACMUI review milestone, the EDO would determine whether the issues involved in the rulemaking were sufficiently controversial or complex to warrant requesting such a review at the proposed or final rule stage.

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<sup>7</sup>SECY-94-109, recommending a revised CRGR scope of review, was sent to the Commission on April 21, 1994. Whatever decision is reached by the Commission will be factored into the procedures noted in this paper.

## VII. Electronic Rulemaking Bulletin Boards and National Information Network

Internal Electronic Bulletin Boards (IEBBs) will be established for distributing and developing rulemaking documents internally as described above to facilitate the internal concurrence process. At appropriate points in the process an approved version of the rule and key supporting documents will be made available outside the NRC for obtaining public and Agreement State comments on an external EBB. The enhanced participatory rulemaking on radiological criteria for decommissioning is currently using such a system. The external EBB provides current information about the status of the decommissioning rulemaking and also provides an electronic method for the public to comment. Background information on the rulemaking and summaries of the public workshops are available for on-line viewing or download. This approach has been well received and is proving very useful in enhancing public awareness and participation. This initiative will be expanded with the objective of making most rulemakings available for public review on an external EBB.

On December 10, 1993, the Commission directed the staff to take a number of actions with respect to the National Performance Review and National Science Foundation High Performance Computation, Communications, and Information Technology (HPCCIT) initiatives. The Commission directed that the agency monitor and support the National Science Foundation's MOSAIC and related HPCCIT projects and directed financial support for MOSAIC at a funding level determined by IRM. IRM has established an interagency agreement with the National Science Foundation to participate in application of the MOSAIC technology to the NRC. Members of NRC's Technology Advancement Board have established an NRC "home page" as an initial demonstration of MOSAIC capabilities within the NRC environment. IRM is working together with NRC program offices to recommend appropriate applications and facilitate the transfer of this technology to the NRC environment.

The staff also plans to explore use of other innovations resulting from NRC's participation in the electronic network projects sponsored by the National Performance Review and other similar efforts taking place throughout the Federal Government, such as Reg Net. Reg Net is proposed to be a regulatory information system whose purpose is to ease and speed up the regulatory process in this country. When fully developed, it will have the capability of electronically exchanging regulatory information (regulatory data bases and regulatory support computing analysis codes) at the local, State, and Federal level. The Reg Net concept envisions more accurate and timely communications between regulators, the regulated community, and the interested public on a variety of issues (e.g., submittals to demonstrate compliance with regulatory requirements). Currently, Commissioner Rogers and the Associate General Counsel are participating on the Interagency Task Force on the Electronic Enhancement of the Regulatory Process. The NRC has already been urged to link its MOSAIC "home page" with other agencies. A number of other interagency opportunities that the Commission may wish to consider for NRC participation are also being considered.

Other agencies are also using EBBs to support rulemaking. OMB is actively supporting an expanded EBB project at the Department of Labor (DOL). That "Reg-Net" project is planning to demonstrate the use of electronic conferences and facilitation as a real-time implementation of many Administrative Conference recommendations on regulatory negotiation. Anticipated advantages include: improvements in the quality of the developed rule, reduced contention resulting from addressing disagreements as they occur, and reduced drafting and implementation time. DOL has obtained a leading national legal scholar who is expert in both administrative law and electronic information to assist with identification and evaluation of numerous legal issues as they arise. These issues will also be faced by other agencies, including NRC, that are developing Reg Net projects. Such issues include matters that range from constitutional concerns such as how to define an electronic bulletin board that is not deemed "a public square" for purposes of the First Amendment to the Constitution to how to legally authenticate electronic application documents.

Other Federal agencies are adapting CD Rom technology, considering amendments to the Freedom of Information Act to address electronic data, addressing Privacy Act concerns arising from manipulation of multiple data bases, identifying how to respond to Regulatory Flexibility Act issues raised by small businesses with limited computing resources, and experimenting with revised alternative dispute resolution mechanisms that take advantage of electronic communications. The staff will be seeking opportunities to jointly support efforts to develop uniform responses to these challenges.

With regard to rulemaking, the establishment of information links with licensees, members of the public and other interested parties will be accomplished, at least in this initial stage of development of the Reg Net concept, through the external EBB. To maximize accessibility to the information on the rulemaking EBB, linkages will be established through the FED world system operated by the National Technical Information Service which is accessible both directly and through various networks such as INTERNET. For those accessing the EBB through INTERNET's World Wide Web (WWW) the EBB could also be reached through the NRC's "home page" MOSAIC interface or through the FEDworld gateway. For those whose computers don't support MOSAIC, a telnet connect is available to FEDworld. If a person has neither a local dial up access to INTERNET nor a gateway to FEDworld, 1-800 telephone numbers will be published.

The staff is also exploring the feasibility of additional initiatives to facilitate rulemaking within the context of the Reg Net concept and will notify the Commission of specific activities that are determined to be beneficial as they are further developed.

#### VIII. Contractor Assistance

Contractor assistance has proven appropriate and helpful in a number of stages in the rulemaking process. Proposed and final rules must be supported by a



variety of analyses including: a regulatory analysis (including where applicable cost/benefit, safety goal and backfit analyses), environmental impact statements where applicable, a public comment analysis, and a Paperwork Reduction Act information collection burden estimate. Preparation of these documents may require assembling a large amount of economic, environmental, and safety information. Thus, although the staff always writes all rules, contractor assistance is routinely used to develop or help develop supporting documents.

Improvements to make more effective use of contractors have been pursued. For example, the Office of Nuclear Regulatory Research has initiated a procurement action for a 5-year task order commercial contract. Under this contract, a task order would be established for each major rulemaking, covering the entire period of development of the rulemaking. The contractor would be tasked to assist the NRC in planning and preparation of the necessary supporting analyses.

Increased rulemaking efficiency is also expected to result through assembling generic data bases for information needed for regulatory analyses, environmental analyses, and other needs. For example, the staff has used contractors to develop the FORECAST code, which generates cost estimates for various modifications to nuclear power plants. Other areas where generic data bases could be developed are also being considered. For example, a recent survey of materials licensees conducted for the Offices of Administration and Information Resources Management gathered data on size and activity characteristics that could be incorporated as a data base for regulatory and other analyses.

#### IX. Rulemaking Diagnostic Management System

The staff is planning to expand the use of the Rulemaking Diagnostic Management System (RDMS), a system for management control of rulemaking being used within the Office of Nuclear Regulatory Research. This system currently allows RES management to periodically verify the status of rulemakings underway within RES and to take actions necessary to resolve problems in meeting schedules. The RDMS is designed to expedite the rulemaking process through tracking the progress of rulemakings against established schedules and to identify and correct problems encountered by the staff in achieving those schedules. Rulemaking task leaders report periodically on the status of their rulemakings to section leaders where problems are identified and actions recommended to resolve problems are identified. This information flows up the management chain, and corrective actions are taken by the appropriate level of management. In the future, when the recommendations of this paper are fully implemented, the RDMS will be available to all offices and can be used for all agency rulemaking actions in concert with the Regulatory Plan (which will establish scheduled milestones for each agency rule) and the IEBC (which will display the development of key rulemaking documents and status of the concurrence process).

IMPLEMENTATION OF THE PROPOSED APPROACH:

Changes to the rulemaking development and concurrence process described here would be implemented by amending the management directive system. A draft of the proposed language is included as Enclosure B. After further review and refinement, the changes will be circulated to affected offices for comment in the summer of 1994, with the goal of final issuance by the end of the calendar year. The Regulations Handbook (NUREG/BR-0053) would be modified to reflect the approved changes.

A proposed revision to Management Directive 9.17 on EDO rulemaking authority is included as Enclosure C.

Interaction between the staff and each of the advisory committees is governed by a Memorandum of Understanding (MOU). If the approach described in Section V is acceptable to the advisory committees, changes to the MOUs could proceed with a goal of finalizing the changes in the fall of 1994.

Procurement action for the contract discussed above was sent to the Division of Contracts and Property Management in early March 1994. Contractor selection should take place during the fall of 1994, and a new contract should be in place in the winter of 1995.

An external electronic bulletin board devoted to rulemaking is currently targeted to become operational in the summer of 1994.

RESOURCE IMPLICATIONS:

Implementation of this plan will require no overall increase in resources over those currently included in the FY 1994-1998 Five-Year Plan.

COORDINATION:

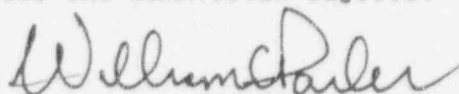
The staff has discussed the proposed revisions in the role of the advisory committees with the ACRS on May 5, 1994, and will continue working with the ACRS to implement those recommendations approved by the Commission.

RECOMMENDATION:

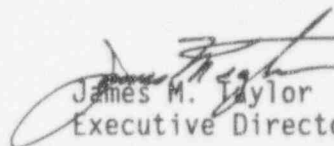
That the Commission:

1. Approve the modifications to Management Directive 9.17 as proposed in Enclosure C.

2. Note: The staff plans to implement the revisions to the rulemaking process discussed here unless the Commission objects.



William C. Parler  
General Counsel



James M. Taylor  
Executive Director for Operations

Enclosures:

- A. Recent Proposals for Improving Rulemaking, including the Report of the National Performance Review - 9/93
- B. Draft Proposed Rulemaking Process To Be Included in The Management Directives System.
- C. Draft Management Directive 9.17

DISTRIBUTION:

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ENCLOSURE A

## ENCLOSURE A

### RECENT PROPOSALS FOR IMPROVEMENT

Recent discussions of rulemaking practices at the NRC in a variety of context have produced a number of suggestions for improvement. We discuss these efforts here in order to demonstrate the scope of work that is occurring in this area. In addition, these proposals also provide many useful suggestions for increasing the effectiveness of NRC's process.

#### Regulatory Review Group

The Regulatory Review Group (RRG) was established in January 1993 to conduct a review of power reactor regulations and related processes, programs and practices, and to consider specifically the feasibility of increasing overall industry flexibility and reducing regulatory burden without adversely impacting reactor safety. The RRG published its findings and recommendations in August 1993. The RRG examined agency administrative practices and proposed such improvements as eliminating unnecessary reporting requirements and improving the agency's rulemaking practices. These rulemaking improvement recommendations include:

- (1) A discussion should be added in the Regulatory Agenda to describe how rulemakings are prioritized;
- (2) Schedules should be included for all rulemakings in the Regulatory Agenda;
- (3) The abstract information in the Regulatory Agenda should be current;
- (4) The agency should issue guidance on the scope and the level of detail needed on petitions for rulemaking that reduce the regulatory burden; and
- (5) The agency should provide a mechanism to reassess rulemakings that are old, and of low priority.

#### NUMARC

On December 7, 1993, the Nuclear Management and Resources Council (NUMARC) submitted a paper to the NRC on "Industry Suggestions for Streamlining NRC Rulemaking Procedures." Citing the Commission's Principles of Good Regulation and President Clinton's September 30, 1993, Executive Order 12866, Regulatory Planning and Review, NUMARC suggested streamlining in order to achieve two objectives: addressing safety significant matters more expeditiously and adopting regulatory improvements that enhance safety and efficiency through reducing unnecessary or overly burdensome requirements. NUMARC concluded that NRC should implement constructive ways to focus attention and staff resources and should impose necessary management discipline on the rulemaking process to achieve that end. Some of NUMARC's suggestions include:

- (1) A categorization process for NRC Rulemakings;
- (2) Once categories are defined, tailor the rulemaking processes to each category, e.g. definitive schedules for rulemaking actions are established in accordance with each category mentioned in the paper;
- (3) The staff should reconstruct the existing process so as to incorporate concurrent reviews, as opposed to serial reviews, to the maximum extent possible;
- (4) Guidelines should be established for categorizing and prioritizing rulemaking actions, and schedules established for completing the various steps associated with the process;
- (5) Responsible NRC staff managers should be held accountable, e.g., in performance reviews, for their performance in overseeing the timely preparation and completion of rulemaking actions;
- (6) Eliminate reviews from offices that provide no substantive value, i.e., where this review would not change the substantive result; and
- (7) The NRC should consider the use of new approaches, e.g., promulgation of temporary rules of limited duration that would be in effect for an interim period of time.

In a memorandum dated December 15, 1993, OGC informed the Commission that NUMARC's recommendations, as mentioned above, had been reviewed and that with two exceptions, "the general suggestions offer fruitful avenues for consideration and are not dissimilar from our own views on opportunities for improving the effectiveness and efficiency of NRC rulemaking."<sup>1</sup>

#### Administrative Conference

In addition, the December 15 memorandum also suggested using the Administrative Conference recommendations, "Improving the Environment for

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<sup>1</sup> The two exceptions noted involve the issuance of immediately effective rules for immediate safety issues and the promulgation of temporary rules of limited duration. The former involving immediate safety issues are best dealt with from the legal perspective by issuing an immediate effective order and not by an immediately effective rule. The latter involving temporary rules of limited duration are likely to generate more challenges, closer judicial scrutiny, and additional uncertainties. Experience also suggests that temporary or interim rules may have a tendency to become permanent.

Agency Rulemaking," as guidance in developing revised agency rulemaking management techniques.<sup>2</sup>

In examining our data and considering past proposals, we used the conference's recommendations as a benchmark to gauge the potential effectiveness of various proposals to improve the process. The use of these recommendations allows a comparison between NRC's rulemaking process and the generic goals articulated by experts outside the agency. These recommendations include the following:

- (1) Systematically setting priorities at the highest agency levels and tracking rulemaking initiatives, including a clear designation as to who has the authority to ensure that agency schedules and policies are followed;
- (2) Reviewing the agency's existing system for developing and reviewing regulations to determine where problems and bottlenecks are occurring and to improve and streamline the process;
- (3) Achieving timely internal clearances of proposed and final rules, using, where feasible, publicly announced schedules for particular rulemaking proceedings;
- (4) Managing rulemaking files so that maximum disclosure to the public is achieved during the comment period and so that a usable and reliable file is available for purposes of judicial review;
- (5) Making use, where appropriate, of negotiated rulemaking and advisory committees;
- (6) Considering innovative methods for reducing the time required to develop final rules without eliminating the opportunity for consideration and comment;
- (7) Taking steps to ensure that proposed rules are reviewed periodically and formally withdrawn when no future action is contemplated; and
- (8) Evaluating and reconsidering existing rules and initiating amendments and repeals where appropriate.

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<sup>2</sup> 1 CFR §305.93-4 (December 9, 1993).

# REG05: STREAMLINE AGENCY RULEMAKING PROCEDURES



## BACKGROUND

In an effort to coordinate policies within each agency and within the executive branch, numerous layers of review and analyses have been added on top of the relatively simple notice-and-comment requirements of the Administrative Procedure Act (APA). Clearance is required by numerous offices within the agency (and again within the department if the agency is part of a department) and by the Office of Management and Budget (OMB). As has been previously noted, the entire process is repeated twice—first at the proposal stage, then again when the rule is finalized. After a several-month-long study by a contractor, one agency found that it took an 18-foot flow chart with 373 boxes to describe its then-current rulemaking process.<sup>1</sup>

Another reason for the extensive internal review is the fear of litigation challenging the rule. Agencies compile extensive records to defend themselves if rules are challenged in court—even for issues no one has raised during the public comment period. An agency can spend considerable resources developing a rule only to have it nullified in court because the rule was based on an impermissible statutory interpretation. If a successful challenge is brought after the rule is issued, an entire program may be thrown into a state of disarray.<sup>2</sup>

Some agencies have statutory provisions that help reduce the amount of litigation preparation needed during the rulemaking process. For example, some statutes prohibit litigants from challenging a rule on any basis other than ones raised during the public comment period and require challenges to be brought within 60 days of the day the rule is issued.<sup>3</sup>

The straightforward APA notice-and-comment rulemaking process has now become so formalized that its name—informal rulemaking—seems a misnomer. Some agencies, however, have additional statutory requirements that make their rulemaking process even more cumbersome. For example, the Federal Trade Commission is required to conduct trial-type hearings that allow cross-examination of witnesses.<sup>4</sup>

## NEED FOR CHANGE

Although different agencies have different internal rulemaking processes, within an agency too often the same review process is used and the same number of clearances are required regardless of the significance or complexity of a rule.<sup>5</sup> A process with numerous checks makes sense for significant rules (e.g., ones that announce a major policy, initiate a new regulatory program, have a significant effect on the economy, or



are particularly controversial). However, a large number of the thousands of rules issued each year are not significant and do not warrant extensive review by numerous offices. Anecdotal evidence indicates that insignificant rules (which may be a clarification of an existing rule or a small change needed to undo an unintended consequence of an existing rule) often languish on reviewers' desks because the rules are not high priority and the reviewers are busy with other demands.<sup>6</sup> Even relatively minor changes to an existing program can easily take nine months or more.

The failure to establish a process that differentiates between significant and insignificant rules is costly. The current lengthy process precludes quick, minor adjustments to existing programs, wastes the time of numerous reviewers, and frustrates staff responsible for getting the rules out and keeping programs functioning. Evidence that the rulemaking process has become too cumbersome is provided by the frequency with which agency staff turn to other methods of establishing agency policy. Instead of issuing rules, agencies issue policy statements, guidance documents, and memos to agency personnel that are often not required to go through public comment, extensive internal agency clearance, or OMB review.<sup>7</sup>

**Some Efforts at Streamlining.** The Clinton administration's regulatory review executive order is a major step in streamlining the regulatory process. It will streamline the review process by requiring the Office of Information and Regulatory Affairs (OIRA) to review only significant rules.

The Environmental Protection Agency (EPA) also has made efforts to streamline its process and avoid the "double" review process (i.e., all clearances required both at proposal and final rule stage) by issuing "direct final" rules for certain rules on which it believes the public will not comment. Although EPA issues many rules that are controversial and that benefit from public comment, a significant number of rules

receive no comments. These rules include:

- minor modifications of existing rules (such as directions about where to submit information or technical changes to testing standards that have been adopted by a professional association);
- federal approval of changes to a state plan implementing federal law affecting only one or a small group of companies (especially where the federal agency has very little discretion); and
- "significant new use" rules limited to specific chemicals.

In this direct final rulemaking approach, EPA publishes a notice in the *Federal Register* saying that a rule will become effective in 60 days unless, within 30 days, someone submits written notice of an intent to file an adverse or negative comment. If no such notice of intent is filed, the rule becomes final without going through a second round of intra- and inter-agency review. If even one person files such a notice, EPA withdraws the rule, republishes it as a proposed rule, and proceeds with normal notice-and-comment rulemaking and the second round of review. (Republishing the rule as a proposal serves two functions. First, it gives an opportunity to comment to people who may have kept silent because they wanted the rule to go into effect immediately. Second, it self-imposes a penalty—additional steps and further delay—which serves to prevent the agency from overreaching in the use of this technique.)

This approach avoids the second round of clearances and review, which otherwise delays rules, wastes time, and should be superfluous (especially if all reviewers are warned the first time that the rule might go final without further review). Theoretically, the second review ought to be very quick, but clearing any document through numerous government offices takes time. The paper shuffling also wastes the reviewers' time by requiring them to look at something twice when once would have sufficed.

EPA uses this process routinely in two

areas—approval of changes to state implementation plans and “significant new use” rules for chemicals.

- In a pilot project testing this procedure for EPA approval of changes to state implementation plans under the Clean Air Act, 90 rules were processed in an average of 181 days, which was considerably better than the 419 days it took to process 81 comparable rules prior to the use of the direct final process.<sup>8</sup> For the last 10 years, EPA has used the process nationwide to approve changes to state plans.
- In 1989, as a result of an informal reg neg process with industry and environmental groups, EPA adopted the direct final rulemaking process for chemical-specific significant new use rules (SNURs) issued under the Toxic Substances Control Act.<sup>9</sup> SNURs for at least a hundred chemicals have been issued as direct final rules.<sup>10</sup>

EPA also uses direct final rules occasionally for other types of rules. The agency has rarely had to withdraw a rule because public comments were filed, and no one has ever challenged these rules for failure to comply with the APA.<sup>11</sup>

Some agencies have streamlined the process by issuing broad, generic rules to resolve common issues or to establish standards applicable to multiple industries instead of conducting separate rulemakings for each issue or industry. For example, the Social Security Administration and the Nuclear Regulatory Commission each have successfully issued rules concerning common problems arising in disability claims and applications for power plants, respectively. On the other hand, the Occupational Safety and Health Administration was not allowed by a court to use a generic, instead of a hazard-by-hazard, approach for permissible exposure levels for air contaminants.<sup>12</sup>

The National Marine Fisheries Service has established categories of rulemaking notices that appear in final form in the *Federal Register* after reduced review. For example, when a quota of fish previously

specified by regulation has been taken in a particular fishery, a notice closing that fishery is published in the final rule section of the *Federal Register*. Violators of these closure notices may be subject to a variety of civil enforcement proceedings. These notices are not reviewed by either the Department of Commerce or OIRA.<sup>13</sup>

Agencies also conserve agency resources by adopting voluntary national consensus standards rather than developing criteria in-house.<sup>14</sup>

## ACTIONS

### 1. Streamline internal agency rulemaking procedures. (1)

The President should direct heads of regulatory agencies to review and streamline their internal rulemaking processes. The Regulatory Coordinating Group (RCG), in consultation with the Administrative Conference of the United States (ACUS), should assist the process by providing a forum for agencies to exchange information and coordinate hiring of contractors (if any are necessary) to avoid duplicative efforts. A variety of principles should be adopted to streamline the process and reduce the cost of issuing rules, including:

- Agencies should differentiate between significant and insignificant rules and use a shorter process for insignificant rules. The new regulatory review executive order requires OIRA review only for significant rules. Agencies also should strive to group or tier rules and to adjust the process so that the number of steps in the clearance process varies with the significance or importance of the rule.
- Executive departments (such as the Department of Health and Human Services) should review their internal delegations to determine whether agencies headed by Presidential appointees (such as the Food and Drug Administration) can issue some insignificant rules without

## RECOMMENDATIONS AND ACTIONS

departmental review. It might be appropriate to develop a triage system similar to the one in the new regulatory review executive order.

- Agencies should determine whether there are continuing, unnecessary roadblocks in the process and then determine how to remove them.
- Agencies should get early input from top policymakers on the choice of regulatory approach to be taken so that agency resources are not wasted drafting regulations that are inconsistent with the desired policies.

### *2. Use "direct final" rulemaking to reduce needless double review of noncontroversial rules. (1)*

The head of each regulatory agency should use "direct final" rulemaking or a similar approach at least once in the next year (or explain why it cannot be done).<sup>16</sup> The direct final process should only be used for rules that the agency believes are so noncontroversial that no one would file adverse or negative comments on the proposal. Under this process, the agency would publish a direct final rule in the *Federal Register*. The *Federal Register* notice should explain that the rule would become effective in 60 (or some other appropriate number) days if, within 30 (or some other appropriate number) days, the agency did not receive notice from any person of the intention to file adverse or negative comments.<sup>17</sup> If the agency is notified that adverse comments would be filed, the agency would be required to withdraw the direct final rule, republish it as a proposed rule, and go through the usual notice-and-comment procedures.

### *3. Develop specifications for rulemaking petitions. (1)*

The heads of regulatory agencies should issue regulations specifying what must be in petitions for rulemaking and describing the process for filing them.<sup>18</sup> Such regulations

should explain that detailed petitions, complete with a text of a proposed rule and underlying analyses, may help the agency respond to the petition more quickly. Sufficiently detailed petitions may form a basis for a notice of proposed rulemaking. After a public comment period, the agency could then either withdraw the proposal or modify it as necessary and adopt it as a final rule.<sup>19</sup>

### *4. Evaluate and draft proposed legislative changes to speed the rulemaking process. (4)*

Heads of regulatory agencies, in coordination with the Regulatory Coordinating Group (RCG) and ACUS should:

- identify existing statutes that unnecessarily require cross-examination and other adjudicative fact-finding procedures in rulemakings and should recommend whether the administration should seek legislative changes;
- identify which, if any, statutes should be amended to limit the amount of time parties have to challenge a rule, or to limit the issues on judicial review to those that were raised during the public comment period, and should recommend whether the administration should seek legislative changes; and
- recommend whether the administration should seek amendments to ensure that regulatory statutes provide sufficient flexibility for agencies to issue "generic rules" that would settle, in one proceeding, issues that would otherwise recur in numerous separate rulemakings or enforcement proceedings.

The Chair of the RCG, in coordination with ACUS, should study whether:

- The administration should seek an amendment to the Federal Advisory Committee Act to exempt advisory committees that meet only once from its requirements.<sup>20</sup>
- It would be feasible, useful and constitutional for agencies to be able to

seek judicial resolution (similar to a declaratory judgment) by a court of difficult statutory interpretations that are important to resolve before an agency finalizes a rule and expends significant resources.<sup>21</sup> If the administration seeks legislation, the procedure to be established should ensure that affected interests are represented and that issues are not presented prematurely (*i.e.*, before the agency has definitively determined that there is an actual problem of statutory interpretation).

### Cross-references to Other NPR Accompanying Reports

- Department of Labor, DOL03: Expand Negotiated Rulemaking and Improve Up-front Teamwork on Regulations.*
- Department of Education, ED05: Streamline and Improve the Department of Education's Grants Process.*
- Department of Health and Human Services, HHS02: Reengineer the HHS Process for Issuing Regulations.*
- Streamlining Management Control, SMC08: Expand the Use of Waivers to Encourage Innovation.*

### Endnotes

1. Although that agency has since modified its process, the process depicted on the chart is not atypical of rulemaking procedures throughout the government.
2. See *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991) (EPA's asbestos rule, 10 years in the making, remanded to agency for lack of substantial evidence).
3. See the *Clean Air Act*, 42 U.S.C. §§ 7607(b)(1) and (d)(7)(B) (1991 Supp.).
4. 15 U.S.C. § 57a (1988). The Securities and Exchange Commission has similar requirements in the *Securities Act Amendments*, 15 U.S.C. § 78f(e) (1908), as does the Environmental Protection Agency (EPA) in the *Toxic Substances Control Act*, 15 U.S.C. § 2605(c) (1988).
5. Some very minor or repetitive rules have an expedited process, but most agency processes fail to adequately match the thoroughness of the process with the complexity of the rule. The American Waterways Operators reports that a staff member from the Office of Information and Regulatory Affairs noted that "the Coast Guard's rigorous internal review process applies equally to rules of sweeping consequence and minor technical guidelines." The American Waterways Operators, "The Federal Regulatory Process: Opportunities for and Obstacles to Government/Industry Cooperation," May 1992, p. 17.
6. Interview with Richard Wilson, Director, Office of Mobile Sources, Environmental Protection Agency, May 14, 1993.
7. To a certain extent, the use of such other methods allows agencies to differentiate between significant and

insignificant rules and is a useful development. However, there are drawbacks to these methods — although technically these policies cannot bind people outside the agency, as a practical matter, they may have that effect. Unlike rules (which are published in the *Federal Register* and codified in the *Code of Federal Regulations*), less formal statements of agency policy are not necessarily compiled in one place and may not be accessible to the public. There is a general sense that agencies are turning to policy statements and guidance too frequently. See Emery, Fred, *Rulemaking as an Organizational Process* (1982), p. 46 (unpublished report to ACUS); Anthony, Robert, "Agency Efforts to Make Nonlegislative Documents Bind the Public," *Admin. Law Review*, Vol. 44 (1992), p. 31. An expanded version of the latter article will shortly appear as *Interpretive Rules, Policy Statements, Guidance, Manuals and the Like—Should Agencies Use Them to Bind the Public?*, 1992 Administrative Conference of the U.S. Recommendations and Reports.

8. Environmental Protection Agency, *Requirements for Preparation, Adoption, and Submission of State Implementation Plans: New SIP Processing Procedures to Save Time and Resources*, 47 FR 27073, 27074 (June 23, 1982) (in this notice EPA uses the term "immediately final" rather than "direct final").

9. Interview with James Nelson, Associate General Counsel, Environmental Protection Agency (May 11, 1993). See 40 C.F.R. § 721.170(d)(4)(1).

10. See note 9 above.

11. Interviews with Alan Eckert, Associate General Counsel, Environmental Protection Agency, May 6, 1993; James Nelson, Associate General Counsel, EPA, May 11, 1993; and Howard Hoffman, Senior Attorney, EPA, May 10, 1993. In response to an informal request to all attorneys in Environmental Protection Agency's Office of the General Counsel, no direct final rule was identified as having been challenged in court for failure to comply with the Administrative Procedure Act (APA).

12. *AFL-CIO v. OSHA*, 965 F.2d 962 (11th Cir. 1992).

13. Memorandum to Jeffrey Lubbers, Team Leader, NPR Improving Regulatory Systems Team, from Gloria Gutierrez, Acting Chief Financial Officer and Assistant Secretary for Administration, Department of Commerce, Aug. 5, 1993.

14. Administrative Conference of the United States, Recommendation 78-4, "Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulations," 1 C.F.R. § 305.78-4.

15. These principles should apply to all agencies even though agency processes vary significantly from agency to agency, depending, in part, on the agency's mission and culture.

16. Agencies can use direct final rules without new legislation, although the process does pose some litigation risk. Arguably, direct final rules meet the requirements of the APA. However, an argument could be made to the contrary. Agencies should determine when it is appropriate to take that risk after consultation with their general counsels. One factor that may make it easier for EPA to use the process is the special provisions in the *Clean Air Act* and the *Toxic Substances Control Act* that require anyone challenging a rule to bring the judicial challenge within 60 days after the rule is published in the *Federal Register*. 42

ENCLOSURE B

DRAFT PROPOSED RULEMAKING PROCESS

DRAFT NRC MANAGEMENT DIRECTIVE ON RULEMAKING PROCEDURES

I. INITIATION OF RULEMAKING

- A. ANY OFFICE REPORTING TO THE EDO, OR THE OGC, AND WISHING TO RECOMMEND INITIATION OF RULEMAKING, INCLUDING RULEMAKING IN RESPONSE TO A PETITION, SHOULD REQUEST SUCH BY A MEMO TO RES.
- B. COMMISSION PAPERS RECOMMENDING RULEMAKING SHOULD NOT BE PREPARED BEFORE FOLLOWING THE INITIATION SECTION OF THIS MANAGEMENT DIRECTIVE.
- C. RES, IN CONSULTATION WITH OGC AND OTHER OFFICES WHICH WILL PARTICIPATE IN THE RULEMAKING, WILL PREPARE A RULEMAKING PLAN IN ACCORDANCE WITH SECTION II OF THIS DIRECTIVE.
- D. RES WILL PREPARE A MEMO TO THE EDO TRANSMITTING THE INFORMATION DEVELOPED IN THE PLANNING PROCESS AND A RECOMMENDATION ON WHETHER PROCEEDING IS JUSTIFIED BASED ON THIS INFORMATION.
- E. IF THE COMMISSION DIRECTS THE STAFF TO UNDERTAKE RULEMAKING, A PLAN FOR THE RULEMAKING IN ACCORDANCE WITH SECTION II OF THIS DIRECTIVE SHOULD BE DEVELOPED TO THE EXTENT PRACTICAL.

## II. DEVELOPMENT OF PLAN FOR RULEMAKING

RES WITH ASSISTANCE FROM OGC AND THE REQUESTING AND PARTICIPATING OFFICES (RES IS INVOLVED AT THE PLANNING STAGE EVEN WHEN ANOTHER OFFICE HAS LEAD RESPONSIBILITY FOR A RULEMAKING) SHALL DEVELOP A PROPOSED PLAN FOR EACH CONTEMPLATED RULEMAKING WHICH:

- (A) DEFINES THE REGULATORY PROBLEM OR ISSUE TO BE RESOLVED BY THE RULEMAKING (E.G., A SAFETY CONCERN; A NEED TO FACILITATE THE LICENSING PROCESS; RELIEF OF AN UNNEEDED BURDEN). A DESCRIPTION OF THE RELEVANT EXISTING REGULATORY FRAMEWORK SHOULD BE INCLUDED AS WELL AS AN EXPLANATION OF WHY THE ACTIONS WHICH WOULD BE NECESSARY BY LICENSEES OR THE NRC TO RESOLVE THE PROBLEM CANNOT BE ACCOMPLISHED EFFECTIVELY WITHIN THE EXISTING FRAMEWORK.
- (B) PROVIDES OGC'S ANALYSIS DEMONSTRATING THAT THERE ARE NO KNOWN BASES FOR LEGAL OBJECTIONS TO THE CONTEMPLATED RULEMAKING AND OGC'S IDENTIFICATION OF ANY POTENTIAL LEGAL COMPLICATIONS WHICH SHOULD BE ANTICIPATED.
- (C) PROVIDES THE BASIS, CONSIDERING PRELIMINARY REGULATORY ANALYSIS OF AVAILABLE INFORMATION, FOR BELIEVING THAT THE CONTEMPLATED RULEMAKING IS LIKELY TO BE COST EFFECTIVE AND WILL MEET BACKFIT RULE CRITERIA.

- (D) INDICATES WHETHER THERE ARE ANY KNOWN PROBLEMS WHICH THE AGREEMENT STATES COULD HAVE IN IMPLEMENTING SUCH A RULE BASED ON OBTAINING EARLY AGREEMENT STATE FEEDBACK ON THE CONCEPT. THIS WILL BE ACHIEVED BY NOTIFICATION OF THE AGREEMENT STATES THROUGH THE AGREEMENT STATE RULEMAKING BULLETIN BOARD.
- (E) IDENTIFIES THE SUPPORTING DOCUMENTS SUCH AS A GEIS, REGULATORY GUIDES, INSPECTION PLANS AND RIA'S WHICH MUST BE DEVELOPED TO COMPLETE THE RULEMAKING AND TO IMPLEMENT THE RULE.
- (F) IDENTIFIES THE RESOURCES REQUIRED TO COMPLETE AND TO IMPLEMENT THE RULEMAKING, INCLUDING DEVELOPING ALL THE SUPPORTING DOCUMENTS, AND WHETHER THESE RESOURCES ARE INCLUDED IN THE CURRENTLY APPROVED FIVE-YEAR PLAN AND IDENTIFIES THE OFFICE RESPONSIBLE FOR EACH ACTIVITY.
- (G) INDICATES WHETHER IT IS RECOMMENDED THAT THE EDO ISSUE THE PROPOSED OR FINAL RULE OR BOTH IN ACCORDANCE WITH MANAGEMENT DIRECTIVE 9.17.<sup>3</sup>
- (H) IDENTIFIES THE LEAD OFFICE AND THE KEY STAFF WITHIN EACH OFFICE WHO WILL BE INVOLVED IN THE RULEMAKING INCLUDING THE SENIOR MANAGER DESIGNATED BY THE OFFICE DIRECTOR TO CONCUR FOR THE

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<sup>3</sup> ASSUMES MANAGEMENT DIRECTIVE 9.17 IS REVISED TO ALLOW EDO TO PUBLISH PROPOSED BUT NOT FINAL RULES HAVING MAJOR POLICY IMPLICATIONS.



OFFICE. THIS DESIGNEE IS RESPONSIBLE FOR KEEPING THE OFFICE DIRECTOR INFORMED OF KEY POLICY ISSUES RELATED TO THE RULEMAKING.

(I) IDENTIFIES WHETHER A STEERING GROUP-WORKING GROUP FORMAT WILL BE FOLLOWED.

(J) DESCRIBES SPECIAL MEASURES OR PROCEDURES TO BE EMPLOYED IN THE RULEMAKING PROCESS SUCH AS ISSUANCE AS A DIRECT FINAL RULE, ENHANCED PARTICIPATION OR NEGOTIATED RULEMAKING.

(K) INCLUDES THE SCHEDULES FOR PREPARING THE SUPPORTING INFORMATION AND THEN COMPLETING THE PROPOSAL AND COMMENTS PROCESS FOR THE RULEMAKING. THE SCHEDULE SHALL BE ESTABLISHED BASED ON:

- 1) THE PRIORITY OR IMPORTANCE GIVEN TO THE ACTION
- 2) THE COMPLEXITY OF THE ISSUES TO BE RESOLVED
- 3) THE NUMBER AND COMPLEXITY OF SUPPORTING INFORMATION SUCH AS REGULATORY GUIDES, A GEIS OR TECHNICAL TOOLS SUCH AS COMPUTER CODES NEEDED FOR IMPLEMENTATION
- 4) THE DEGREE OF ENHANCED INTERACTION OR NEGOTIATION WITH INTERESTED PARTIES NEEDED TO COMPLETE THE RULEMAKING.

III. ACTIONS FOLLOWING APPROVAL OF A RULEMAKING PLAN BY THE EDO

FOR RULEMAKINGS PROPOSED BY THE STAFF AND APPROVED BY THE EDO,

- (A) RES SHALL MAKE THE APPROVED PLAN AVAILABLE TO THE NRC STAFF THROUGH THE INTERNAL NRC RULEMAKING BULLETIN BOARD AND TO THE STATES THROUGH THE AGREEMENT STATE RULEMAKING BULLETIN BOARD.
- (B) ADMIN SHALL INCLUDE A NEW REGULATORY AGENDA ENTRY ON THE REGULATORY AGENDA BULLETIN BOARD
- (C) FOR MAJOR RULES, ADMIN SHALL INCLUDE THE NEW ENTRY IN THE ANNUAL SUBMITTAL TO OMB ACCORDING TO EXECUTIVE ORDER 12866
- (D) THE PARTICIPATING OFFICES WILL IMPLEMENT THE PLAN AS APPROVED BY THE EDO. OFFICE SENIOR MANAGEMENT DESIGNEES WILL OVERSEE EACH OFFICES' ACTIVITIES TO MAINTAIN SCHEDULES.
- (E) MODIFICATIONS TO THE PLAN INVOLVING SIGNIFICANT CHANGES IN RESOURCES, SCHEDULES OR POLICY SHOULD BE APPROVED BY THE EDO. RESOURCE CHANGES SHOULD BE COORDINATED WITH THE OFFICE OF THE CONTROLLER.
- (F) AGREEMENT STATE INVOLVEMENT WILL BE SOUGHT ON PRELIMINARY VERSIONS OF THE PROPOSED RULE THROUGH THE AGREEMENT STATE BULLETIN BOARD.

IV. ADVISORY COMMITTEE REVIEW

- (A) THE PROPOSED RULE AS APPROVED BY THE EDO WILL BE SENT TO THE APPROPRIATE ADVISORY COMMITTEE.
  
- (B) COMMENTS RECEIVED FROM ANY INDIVIDUAL MEMBERS WILL BE MAINTAINED AS PART OF THE RULEMAKING RECORD.
  
- (C) THE STAFF IF REQUESTED, WILL MEET WITH THE APPROPRIATE COMMITTEE AT ANY TIME IN THE RULEMAKING PROCESS TO DISCUSS THE STAFF'S RATIONALE FOR PROCEEDING.
  
- (D) FORMALLY DOCUMENT AND RESPOND TO ANY CONSENSUS COMMITTEE COMMENTS OR RECOMMENDATIONS OR TO ANY INDIVIDUAL COMMITTEE MEMBER COMMENTS IN THE FINAL COMMISSION PAPER TRANSMITTED TO THE COMMISSION FOR APPROVAL.

V. CONCURRENCE ON RULEMAKING DOCUMENTS

FOR EACH RULEMAKING, AN OFFICE REPRESENTATIVE AND AN ALTERNATE WILL BE DESIGNATED BY THE OFFICE DIRECTOR OR BY GENERAL COUNSEL. THE DESIGNEE (AND HIS OR HER ALTERNATE IN THE DESIGNEE'S ABSENCE) WILL:

- (A) KEEP OFFICE MANAGEMENT INFORMED OF THE POLICY ISSUES WHICH COULD AFFECT OFFICE INTERESTS OR CONSTITUTE A BASIS FOR LEGAL OBJECTION AND THE DESIGNEE'S PROPOSED POSITION REGARDING THESE ISSUES.
- (B) SPEAK/SIGN FOR HIS OR HER OFFICE REGARDING CONCURRENCE OR CONDITIONS FOR CONCURRENCE OR NO LEGAL OBJECTION, (I.E., WRITE CONCURRENCE LETTER OR IDENTIFY SPECIFIC ISSUES WHICH PREVENT CONCURRENCE OR NO LEGAL OBJECTION).
- (C) OVERSEE OFFICE REVIEW REGARDING FACTUAL MATTERS IN CONCURRENCE DOCUMENT, INCLUDING PROVISION OF TIMELY FEEDBACK DURING DOCUMENT DEVELOPMENT PROCESS.
- (D) THE OFFICE DESIGNEE COULD INTERACT IN THE CONCURRENCE PROCESS IN EITHER THE TRADITIONAL MODE OR AS A MEMBER OF A STEERING GROUP.

OFFICE CONCURRENCE SHALL MEAN THAT:

- (A) THE OFFICE AGREES WITH THE OVERALL APPROACH, OBJECTIVE, AND TECHNICAL CONTENT AND RESOURCES IN THE COMMISSION PAPER OR DRAFT PROPOSED OR FINAL RULE.
- (B) THE DOCUMENT DOES NOT OR WILL NOT ADVERSELY IMPACT OR CONFLICT WITH OTHER NRC PROGRAMS AND POLICIES.
- (C) THE OFFICE AGREES WITH MATERIAL WHICH IS PRESENTED AS FACTUAL AND FOR WHICH THE OFFICE HAS A PROGRAMMATIC BASIS FOR JUDGING THE ACCURACY OF THE MATERIAL.

OFFICE CONCURRENCE OR NO LEGAL OBJECTION SHALL NOT BE WITHHELD BY AN OFFICE ON THE BASIS OF:

- (A) QUESTIONS REGARDING THE TECHNICAL BASIS FOR THE PROPOSAL EXCEPT AS THEY ARE BASED ON MATERIAL FOR WHICH THE OFFICE IS IN A POSITION TO DECISIVELY REFUTE THE TECHNICAL BASIS. HOWEVER, THE CONCURRING OFFICE SHALL PROVIDE TIMELY NOTIFICATION TO THE PROPOSING OFFICE OF ITS QUESTIONS OR CONCERNS REGARDING ANY TECHNICAL ANALYSIS OR INFORMATION OF DATA WHICH MAY INVALIDATE OR RAISE DOUBTS ABOUT THE PROPOSAL.
- (B) EDITORIAL STYLE OR MANNER OF PRESENTATION WHICH DO NOT IMPACT THE POLICY RECOMMENDATIONS. HOWEVER, THE CONCURRING OFFICE MAY

PROVIDE TIMELY SUGGESTIONS FOR REVISED WORDING FOR THE OPTIONAL USE OF THE PROPOSING OFFICE.

- (C) THE OFFICE OF GENERAL COUNSEL'S REVIEW OF RULEMAKING ACTIONS WILL BE CONSISTENT WITH OGC POLICY AND PROCEDURE DIRECTIVE NO. 14 WHICH GOVERNS OGC REVIEW AND SIGN-OFF OF PAPERS. IT PROVIDES FOR EITHER "CONCURRENCE" OR "NO LEGAL OBJECTION." CONCURRENCE MEANS, THAT FROM OGC'S STANDPOINT, THE RECOMMENDED ACTION IS LEGALLY SUFFICIENT, IS CONSISTENT WITH EXISTING COMMISSION POLICY (OR SOUND FUTURE POLICY), AND IS SUPPORTED BY OGC. A "NO LEGAL OBJECTION" MEANS THAT EITHER 1) OGC HAS NO PARTICULAR INTEREST IN OR CONTRIBUTION TO MAKE TO THE POLICY ASPECTS OF THE RECOMMENDATION, OR 2) THE REVIEWING ATTORNEY DISAGREES WITH THE RECOMMENDATION ON POLICY GROUNDS. IN THE LATTER CASE, THE ATTORNEY WILL FORMALLY COMMUNICATE THE POLICY DISAGREEMENT WITH SUPPORTING REASONS TO THE ORIGINATING OFFICE (BRANCH CHIEF OR ABOVE) OR TO THE PROPOSED SIGNOR OF THE PAPER AS APPROPRIATE. OGC REVIEW AND PROCESSING WILL NOT BE HELD UP BECAUSE OF NON-LEGAL POLICY DISAGREEMENTS. A PAPER IS CONSIDERED LEGALLY SUFFICIENT WHERE ALL RELEVANT, SIGNIFICANT FACTS ARE PRESENTED AND THE FACTS CONSIDERED IN LIGHT OF APPLICABLE LAWS (CONSTITUTION, TREATIES, STATUTES, REGULATIONS, EXECUTIVE ORDERS, JUDICIAL DECISIONS, AGENCY ADJUDICATORY DECISIONS, CONTRACTS AND AGREEMENTS, AND BINDING COMMISSION POLICY AND SRMS.) OGC WILL NOT RETURN PAPERS OR WITHHOLD A DETERMINATION OF "NO LEGAL OBJECTION" FOR REASONS OF EDITORIAL STYLE.

VI. SCHEDULING OF CONCURRENCES

- (A) AT BOTH THE PROPOSAL AND FINAL STAGES, RULEMAKING DOCUMENTS FOR WHICH CONCURRENCE IS BEING REQUESTED WILL BE TRANSMITTED TO ALL CONCURRING OFFICES SIMULTANEOUSLY, BOTH BY AN OFFICIAL HARD COPY HAND CARRIED MEMORANDUM AND ELECTRONICALLY VIA AN INTERNAL NRC RULEMAKING BULLETIN BOARD. THE EDO AND KEY TECHNICAL STAFF WITHIN THE OFFICE AND THE ADVISORY COMMITTEE WILL BE NOTIFIED OF THE AVAILABILITY OF THE DOCUMENTS ON THE RULEMAKING BULLETIN BOARD.

RECEIVING OFFICES WILL HAVE AN INTERNAL LOGGING AND CONCURRENCE TRACKING SYSTEM WHICH CAN BE APPLICABLE TO RULEMAKING AND WILL LOG IN THE RECEIPT OF THE HARD COPY DOCUMENTS. A STAFF MEMBER OR ALTERNATE WILL BE DESIGNATED TO RECEIVE CONCURRENCE DOCUMENTS AND SIGN A RECEIPT FOR THE TRANSMITTING OFFICE.

- (B) WITHIN 20 CALENDAR DAYS, THE CONCURRING OFFICE SHALL RESPOND TO THE PROPOSING OFFICE BY HAND CARRIED MEMORANDUM OR BY NRC MAIL AND ALSO BY MEANS OF THE RULEMAKING BULLETIN BOARD. THE RESPONSE WILL:

- A. CONCUR OR PROVIDE NO LEGAL OBJECTION WITHOUT COMMENT IN THE RULEMAKING DOCUMENT.

- B. CONCUR OR PROVIDE NO LEGAL OBJECTION ON THE PROVISION THAT SPECIFIC POLICY OR LEGAL RECOMMENDATIONS OF THE CONCURRING OFFICE CAN BE ACCOMMODATED.
  - C. STATE ITS POLICY REASONS FOR WITHHOLDING CONCURRENCE OR LEGAL OBJECTION, AND ITS PROPOSALS FOR RESOLVING ITS OBJECTIONS WHICH, IF ADOPTED BY THE PROPOSING OFFICE, WOULD RESULT IN CONCURRENCE. A COPY OF THIS MEMORANDUM SHOULD BE SENT TO THE OEDO.
  - D. STATE ITS REASON FOR BEING UNABLE TO RESPOND ON SCHEDULE AND SEND A COPY OF THIS MEMORANDUM TO THE OEDO.
- (C) WITHIN 20 CALENDAR DAYS OF RECEIPT OF CONCURRENCE MEMORANDA, THE PROPOSING OFFICE SHALL:
- 1. PROVIDE A FINAL RULEMAKING PROPOSAL TO THE EDO OR
  - 2. HOLD A MEETING INVOLVING THE DESIGNATED REPRESENTATIVES OF PARTICIPATING OFFICES (OR THEIR ALTERNATES) WITH THE DEDR TO RESOLVE ANY IMPASSE WHICH IS PREVENTING FINALIZATION OF THE RULEMAKING FOR EDO REVIEW.
- (D) WITHIN 20 CALENDAR DAYS OF RECEIPT OF A PROPOSED OR FINAL RULE, THE OEDO SHALL:



1. TRANSMIT THE PROPOSED RULE FOR COMMISSION ACTION.
2. NOTIFY THE COMMISSION OF THE INTENT TO ISSUE THE RULE UNDER EDO AUTHORITY.
3. RETURN THE PROPOSAL TO STAFF FOR MODIFICATION OR RESOLUTION OF QUESTIONS WITHIN A SPECIFIED SCHEDULE.

ENCLOSURE C

Draft Management Directive 9.17

DRAFT MDS CHANGE ON RULEMAKING AUTHORITY OF THE EDO

MANAGEMENT DIRECTIVE 9.17, ORGANIZATION AND FUNCTION OF THE  
OFFICE OF THE EXECUTIVE DIRECTOR FOR OPERATIONS

9.17- 03 Delegation of Authority to the Executive Director for  
Operations

Section (0310) is revised to read:

In addition to these limitations, the EDO's delegated authority under paragraph 213 of this directive does not extend to the promulgation of final rules that involve significant questions of policy. The EDO does have the authority to promulgate proposed rules, or advance notices of proposed rulemaking, that involve significant questions of policy. (0310)