File
Regulatory
Relief

STATEMENT

OF

JAMES C. MILLER III

ADMINISTRATOR FOR INFORMATION AND REGULATORY AFFAIRS,
OFFICE OF MANAGEMENT AND BUDGET

AND

EXECUTIVE DIRECTOR,
PRESIDENTIAL TASK FORCE ON REGULATORY RELIEF

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS

OF THE

U.S. SENATE

(May 12, 1981)

Mr. Chairman and Members of the Committee:

I am pleased to appear before you this morning to discuss long-needed changes in the regulatory process. Joining me today is C. Boyden Gray, Counsel to the Presidential Task Force on Regulatory Relief.

In recent years this Committee has made substantial progress in identifying major problems of regulatory procedure and ways of dealing with them. We have had a cordial working relationship with you and your staff and look forward to a continuation of this relationship in the future.

Before addressing the merits of the major bills before the Committee, I would like to emphasize the importance of the President's program of regulatory relief and discuss our early experience under Executive Order 12291, "Federal Regulation."

President's Program of Regulatory Relief

President Reagan has made regulatory relief one of the four cornerstones of his program of economic recovery. The first is budgetary restraint, the second is tax reduction, the third is regulatory relief, and the fourth is a stable monetary policy. All of these share the fundamental philosophical underpinning of increasing aggregate economic activity so as to increase employment opportunities, reduce inflation, and raise the real incomes of all Americans.

Budgetary reductions are a means of putting more resources in the private sector, where they are more productive. Reductions in tax rates reduce the disincentives for consumers to save and for businesses to invest. Regulatory relief, of the type that leads to achieving regulatory goals at lower costs, increases the supply of goods and services available for satisfying other pressing needs. And a stable monetary policy reduces uncertainty and therefore leads to greater investment on the part of businesses and more thoughtful and rational expenditures on the part of consumers.

As I have already stated, the President has given regulatory relief an extraordinarily high priority since coming into office. The day after the Inauguration he asked the Vice President to chair a Cabinet-level Task Force

on Regulatory Relief, which has been charged with reviewing new regulations, assessing existing regulations, and coordinating the Administration's legislative policies in the regulatory area. As the Vice President has indicated, the charge given his Task Force is not to study regulation or study ways of reforming regulation, but to provide regulatory relief.

I think we have made significant progress under the President's program. Aided by Executive Order 12291, which I will describe in more detail in a moment, we have moved forward to address many of the more pressing problems. Almost every agency has been involved. Most notably, the Department of Energy has moved expeditiously in removing restraints on energy production and distribution. The Department of Labor--including the Occupational Safety and Health Administration--has responded to acute needs to find ways of achieving health and safety goals at lower costs. The Environmental Protection Agency has taken important initiatives to streamline its regulatory procedures and grant relief amounting to considerable savings at little or no harm to the environment. The Department of Transportation likewise has identified numerous regulations--especially those affecting the automobile--which demand prompt attention.

Although we do not yet have final figures, I can assure you that the relief measures identified thus far amount to billions of dollars per year. Moreover, what has taken place to date is only the tip of the iceberg. Much more will be forthcoming. Vice President Bush, Director Stockman,

Chairman Weidenbaum, and other Members of the Task Force have made it plain to us that their expectations for regulatory relief are very high. The President wants it, and the country demands it.

Experience under Executive Order 12291

Now, let me turn to the Administration's experience under the new Executive Order. First, I think it is important to bear in mind that Executive Order 12291 has been in place only since February 17, and therefore experience has been too short and insufficient to permit a definitive judgment as to precisely how it will work in the long run.

The Executive Order has three major parts. First, it sets forth the President's regulatory principles. These include requirements that if the agency wishes to regulate, it should do so for good reason; the benefits of the regulation should exceed the costs; the agency should choose the least costly way of securing the regulatory objective; and the regulation should maximize net benefits.

Second, the Executive Order establishes the pre-eminence of the Presidential Task Force on Regulatory Relief in matters concerning regulatory policy.

Third, the Executive Order creates a mechanism through which the Office of Management and Budget (OMB), under the overall direction of the Task Force, is to review proposed regulations and consult with agencies about them. It also calls for a mechanism for OMB to identify existing regulations which agencies must address, and for OMB and the Task Force to coordinate the development of legislative proposals in the regulatory area. Consistent with the responsibilities of my office under the Paperwork Reduction Act of 1980, we have endeavored to combine the processing of regulatory proposals as to their paperwork requirements and the substance of the regulations. Accordingly, we have developed a computerized system to monitor all regulations that are forwarded by Executive Branch agencies.

Numerous regulatory agencies--independent as well as those in the Executive Branch--have submitted rules for review under the order as shown below:

Department/Agency	Submissions
Agriculture	101
Commerce	38
Community Services Administration	1
Education	34
Energy	17
Environmental Protection Agency	161
Federal Emergency Management Agency	5
Federal Inspector for Alaska Natural Gas Transportation	4
General Services Administration	13
Health and Human Services	15
Housing and Urban Development	37
Interior	22
Justice	15
Labor	31
National Foundation on the Humanities	5
Nuclear Regulatory Commission	1
Office of Personnel Management	10
Small Business Administration	2
State	2
Transportation	110
Treasury	1
U.S. Metric Board	3
Veterans Administration	30
TOTAL	658

One tangible result of our efforts has been to reduce significantly the flow of new regulations from the Executive Branch agencies. As shown in the table below, the rate of issuance of new regulations--both final and proposed--is down by more than a third since January, and the number of pages printed in the Federal Register has been cut by more than half.

Federal Register	Average Daily Number (1981)				
	Jan.	Feb.	Mar.	Apr.	Percent Change April vs. Jan.
Final Rules	38	21	21	23	-39
Proposed Rules	25	14	11	16	-36
Pages Printed	461	230	231	214	-54

I want to stress, however, two points with regard to our experience under the Executive Order. First, although I have been a close student of this matter since having a responsibility for President Ford's Inflation Impact Statement Program, I continue to be amazed at the variety of issues that crop up from time to time. Thus, it is my firm belief that institutional arrangements for addressing such issues must remain flexible. No one can know in advance all the contingencies and be able to establish hard and fast rules for dealing with them.

Second, I am daily thankful for the authority contained in the Executive Order to exempt regulations. For example, we discovered quickly that a morass of detailed minor regulations would quickly clog our regulatory

review pipeline. The authority granted by the Executive Order allowed us to exempt certain classes of Internal Revenue Service, Environmental Protection Agency, and Department of Transportation regulations that threatened to bring our program to a standstill. On the other hand, our ability under the Executive Order to identify certain regulations as "major" keeps the agencies on their toes and enables us to take a close look at particularly controversial or burdensome regulations that normally would not qualify as "major."

Comments on S.1080 and S.344

Mr. Chairman and Members of the Committee, we in the Administration heartily support the basic outlines of S.1080, the proposed Regulatory Reform Act, and look forward to expeditious treatment of the bill by Congress. We wish to emphasize, however, that the business of procedural reform is a two-edged sword. Like so many things in life, a good idea pushed to extremes can be counterproductive, just as bad ideas always are. We want to work with you to ensure that in any resultant legislation the appropriate balance is struck between strengthened procedures and the necessary flexibility to implement them. I believe that by and large S.1080 strikes the appropriate balance.

We do have certain concerns with the language of S.1080, concerns we believe should be addressed in the legislative process.

Two generic points especially concern us. First, we want to make very certain that the bill would not restrain the Administration's ability to achieve regulatory relief under the Executive Order. We believe that a clear enunciation of the President's regulatory principles and the oversight role of OMB and the Task Force are crucial to the success of this effort.

Second, we note that a significant difference between the review process under Executive Order 12291 and the process that would be established by S.1080 is the role of the judiciary in achieving the purposes of the program. Under the Executive Order, there is no judicial enforcement of the additional requirements imposed upon the agencies. In other words, there can be no judicial challenges to agency rules on the grounds that a rule should or should not have been a major rule that the Regulatory Impact Analyses and reviews were inadequate, or that any other requirements of the Executive Order had not been satisfied. The Executive Order relies upon the Executive to enforce compliance with the Order, and I can assure you that we will continue to do this aggressively. It may be appropriate at some point to involve the courts in ensuring compliance with new regulatory procedures, but we must ensure that we do not create a new gauntlet of judicially reviewable procedures which could be used for purposes other than those for which regulatory reform is intended.

With just a few changes, we believe the bill before you would satisfy these concerns. Essentially, what is required is an Executive Branch oversight mechanism that permits the White House greater enforcement over major rule designations and compliance with the bill and that concommitantly reduces the courts' role in these areas. We also believe that it would be simpler to put the new procedural provisions in a new Chapter 6 of the Administrative Procedure Act, rather than run the risk of unintentionally complicating the well-understood provisions of existing Chapter 5.

With these and other minor changes, we believe that the basic provisions of the bill would result in worthwhile, long-lasting reform of the regulatory process. As our Executive Order indicates, we believe that it is essential to do benefit-cost analysis where appropriate and to insist on the most cost-effective means of achieving a statutory goal. Moreover, we believe it equally important to provide a mechanism for the review of existing rules. While we can achieve these same ends under the Executive Order, it would be useful to perpetuate these principles—many of which, we should add, were identified by this and other Committees during the last two years.

Similarly, it is important to require agencies to reveal at the outset of a proceeding precisely what data and studies they are relying upon, so that all interested parties may be able to participate more fully. Fuller participation is also insured by other provisions which prohibit final agency reliance on material not available for comment. These are important provisions and we support them.

The bill also contains a hearing and notification for major rules that have come to be called hybrid rulemaking. We agree with the bills sponsors that hybrid procedures would improve the regulatory process by strengthening the factual basis for rules, so long as the provision for judicial review is carefully circumscribed to avoid dilatory litigation over purely procedural issues. With minor technical changes, we believe S.1080 could accomplish that objective.

In connection with judicial review, we should add one point about the Bumpers Amendment. We see no serious problem in eliminating any presumption of validity with respect to an agency's assertion of power or jurisdiction beyond its statutory authorization. Indeed, under the Executive Order we shall endeavor to accomplish this same objective. But other presumptions not involving agency jurisdiction or power--such as those relating to procedural regularity, statutory interpretation of technical or scientific provisions, and an agency's own rules--serve a useful purpose in focusing judicial review on the issues of significance. Moreover, elimination of those presumtions would undo nearly half a century of precedent and create needless uncertainties and litigation.

Now let me comment briefly on S.344. This bill contains a mechanism which would allow individual committees of Congress to delay the effective dates of a "significant" regulations for 60 days or more. While the Administration supports increased Congressional oversight of regulatory agencies, it has serious constitutional concerns with respect to legislative veto devices and opposes any legislative veto that applies to Executive Branch agencies. It is not my role to discuss the constitutional or legal objections to such devices. I can say, however, that as a matter of policy the Administration could accept certain versions of a legislative veto mechanism applying only to selected "independent" agencies.

Finally, we would like to note that neither procedural legislation nor legislative veto is a substitute for reform of substantive statutes like the Clean Air Act. Passage of S.1080 would improve the regulatory process. But the organic statutes must be reexamined and we would welcome consideration of legislation that would provide for the periodic and comprehensive review of existing legislated regulatory programs.

. . . . . .

Mr. Chairman, Members of the Committee: that completes my prepared statement. Dr. Weidenbaum, Mr. Gray, and I shall be happy to address any questions you might have.

4/27 TO FRANK.
(JIM [illegible])

File
Reg. Relief

OFFICE OF THE VICE PRESIDENT

WASHINGTON

April 24, 1981

MEMORANDUM FOR THE VICE PRESIDENT AND THE DIRECTOR

FROM: C. Boyden Gray

SUBJECT: Status Report on Regulatory Relief

In Jim Miller's absence I am submitting this report on the Administration's regulatory relief initiatives during the past week.

Legislative Veto Testimony: Following consultation with the Cabinet, Senior White House staff, and Task Force staff, the Department of Justice presented the Administration's position on legislative veto proposals in testimony before a Senate Judiciary Committee subcommittee. (See Attachment 1.)

Handicap Legislation: Legislation pertaining to transportation for the handicapped was discussed by the Vice President, the Director, and the Secretary of Transportation. Tentative agreement was reached to recommend legislation to shift the role of ensuring nondiscrimination against the handicapped (in federally-assisted mass transit systems) to the states and local governments. (See Attachment 2.)

The Task Force staff will meet with representatives from major handicap groups on Monday afternoon.

Debt-Equity Regulations: The Department of the Treasury (Internal Revenue Service) has deferred until the end of calendar year 1981 regulations under section 385 of the Internal Revenue Code, involving whether certain instruments are classified as debt or equity. These regulations are quite controversial and appear to raise major economic issues. Treasury, OMB and the Task Force staff are reviewing the regulations under the Executive Order.

National Flood Insurance Program: In consultation with the Task Force staff, the Federal Emergency Management Agency is reconsidering rules which, according to some estimates, would have an impact of over $200 million annually and severely curtail coastal development. The Agency has decided to postpone the regulations, which were previously scheduled to take effect May 1.

Lead Rules: The Department of Labor has asked the Supreme Court to remand to it its rule concerning occupational exposure to lead. Like the cotton dust rule, the lead rule will be reconsidered pursuant to a benefit-cost review. (See Attachment 3.)

Patient Package Inserts: On Thursday Secretary Schweiker announced that the commissioner of Food and Drugs will conduct a full review of the need for patient package inserts. The effective date of a pilot program requiring patient package inserts in five new classes of drugs will be postponed pending this review. (See Attachment 4.)

Sex Discrimination Regulations: The Department of Education issued a notice of proposed rulemaking to withdraw the portion of its antidiscrimination regulations pertaining to dress codes. Under this provision, a school district could be refused Federal financial assistance if it was found to have dress codes that discriminate on the basis of sex. (See Attachment 5.)

Department of Justice

STATEMENT

OF

THEODORE B. OLSON
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

BEFORE

THE

SUBCOMMITTEE ON AGENCY ADMINISTRATION
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

S. 890 - LEGISLATIVE VETO

ON

APRIL 23, 1981

Statement of Theodore B. Olson
Assistant Attorney General, Office of Legal Counsel
Department of Justice

Before the Subcommittee on Agency Administration
of the Senate Committee on the Judiciary

April 23, 1981

Mr. Chairman and Members of the Subcommittee:

INTRODUCTION

It is a pleasure to appear before you today to present the views of the Department of Justice regarding S. 890, the proposed Regulatory Reduction and Congressional Control Act of 1981.

Before I address the specific provisions of S. 890, I would like to make a few general comments concerning the generic term "legislative veto". This is an expression which has been used to embrace an extremely wide category of Congressional oversight mechanisms over administrative functions or actions. Tension has existed between the Legislative and Executive Branches for decades over this subject, arising from the quite natural and appropriate tendency of the Executive Branch to seek to protect its constitutionally ordained functions and responsibilities while, at the same time, Congress seeks by various means to insure that when it delegates authority, the powers delegated are exercised in a responsible and proper fashion.

The Constitution is an instrument which derives much of its strength from its flexibility. It is not useful or correct to say that all governmental functions are divided into three

totally separate and categorical spheres, Legislative, Executive and Judicial. For example, the Senate provides its advice and consent to certain Executive Branch appointments and the Executive Branch has been permitted to exercise certain delegated and prescribed rulemaking responsibilities. As has been said, the three Branches are not hermetically sealed chambers.

Therefore, I cannot and should not address all oversight mechanisms which might be characterized as legislative vetoes. Some such mechanisms in the context in which applied may be quite consistent with the constitutional scheme for the division of responsibilities, and many may not. I will mention some methods which I think may be constitutional later in my remarks. Many would have to be decided by the courts. I will confine the bulk of my comments to the bill which I have been invited to address, S. 890.

This bill includes, in § 3, provisions under which one House of Congress, acting in the absence of disapproval by the other House, could invalidate a broad range of substantive agency rules by adopting a resolution of disapproval or a resolution for reconsideration of a rule.

The broad and sweeping nature of the legislative veto provisions in this bill represents an unconstitutional invasion of the power of the Presidency. 1/ Taken as a whole, these

1/ Ten previous Presidents have opposed legislative veto devices of various types. President Wilson was the first to veto legislation containing a two-house legislative veto. Subsequently, Presidents Hoover, Roosevelt, Truman, Eisenhower, Kennedy, Johnson, Nixon, Ford and Carter expressed their opposition to such mechanisms.

Congressional resolution mechanisms do not conform to the procedures for legislative action prescribed in Article I, Section 7, Clauses 2 and 3 of the United States Constitution. They are also objectionable from a constitutional standpoint because they violate the general principle of the separation of powers that is so basic to our constitutional scheme of national government, and that is embodied in the Constitution's overall structure and in several of its specific provisions, including Article I, Section 7, Clauses 2 and 3. The carefully-considered conclusion of the Attorney General is that the Congressional resolution mechanisms in § 3 of S. 890 are unconstitutional.

I hasten to add at the outset that this does not mean that Congress lacks other means to assert its constitutional authority to oversee and guide the exercise of delegated power by federal agencies. There are actions which Congress could take to deal with specific regulatory schemes. Furthermore, we wish to emphasize that notwithstanding the position of this Administration on the so-called "legislative veto" devices contained in § 3 of S. 890, we share with supporters of this legislation a strong interest in improving the operation of the federal regulatory process and in controlling abuses in the exercise of delegated powers. The Department of Justice concurs that federal agencies should be responsive to the will of the people as expressed through their elected representatives.

I will first briefly discuss the major elements of the Congressional resolution mechanisms in § 3 of S. 890, on which my testimony will focus. I will then state the Department's constitutional objections to those mechanisms, which objections are particularly acute here due to the sweeping nature of the veto provisions in this proposed legislation. Finally, I will address the theme which I mentioned at the outset that, apart from the mechanisms contemplated by § 3 of S. 890, there are other, constitutional means by which Congress can control the agencies' implementation of public law and correct the abuses in it that are perceived to exist.

I

Section 3 of S. 890 would amend title 5, United States Code, by adding a new chapter 8, entitled "Congressional Review of Agency Rulemaking." The new chapter, which would govern most substantive rulemaking, would establish authority for either House of Congress to adopt a resolution of disapproval or a resolution for reconsideration of an agency rule. All existing and proposed agency rules would be subject to the review mechanisms established by S. 890 except those relating generally to internal agency functions or those which repeal or grant exemptions to the applicability of rules. Resolutions

of disapproval by a single House of Congress would purport to nullify proposed agency rules unless the other House of Congress disapproved of the original House's resolution of disapproval within a stated period. Resolutions of reconsideration by a single House of Congress would nullify existing rules unless such rules were readopted by an agency and resubmitted as recommended rules to Congress.

Under proposed § 802 (with the limited exceptions noted above), rules promulgated by agencies pursuant to their statutory authority would no longer be considered final upon publication. Rather, they would be viewed as "recommendation[s] of the agency to the Congress," and would have no force and effect if either House of Congress adopted a resolution of disapproval within 60 days of continuous session of Congress, and the other House of Congress did not disapprove the first House's resolution within an additional 30 days of continuous session. These time periods would begin to run when the agency, upon publishing a "recommended final rule" in the Federal Register, transmitted it to the Secretary of the Senate and Clerk of the House of Representatives. If a "recommended final rule" were disapproved under these provisions, the affected agency would be able to issue another "recommended final rule" relating to the same subject matter, but any such reformulation would itself

have to be adopted in a manner complying with the procedures summarized above.

Under § 803 of the proposed legislation, most existing rules and regulations could be unilaterally repealed by a resolution for reconsideration by one House of Congress. If such a resolution were passed, the existing rule would lapse unless resubmitted by the agency to Congress as a recommendation. The recommendation could become law only if not disapproved by one House or if a resolution of disapproval were overridden by the other House.

As S. 890 is written, resolutions of disapproval or reconsideration can be based upon any factors deemed "appropriate." In short, virtually all exercises of rulemaking powers delegated by law to an agency would become, under S. 890, mere recommendations to Congress which could take effect only with the passive acquiescence of both Houses of Congress or the affirmative support of one House.

II

The Department of Justice has two fundamental constitutional objections to the provisions in S. 890 that authorize the adoption of resolutions of disapproval and resolutions for reconsideration of agency rules. First, we believe that these provisions violate the constitutionally prescribed procedure by which

legislative action must be taken. Second, we believe that to the extent that the Congressional resolution provisions do not call for legislative action as such (and thus are not subject to the constitutionally specified procedures for such action), they are contrary to the constitutional precept of the separation of powers.

A

A fundamental principle of our Constitution is that the exercise of legislative power by Congress must follow certain procedures as prescribed in Article I, Section 7, Clauses 2 and 3. The process of Congressional review contemplated by S. 890 is inconsistent with these procedures. Article I, Section 7, Clause 2 provides that every bill "before it becomes[s] a law" shall have passed both Houses of Congress and shall be presented to the President for his approval or veto. If the President vetoes a proposed law, it may be passed over his objection only by a two-thirds vote of both Houses. Thus, the exercise of legislative authority requires the concurrence of both Houses of Congress and the President, or, if the President does not approve a bill, the concurrence of two-thirds of both Houses after the President has vetoed the bill and expressed his objections to it.

The possibility that this procedure could be evaded through an exercise of legislative power by some means other

than a "bill", a "resolution" for example, was foreclosed by the Framers, who provided in Article I, Section 7, Clause 3, which in many respects tracks the language of Clause 2, that "[e]very Order, Resolution, or Vote" requiring concurrent action (except resolutions of adjournment) 2/ "shall be presented to the President," who may approve or veto the proposal. Like Clause 2, Clause 3 provides that after a proposal is vetoed, it may still become the law if it is subsequently passed by a two-thirds vote of both Houses. Thus, Clause 3, read in conjunction with Clause 2, makes plain that the Framers intended that all exercises of legislative power having the substantive effects of legislation, even if not its traditional form, must follow the specified procedure. The history of the adoption of Clauses 2 and 3 confirms that conclusion. During the debate on the Presidential veto provision, James Madison observed that

> if the negative of the President was confined to bills: it would be evaded by acts under the form and name of

2/ Article I, Section 5, Clause 4 prevents adjournments for more than three days without the consent of each House. Because such adjournments thus must be accomplished by concurrent action, a specific proviso in Article I, Section 7, Clause 3 was necessary to prevent Congress from having to submit adjournment resolutions to the President. It would be inappropriate for Congress to have to present adjournment resolutions to the President for his approval or veto, since the President is able to convene Congress in any event. See Article II, Section 3; S. Rep. No. 1335, 54th Cong., 2d Sess. 6 (1897).

> Resolutions, votes [etc. He] proposed that "or resolve" should be added after "bill" . . ., with an exception as to votes of adjournment [etc.]

5 Elliot, Debates on the Federal Constitution 431 (1845). Although Madison's proposal was initially rejected, it was renewed during the following day's session by Mr. Randolph, who put the proposal in a new form (substantially as it now appears), whereupon it was adopted by a 9 to 1 vote. 2 Farrand, Records of the Federal Convention of 1787, 201-05 (rev. ed. 1937).

Thus, both the language and the history of Clauses 2 and 3 demonstrate that the Framers intended that all exercises of legislative power having the effect of legislation, even if not in the form of "bills," must follow the specified procedure, which includes passage by both houses of Congress and then presentation to the President. 3/ The provisions of S. 890

3/ Exercises of legislative power having the substantive effect of legislation and subject to the procedures of Article I, Section 7, are distinguishable from: (1) acts that may be taken by one or both Houses of Congress or their Committees because they are merely in aid of Congress' legislative power and do not purport to bind the Executive Branch, such as investigations, oversight hearings, or requests for information from the Executive Branch; and (2) acts by one or both Houses of Congress expressly authorized by a constitutional provision that does not require the procedures in Article I, Section 7. The latter class of actions includes the power of the House to impeach (Article I, Section 2, Clause 5); the Senate's power to convict following impeachment (Article I, Section 3, Clause 6) and to ratify treaties and pass upon Presidential nominations (Article II, Section 2, Clause 2); the power of both Houses to pass a concurrent resolution of adjournment that is not presented

(continued)

that would authorize resolutions of disapproval or resolutions for reconsideration which would nullify the effectiveness of agency rules are exercises of legislative power. Indeed, if the provisions did not purport to be such, they could only be exercises of executive or judicial power, which, as will be discussed subsequently, would violate the constitutional principle of separation of powers. Therefore, the provisions of S. 890 are subject to the procedures specified in Article I, Section 7, Clauses 2 and 3. However, S. 890 contravenes those requirements in two respects: first, the bill does not require the affirmative passage of a resolution by both Houses of Congress; second, it does not permit the President to exercise his power to approve or veto that resolution after both Houses of Congress have given their concurrence to it.

1.

Article I, Section 7, Clause 2 assumes that both Houses of Congress must act before a bill is to be presented to the President by providing that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before

3/ (continued)

to the President (Article I, Section 7, Clause 3); and the power of each House to establish its own legislative procedures (Article I, Section 5, Clause 2). See also Article V and Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798) (power of both Houses by a two-thirds vote to propose constitutional amendments). In addition, of course, one or both Houses of Congress can employ a resolution as a means of expressing an opinion of the House that purports to have no binding effects on the Executive branch.

it become a Law, be presented to the President . . . ." (emphasis added). Article I, Section 7, Clause 3 speaks of every order, resolution or vote "to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment)", without identifying the orders, resolutions, or votes regarding which such concurrence is necessary. However, reading Clause 3 in conjunction with Clause 2, it is evident that under Clause 3 concurrent action is necessary when the order, resolution or vote would have the same substantive effect as "bills" mentioned in Clause 2, that is, when an order, resolution or vote is an exercise of legislative power in a form other than a "bill," but having the same substantive effect. 4/ This conclusion is buttressed by the language of Article I, Section 1, which vests "[a]ll legislative Powers herein granted" in "a Congress of the United States, which shall consist of a Senate and House of Representatives" (emphasis added). The bicameralism

4/ See S. Rep. No. 1335, 54th Cong., 2d Sess. 1-2, 6-8 (1897). Any suggestion that by assigning "veto" power to one House, rather than both, Congress may avoid the strictures of Article I, Section 7, Clause 3 would appear to be a constitutional absurdity. See Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Cal. L. Rev. 983, 1066 n.428 (it "verges on irrationality to maintain that action by concurrent resolution, whereby Congress is at least held in check by its own structure, is invalid because the veto clause so states, but that the invalidity of a simple resolution, wherein a single House acts without check, is more in doubt"). As another commentator put it: "It surely must be true that a power not permitted to both houses of Congress by the Constitution cannot suddenly be made available by delegating it to one house." J. Bolton, The Legislative Veto, Unseparating the Powers 39 (AEI 1977).

principle of Article I, § 7 contemplates actual passage of a resolution by both Houses -- not mere passive "acceptance" or simple silence by one of the two Houses with respect to the action of the other House. Accordingly, all exercises of legislative power having the substantive effect of legislation require passage by both Houses of Congress. See The Federalist Nos. 49 & 51. Because the provisions of S. 890 contravene the bicameralism principle, they are invalid.

2.

The importance of the second requirement of Article I, Section 7, Clauses 2 and 3 -- that legislative action must be presented to the President before it may become law -- lies in the fact that the Presidential veto is a vital element of our constitutional system of checks and balances, operating as a check to ensure the wisdom of legislation and as a protection against congressional encroachment on the President's constitutional authority. See The Federalist Nos. 48 & 73; 2 Farrand, Records of the Federal Convention of 1787, 299-300, 586-87 (rev. ed. 1937). The Framers feared that, absent a Presidential veto, "the legislative and executive powers might speedily come to be blended in the same hands." The Federalist No. 73 at 469 (Wright ed. 1961). The Framers also considered that the President's veto power could operate on behalf of the public interest as a protection against the effects of special interests in our public life. See The Federalist No. 73. The Congressional resolution mechanisms in S. 890 purport to authorize

one House of Congress, acting without the disapproval of the other House, to exercise legislative power by means of a resolution that is not presented to the President for his approval or veto. Therefore, S. 890 is unconstitutional.

It might be argued that the "resolution of disapproval" and the "resolution of reconsideration" and the accompanying procedures do not constitute the making of substantive legislation. However, a straightforward analysis of the process reveals that it does constitute such action. In the typical situation, Congress delegates rulemaking authority to an agency to implement policy objectives mandated by Congress. Agency regulations adopted pursuant to such a delegation have the force and effect of law if they are within the substantive authority of the statute delegating the rulemaking power. See, e.g., Chrysler Corp. v. Brown, 441 U.S. 281 (1979). Such a statutory delegation, requiring the concurrence of both Houses and presentation to the President, may be withdrawn or modified only by following the same procedure for legislation. Yet S. 890 would erect a fundamentally different scheme. Section 3 would encompass situations where regulations are being and have been promulgated pursuant to a statutory delegation. S. 890 would convert agency regulations into "recommendations" and existing rules, if one House passes a resolution of reconsideration, into nullities. In either case, under S. 890, Congressional

inaction or affirmative action by one House would suffice for the regulations to become law; the action of one House with the passive acquiescence of the other would suffice to nullify them.

B

The second main constitutional objection to the Congressional review provisions of S. 890 is that, to the extent they permit Congress to reserve to itself powers vested by the Constitution in the Executive and Judicial Branches, they violate the principle of separation of powers. This principle, a cornerstone of our Constitution, is directly reflected in the Constitution's structure, which establishes the three branches of government in Articles I, II, and III, respectively. It is also reflected in several specific provisions, including Article I, Section 7, Clauses 2 and 3 (the presentation clauses); Article I, Section 6 (the incompatability and disability clauses); and Article II, Section 2, Clause 2 (the appointment clause). See generally Buckley v. Valeo, 424 U.S. 1, 120 (1976).

The principle of the separation of powers is based on the premise that if one branch of government could, on its own initiative, merge legislative, executive, or judicial powers, it could easily become dominant and tyrannical -- for it would not be subject to the checks on governmental power that the Framers considered a necessary protection of freedom. See The

Federalist No. 47. At the same time, the principle does not assume that the three branches of government are "watertight compartments" acting in isolation of each other. See Springer v. Philippine Islands, 277 U.S. 189, 211 (1928) (Holmes, J., dissenting); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Rather, the Framers conceived of the process of national government as one of dynamic interaction between the three branches, with each "checking" the others and "balancing" the powers conferred on the others with its own assertions of power. At the core of this concept is the precept that no single Branch can usurp or arrogate to itself the essential functions of the other Branches. The boundary between legislative and executive action is set in the first instance by Congress, when it decides how much discretion to delegate to the Executive in implementing policies set by statute. Once the delegation is made, however, implementation of the statutory policies is an Executive function -- indeed, it is the core of the Executive function. The statute sets a boundary beyond which the Executive may not go without intruding on the legislative function. It also sets a boundary within which the Executive must be allowed to function without Congressional overruling except through the

constitutional process of legislation. Otherwise Congress would exercise the essence of the Executive function.

This principle is violated by S. 890 to the extent that the bill would give to the Houses of Congress the power to intervene, apart from the passage of legislation, directly in the process by which the Executive branch implements substantive legislation by means of rulemaking. S. 890 effectively transforms all covered rulemaking into tentative action, rather like that of a Congressional committee, having no force and effect of its own, but merely achieving legal status if Congress does not disapprove it. In essence, S. 890 sets up the Houses of Congress as final administrative authorities on the whole range of regulatory matters. As such, it impermissibly authorizes Congress effectively to exercise the power to execute the law that Article II lodges in the President and the Executive branch.

S. 890 would apply to most rulemaking by all agencies of the Executive Branch. The intrusion that it would establish into the powers of the Executive to implement the laws and to exercise the powers delegated to it would be pervasive, far-reaching, and long-standing. It would cause a major change in the powers of the coordinate branches. Also, in light of the alternatives which will be discussed in a few moments, it is not necessary.

Furthermore, S. 890 invades the constitutional prerogatives of the Judiciary. "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 4 U.S. (1 Cranch) 137, 177 (1803); see The Federalist No. 78 (Hamilton). The Congressional review provisions of S. 890 purport to delegate to Congress the power, by means of a resolution of disapproval or a resolution for reconsideration, to declare what a preexisting statute requires with respect to regulatory action or to determine that a rule is in conflict with judicial decisions. As a consequence, S. 890 would shift to Congress power that the Constitution reposes in the courts and the courts alone.

C

Although the provisions of S. 890 are different in some respects from the classic one-house "legislative veto" provisions, they do not escape the full force of these constitutional objections.

First, there is no meaningful distinction to be drawn between Congressional review of rulemaking (covered by this bill) and other types of agency action in terms of the relevant constitutional norms. Rulemaking is a form of Executive action, see Buckley v. Valeo, supra, 424 U.S. at 140-41, and therefore, like other such actions, is lodged in the Executive Branch

under Article II of the Constitution. The distinction between rulemaking and other forms of Executive action carries no weight with respect to compliance with the constitutionally-prescribed procedure for the exercise of legislative power. Article I, Section 7, Clauses 2 and 3, dictate the procedures to be followed by all legislative action having the force of law and not otherwise covered by specific constitutional sections providing a different procedure, regardless whether the action affects rulemaking, adjudication, or other actions of agencies.

It could be suggested that the adoption of a resolution of disapproval or reconsideration under S. 890 is not really an exercise of legislative power subject to the procedures prescribed in Article I, Section 7, Clauses 2 and 3, but rather is a condition on the exercise of agency discretion under other statutes that give agencies rulemaking power. Viewed in that light, original grants of rulemaking discretion to agencies under other statutes would be changed to "conditional delegations", rather like grants of statutory power made contingent on findings of fact by an Executive officer, or upon the favorable vote of persons who will be affected by proposed governmental action. See H.R. Rep. No. 120, 76th Cong., 1st Sess. 6 (1936). The problem with such a suggestion is that it assumes that the delegation of power to a person or entity outside the Legislative

Branch is constitutionally equivalent to the delegation of power to the Houses of Congress, which are within the Legislative Branch and thus subject to the strictures of Article I. That assumption is insupportable. Any attempted analogy between S. 890 and "conditional legislation" simply fails to take account of the core constitutional issue, namely, the application of the procedural requirements of Article I, Section 7, Clauses 2 and 3, to exercises of power by Congress that have the substantive effect of legislation.

It is no response to the constitutional objections that are inherent in S. 890 to assert that its Congressional resolution mechanisms are authorized by the Necessary and Proper Clause, Article I, Section 8, Clause 18, which grants Congress power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing [enumerated] Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof." The exercise of power by Congress pursuant to the Necessary and Proper Clause is limited by other express provisions of the Constitution, such as Article I, Section 7, Clauses 2 and 3, and by the principle of the separation of powers. See Buckley v. Valeo, supra, 424 U.S. at 135. As the Court of Appeals for the Ninth Circuit noted in Chadha v. INS, 634 F.2d 408, 433 (1980), the Necessary and Proper Clause "authorizes Congress to 'make all laws', not to exercise power in any way it deems convenient. That a power is clearly committed

to Congress does not sustain an unconstitutional form in the exercise of the power."

III

While the Department of Justice believes that the Congressional resolution mechanisms in S. 890 are unconstitutional, and is taking that position in pending litigation, 5/ we would stress that there are many fully constitutional legislative and oversight mechanisms -- some of which

5/ Among the pending cases is Consumer Energy Council of America v. Federal Energy Regulatory Commission, Nos. 80-2184, 80-2312, pending before the District of Columbia Circuit Court of Appeals. Also, this Department has filed a notice of appeal to the Supreme Court on behalf of the Immigration and Naturalization Service in INS v. Chadha, 634 F.2d 408 (9th Cir. 1980). The only federal court yet to reach the issue of the constitutionality of "legislative veto" devices, other than the Chadha court, is the Court of Claims in Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977), cert. denied 434 U.S. 1009 (1978). The 4-3 holding of the Court of Claims in that case was narrowly restricted to the context of the Federal Salary Act, 2 U.S.C. 869(1)(B). See 556 F.2d at 1059. Three of the seven judges forcefully disagreed with the per curiam opinion on the legislative veto device under consideration there. Cf. Buckley v. Valeo, 424 U.S. 1, 140 n. 176 (1976) (declining to address the question of the validity of a one-house "legislative veto" provision in the Federal Election Campaign Act, 2 U.S.C. 438(c), an issue not briefed by the United States); id. at 257 (White, J., concurring in part and dissenting in part) (concluding that the "legislative veto," at least as applied to so-called "independent agencies," not a usurpation of President's constitutional power); McCorkle v. United States, 559 F.2d 1258 (4th Cir.) (declining to reach the issue of the constitutionality of the same provision of the Federal Salary Act that was at issue in Atkins, supra, on the ground that the provision was not "severable" from the rest of the statute and, therefore, even if the statute were held unconstitutional, plaintiff would have no right to additional pay), cert. denied 434 U.S. 1011 (1978); Clark v. Valeo, 559 F.2d 642 (D.C. Cir.) (en banc) (declining to consider constitutionality of "legislative veto" provision of Federal Election Campaign Act on grounds that issue not ripe for adjudication), aff'd mem. sub nom. Clark v. Kimmitt, 431 U.S. 950 (1977).

might conceivably be characterized as legislative vetoes -- that Congress can use to achieve the goals underlying S. 890. In organic statutes, Congress can and should place specific and precise limits on the authority of agencies to issue rules. Moreover, Congress can always override unwise, inappropriate, burdensome, or excessive agency rules with legislation. To the extent that the procedural hurdles within Congress that impede the enactment of legislation have fostered proposals such as S. 890, Congress can adopt legislation assuring early floor consideration of bills overturning agency rules.

Congress can also authorize an agency to act for a limited period of time, thereby forcing the agency to return to Congress for authority to continue to act when its authorization expires. Congress, of course, can hold oversight hearings, at which explanations for agency rules that members of Congress may question can be sought and made part of a public record. Congress can adopt resolutions expressing its views which, while not legally binding upon the Executive branch unless they conform to the plenary legislative process specified in Article I, Section 7, Clauses 2 and 3, can guide an agency in its implementation of the law. Further, Congress has the authority for appropriating the money with which agencies execute the law, and in appropriation statutes Congress can provide for limitations on the expenditure of agency funds for certain purposes, consistent with any other applicable legal requirements.

This Administration has demonstrated that it has the desire and ability to move swiftly to begin to accomplish the objectives which underlie S. 890. As early as January 29, 1981, the Administration moved to postpone the effectiveness of certain regulations and, by Executive Order No. 12291, issued on February 17, 1981, the President began the important process of reducing the burdens of existing and future regulations, increasing agency accountability, and increasing Presidential oversight of the regulatory process. Congressional oversight of this process is appropriate and will be welcomed by this Administration. The best procedure perhaps would be use of joint Congressional resolutions providing an opportunity for a Presidential veto and a Congressional override of that veto in the rare case in which it might occur. This method would be constitutionally appropriate and would include all elected officials in the process.

CONCLUSION

The point to be underscored is not that the Constitution places insuperable hurdles in the path of Congress as it seeks to insure that federal agencies remain accountable and live within the limits ordained by Congress. Rather, Congress has at its disposal a large number of tools. At the same time, the use of these tools must be attentive to the strictures of the Constitution. In the view of the Department of Justice, the Congressional resolution mechanisms contained in S. 890 run afoul of that basic charter. They may seem more efficient in the short run, but that has never been adequate justification for such a substantial alteration of the constitutionally ordained separation of powers.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 864

[Docket No. 78N-1835]

Medical Devices; Classification of Dye Powder Stains; Withdrawal of Proposed Rule

Correction

In FR Doc. 81-10035 appearing on page 20221 in the issue for Friday, April 3, 1981, make the following correction:

On page 20221, in the first column, in the document heading, the Docket No. was printed incorrectly. It should have read as printed above.

BILLING CODE 1505-01-M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. H-004E]

Occupational Exposure to Lead

AGENCY: Occupational Safety and Health Administration (OSHA), Department of Labor.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: Notice is given that the Occupational Safety and Health Administration will shortly be undertaking, through rulemaking procedures under section 6 of the Occupational Safety and Health Act of 1970, a reevaluation and reconsideration of the occupational health standard regulating exposure to lead, 29 CFR 1910.1025. The purpose of this proceeding is to review the technological and economic feasibility of complying with the regulation. The economic consequences of the regulation will be reexamined on two bases. First, the affected industries' ability to comply with the standard will be reexamined. Second, a cost-benefit analysis will be performed, in order to assess the practicality of relying on this approach in setting occupational health standards in the context of a specific regulation. A parallel reevaluation will be performed for the cotton dust standard. See 46 FR 19501 (March 31, 1981).

All provisions of the lead standard will be subject to reexamination. In particular, the economic and technological feasibility of the present permissible exposure limit of 50 micrograms of lead per cubic meter of air (50 $\mu g/m^3$) averaged over an eight-hour day, and of the medical removal protection provision of the regulation, will be subject to analysis. Additionally, for a few industries where employees appear to be exposed to lead on an intermittent basis, the question whether the employees face a significant risk of lead-related disease will be addressed. At this time, public participation is invited on the issues raised by such reevaluation and as to whether other matters relating to the hazards and regulation of lead should be addressed.

DATES: Comments, suggestions and information are invited regarding this Advance Notice of Proposed Rulemaking by June 1, 1981.

ADDRESS: Comments should be submitted to the Docket Officer, Occupational Safety and Health Administration, Docket No. H-004E, Room S-6212, U.S. Department of Labor, 3rd and Constitution Avenue, N.W., Washington, D.C. 20210.

FOR FURTHER INFORMATION CONTACT: James Foster, Occupational Safety and Health Administration, Room N3637, U.S. Department of Labor, Washington, D.C. 20210. Telephone (202) 523-8151.

SUPPLEMENTARY INFORMATION:

1. Introduction

On October 3, 1975, the Occupational Safety and Health Administration (OSHA) proposed a standard for occupational exposure to lead (40 FR 45934) which would limit the maximum permissible lead exposure (PEL) of employees to 100 $\mu g/m^3$ (micrograms of lead per cubic meter of air). The new standard was to supersede the previous national consensus standard which limited lead exposure to 200 $\mu g/m^3$, and which had been adopted by OSHA pursuant to section 6(a) of the Occupational Safety and Health Act (Act). The proposal explained that the necessity for a more stringent and comprehensive regulation was based on the substantial body of scientific and medical evidence showing that lead has adverse effects on the health of workers in the lead industry; that evidence showed that lead results in damage to the nervous, urinary and reproductive systems, and inhibits synthesis of the molecule heme, which is responsible for oxygen transport in living systems. Informal rulemaking proceedings were conducted on the proposal. On November 14, 1978, a final standard which limited occupational exposure to airborne concentrations of lead to 50 $\mu g/m^3$ based on an 8-hour time weighted average (TWA) was published in the Federal Register (43 FR 52952). Additional protective provisions such as environmental monitoring, recordkeeping, employee education and training, medical surveillance, medical removal protection, and hygiene facilities, were included in the standard. Supplemental attachments were published on November 21, 1978 (43 FR 54354).

Immediately after promulgation, the lead standard was challenged by both industry and labor groups in the United States courts of appeals. All cases were transferred and consolidated in the U.S. Court of Appeals for the District of Columbia Circuit. On March 1, 1979, the D.C. Circuit partially stayed the lead standard by delaying the requirement for installing engineering controls and instituting work practices. However, the requirement to meet the PEL using respirators, and provisions for environmental monitoring, recordkeeping, employee education and training, medical surveillance, and medical removal protection were not stayed and became effective on March 1, 1979.

In an opinion issued on August 15, 1980, the court of appeals upheld the validity of OSHA's lead standard in most respects, acknowledging that a number of important questions on appeal were "very close." The court rejected the industry petitioners' contentions that they had not received notice that OSHA might set a permissible limit below the 100 $\mu g/m^3$ standard that was initially proposed, and that OSHA had improperly relied on information not in the public record in reaching its decisions on the standard. The court also concluded that OSHA's finding of a health need to reduce the permissible lead limit was consistent with the Supreme Court's decision in *Industrial Union Dept* v. *American Petroleum Institute*, No. 78-911 (July 2, 1980), which required OSHA to show that employees will face a "significant risk" of harm if a new regulation is not issued. The court of appeals additionally concluded that the medical removal protection provision was authorized by the statute, that it was reasonably necessary, and that it was affordable by industry.

With respect to feasibility, the court of appeals found that feasibility simply meant "capable of being done," without regard to whether the costs are justified in light of the benefits. On that basis, the court affirmed OSHA's finding that the following ten industries could feasibly comply with the 50 $\mu g/m^3$ PEL through engineering and work practice controls: primary smelting; secondary smelting; printing; can manufacturing; battery

manufacturing; paint and coatings manufacturing; ink manufacturing; wallpaper manufacturing; electronics manufacturing; and gray-iron foundries. However, the court found that OSHA had failed to present substantial evidence or adequate reasons to support the feasibility of the PEL in the remaining industries, and remanded the record to the agency for reconsideration of that issue.

The court directed OSHA to return the standard with full explanations within six months. The court also continued, for those industries subject to the remand, the limited stay that had been in effect pending review. With respect to the ten industries for which the standard was held fully applicable, the stay was dissolved.

Since the issuance of court of appeal's August 15 decision, proceedings have taken place simultaneously before the Supreme Court and the agency. Organizations representing the primary lead smelters (Lead Industries Association, or LIA) and the secondary lead smelters (National Association of Recycling Industries, Inc., or NARI), sought a stay pending review by the Supreme Court. On December 8, 1980, the Supreme Court granted that request in part, notably staying for all industries the requirement that the 50 $\mu g/m^3$ standard be achieved through engineering and work practice controls.

LIA and NARI subsequently filed petitions for review in the Supreme Court, as did the South Central Bell Telephone Company. In their petitions, these groups alleged that the standard is invalid on numerous grounds, including lack of adquate notice; improper reliance by the agency on *ex parte* contacts; absence of a finding of significant risk for employees whose exposure is only intermittent; failure by the agency to justify the standard on a cost-benefit basis; absence of evidence supporting the technological and economic feasibility of reaching the 50 $\mu g/m^3$ PEL in the primary and secondary smelting industries; and lack of statutory authority for medical removal protection. The petitions are currently pending before the Supreme Court and no decision as to whether the Court will hear the case has been issued. Contemporaneous with this Advance Notice, a memorandum in response to the petitions is being filed with the Supreme Court asking that the Court grant the petitions, vacate the judgment of the court of appeals, and remand the rulemaking record to the agency.

With regard to the remanded industries, OSHA published a **Federal Register** notice on September 24, 1980 (45 FR 63476) which reopened the rulemaking record and scheduled a hearing for the purpose of soliciting additional information pertaining to the technological and economic feasibility of meeting the 50 $\mu g/m^3$ PEL solely by engineering and work practice controls. Other issues, such as the significance of the risk employees face in particular industries, and the propriety of reliance on cost-benefit analysis in setting standards, were not reopened. OSHA set time periods for the submission of comments and notices of intention to appear at the hearing (by October 27, 1980), and for the informal public hearing (November 5–7, 1980). The record remained open for the receipt of additional comment and data until December 1, and for posthearing argument until December 10, 1980.

On January 13, 1981, OSHA issued its supplemental statement of reasons with regard to the technological and economic feasibility of the PEL for 46 specified industries or occupations (46 FR 6134, Jan. 21, 1981). For most of the 46 categories, OSHA found that the standard was feasible. For a few industry categories, OSHA found that feasible control measures are available but that an extension in the compliance schedule was needed to assure the feasibility of their implementation. For some operations within certain industries, OSHA found that respiratory protection may be the only technologically feasible means of compliance.

The supplemental statement of reasons was submitted to the D.C. Circuit on January 19. Thereafter, because several industry groups informed the agency of their intention to file administrative requests for reconsideration of the remand decision, OSHA and the industry petitioners jointly filed a motion with the D.C. Circuit asking that further judicial proceedings be held in abeyance pending the agency's action on the reconsideration requests. The court has not yet acted on that motion.

The industry requests for reconsideration were filed with the agency on February 26 and 27, 1981. The following parties, among others, filed reconsideration requests: LIA the Shipbuilders Council of America, South Central Bell Telephone Company and AT&T. LIA has alleged that the remand proceedings were procedurally defective. It has also asserted that the standard is invalid due to the absence of industry-specific findings regarding the significance of the risk, as well as the absence of any cost-benefit or cost-effectiveness analysis justifying the primary reliance on engineering controls and the 50 $\mu g/m^3$ PEL. In addition, LIA has alleged that the findings of economic and technological feasibility are inadequate or unsupported for the following seven industries or operations: copper smelting, nonferrous foundries, silver refining, spray painting, stevedoring, steelmaking, and zinc smelting and refining. The Shipbuilders Council has maintained that the shipbuilding and repair industry should be exempted from the lead standard because: the agency failed to make adequate findings of the technological and economic feasibility of compliance; reliance on engineering controls is unwarranted; and the high mobility and high turnover of the workforce makes regulation unnecessary and inappropriate. South Central Bell and AT&T have maintained the telecommunications industry should be exempted for similar reasons.

Several industry groups (including LIA and the Secondary Lead Smelters Association) have also requested that the next "trigger" making the medical removal provision more stringent, which was scheduled to go into March 1, 1981, be suspended for one year. Beginning on March 1, the standard required that workers be removed from high exposure areas (with full pay) when their blood lead levels exceeded 60 $\mu g/100g$ (micrograms of lead per 100 grams of whole blood); employers are also required to keep these workers from such exposure until their blood lead levels had been reduced below 40 $\mu g/100g$. *See* 29 CFR 1910.1025(k)(1)(i)(C) and (k)(1)(iii)(A)(*3*). The industry petitioners have claimed that implementation of the 60/40 trigger will compel the removal of skilled tradesmen in numbers that will severely affect plant production, and will be extremely expensive. They have suggested that OSHA's assumptions about compliance through engineering controls (upon which the correlating cost calculations for medical removal were premised), have lost all meaning because the engineering control requirement has been stayed since the issuance of the standard. The agency granted a thirty-day suspension of the trigger to study this request (46 FR 14897, March 3, 1981). OSHA has also requested additional information from the industry petitioners. A second delay of the effective date of the provision, until May 1, 1981, was published on March 27, 1981 (46 FR 18974).

Finally, even apart from industry's requests for reconsideration and stay discussed above, the agency determined that the January 13 supplemental

statement of reasons should be subject to review (46 FR 11254, Feb. 6, 1981).

2. Reasons for Conducting a Proposed Rulemaking

OSHA has concluded that the lead standard should be reconsidered for several reasons. First, a new rulemaking is appropriate because the agency has now concluded that it should reexamine the position, taken in issuing the lead rule and other standards, that it would be inconsistent with the Act for OSHA to get a toxic substance standard on the basis of a cost-benefit analysis. That the appropriateness of cost-benefit analysis in the application of regulatory policy is of vital concern to the national welfare and the national government is evidenced by the recent establishment of the Presidential Task Force on Regulatory Relief, chaired by the Vice-President, and the recently issued Executive Order No. 12291 which mandates such analysis in certain rulemakings (46 FR 13193). The policy underlying that Order is that cost-benefit analysis is a useful device in the regulatory decisionmaking process. Other safety and health agencies, although administering different statutes with somewhat different purposes, have found that the cost-benefit technique or variants thereof are useful in their decisionmaking processes. *See Consumer Products Safety Commission, Proposed Methodology for Commission Consideration of Findings Under Section 9(c) of the Consumer Products Safety Act*, 45 FR 85772 (Dec. 30, 1980); *Environmental Protection Agency, National Emission Standards for Hazardous Air Pollutants; Policy and Procedures for Identifying, Assessing, and Regulating Airborne Substances Posing a Risk of Cancer*, 44 FR 58642 (1979). In consonance with the policy of the Executive Order, it is the agency's view that it is appropriate to evaluate the practicality of cost-benefit balancing by investigating the concept in the context of an actual standard such as lead, and in a manner which permits public comment. A similar analysis will be performed for the cotton dust standard. See 46 FR 19501 (March 31, 1981).

The agency intends to invite the submission of all information relevant to an assessment of the relationship between the rule's benefits and its costs. In particular, information will be sought concerning the use of respirators as an alternative to engineering controls. The interrelationships between the type of economic analysis which OSHA has traditionally performed and cost-benefit techniques will also be a subject of the new rulemaking. The agency will additionally address whether, based on the cost-benefit analysis, an individual PEL should be set for each industry.

In the agency's view, all this information and data, as well as the public input which will be provided in the rulemaking proceeding, will permit the agency to produce a comprehensive and thorough cost-benefit analysis: This experience, plus the comparative experience under other health and safety laws (a comparison mandated by 29 U.S.C. 655(b)(5)), will enable the agency to decide under what circumstances it is appropriate and practical to factor such an analysis into setting toxic substances standards.

Second, even independent of cost-benefit grounds, the agency has concluded that it is appropriate to reassess the technological and economic feasibility of the 50 $\mu g/m^3$ standard (*i.e.*, the industries' ability to comply with the standard). Since no data specifically addressing the feasibility of attaining the 50 $\mu g/m^3$ PEL was submitted at the original rulemaking, the agency's conclusion that the 50 $\mu g/m^3$ PEL was feasible was based on extrapolation from the evidence submitted concerning the proposed 100 $\mu g/m^3$ PEL. The agency believes that a more complete record could be developed if affected parties are given the opportunity to specifically address the propriety of a 50 $\mu g/m^3$ PEL, as well as other PELs which could be set.

And while the feasibility of the 50 $\mu g/m^3$ PEL in the "remand" industries was addressed anew in the supplemental administrative proceedings, the affected parties have suggested that the short time frame of that rulemaking was inadequate to permit a proper record to be developed. Moreover, the ten industries for which the standard was upheld in whole by the court of appeals were not given this supplemental opportunity to submit data. A new rulemaking proceeding will remedy these perceived deficiencies. It will thereby ensure that the standard which is ultimately set is firmly grounded on the best available evidence.

Reevaluation of the feasibility question would appear to be particularly warranted with regard to the primary and secondary smelting industries because the conclusion that the present standard is feasible for these industries was premised in part on the possibility that innovative developments in process and control technology could contribute to significant air lead reductions. New information concerning the viability of these innovative technologies has now come to the agency's attention. For example, in the statement of reasons to the present standard, OSHA suggested that rather than retrofit existing pyrometallurgical equipment, the primary lead smelting industry might opt to comply with the standard by rebuilding their production facilities to utilize a new, cleaner, smelting process called hydrometallurgy. OSHA based its prediction that the hydrometallurgical process would be commercially available within ten years (the time period granted the primary smelting industry for compliance) on evidence showing that a small scale laboratory experiment using the hydrometallurgical process was being conducted by the Bureau of Mines. Since promulgation of the standard, that laboratory trial has been successfully completed, and a larger scale pilot hydrometallurgical project has been constructed. OSHA believes that the data which can be obtained from this larger scale project may be useful in determining the precise extent to which hydrometallurgy can reduce ambient lead levels.

The data from the pilot hydrometallurgical project, as well as other new information, may also enable the agency to quantify the predicted costs of compliance with the 50 $\mu g/m^3$ level for the primary smelting industry. The agency believes the costs of any standard should be estimated if it is possible to do so. OSHA's statement of reasons to the lead standard, however, did not specify the dollar costs of compliance for this industry. Although a quantification of the costs of achieving compliance by innovative technology may not have been possible at the time the standard issued, the new data may provide the foundation for such a calculation.

Moreover, OSHA's review of the rulemaking record to the original standard suggests that the data and the formula for computing the primary smelting industry's costs of compliance with the 50 $\mu g/m^3$ PEL using *conventional* controls are presently available. No calculation was made by the agency prior to the standard's promulgation. Since the rulemaking record will be reopened, the agency may be able to now compute these costs, and to subject the analysis to public comment.

Similar revisions in the feasibility analysis for the secondary lead smelting industry may be warranted. In its statement of reasons, OSHA suggested that rather than retrofit existing equipment, this industry might prefer to rebuild their production facilities using the new Bergsoe SB furnace, which was in place in a secondary smelting facility in Sweden that had achieved fairly low air lead levels. Industry questioned the

utility of converting to the Bergsoe furnace, claiming that the process will not assure the air lead reductions necessary to achieve the PEL, and that the 90 million dollar cost of converting to the process is prohibitively expensive. Recent data submitted to the agency indicates that the Bergsoe furnace in fact may not be responsible for the reduction in air lead levels attained in the Swedish facility. It now appears that the air lead reductions are attributable to that facility's use of a completely integrated ventilation system, and to meticulous housekeeping and work practices. These controls are much less expensive than the Bergsoe process; however, it appears that the air lead levels achieved through their use is somewhat higher than the 50 $\mu g/m^3$ PEL. As with the new evidence concerning the innovative processes in the primary smelting industry, the agency believes it would be useful to subject this new data to public comment, and to obtain additional information if it exists.

Third, a new rulemaking proceeding will permit OSHA to evaluate whether employees in industries such as telecommunications and stevedoring, whose exposure to lead is asserted to be intermittent, face a "significant risk" of lead-related disease. Neither the agency's statement of reasons to the original standard nor the court of appeals' decision upholding the agency's significant risk finding specifically addressed this question. It is undisputed, however, that the model correlating blood lead levels with the 50 $\mu g/m^3$ lead level, upon which the agency's estimation of risk was premised, assumed that employees would be exposed for eight hours each workday throughout the year. Although OSHA does not believe that an industry-by-industry risk assessment is usually warranted, the fact that lead is excreted from the body upon removal from exposure suggests that the risk presented by highly intermittent exposure may be sufficiently different from that presented by chronic exposure that separate treatment is appropriate here. Therefore, in the new rulemaking proceeding, OSHA intends to solicit data on the extent of risk presented by highly intermittent exposure, and on the extent of exposure which actually occurs in the telecommunications and stevedoring industries. Any other industries which believe they deserve separate treatment on this basis should submit data to the agency as well. OSHA also welcomes suggestions as to the manner in which intermittent exposure should be treated under the standard, *e.g.*, by exempting the industries, or by amending the standard to set a minimum number of days for which employees must be exposed above a certain level before the compliance requirements of the standard will be applicable to a workplace.

Fourth, a new rulemaking will permit the agency to reassess the feasibility of the medical removal protection provision (MRP). As discussed above, several industries have requested a one-year suspension of the 60/40 MRP trigger because they predict that the trigger will compel the removal of large numbers of skilled trademen and will be extremely expensive; they also suggest that these consequences may be due to the continuing stay of the engineering control requirement of the standard. Whether or not the one-year suspension is warranted if the present standard, as stayed, continues in effect, (a question which the agency is addressing separately), it is possible that if the PEL is altered as a result of the new rulemaking proceeding, the lower MRP triggers may have to be adjusted as well. This is so because the feasibility of MRP is keyed to the air lead levels present in the workplace. Accordingly, the new rulemaking will address the question of what adjustments if any, should be made to the MRP triggers. The question of the agency's authority to require MRP, however, will not be open in the new proceeding.

Finally, at this stage of the proceeding, OSHA will accept and consider suggestions as to the necessity for inquiring into other matters relevant to enforcement of the standard.

3. Summary of Issues To Be Addressed in the Proposed Rulemaking

In sum, OSHA invites comment on the propriety of conducting rulemaking on the following issues:

(1) Whether the PEL should be set at:
(a) 50 $\mu g/m^3$ for engineering controls;
(b) 50 $\mu g/m^3$ for any combination of controls including respirators;
(c) 100 $\mu g/m^3$ for engineering controls, combined with 50 $\mu g/m^3$ for respiratory protection;
(d) 150 $\mu g/m^3$ for engineering controls, combined with 50 $\mu g/m^3$ for respiratory protection;
(e) Any other level.

(2) Whether compliance with any of the above PELs is technologically and economically capable of being achieved; and if so, in what time frame.

(3) Whether highly intermittent exposure presents a significant risk of lead-related disease, and if so, how intermittent exposure industries should be treated under the standard.

(4) Whether a cost-benefit analysis can be performed for the lead standard; if so, how.

(5) Whether the relationship between the costs and benefits of any of the proposed PELs is reasonable.

(6) Whether different PELs should be set for different industries covered by the standard.

(7) Whether the MRP "triggers" under the present standard are feasible; if not, what triggers should be set.

4. Effect of the Reconsideration on Enforcement of the Present Standard

Pending the reconsideration discussed above, it is the agency's judgment that the standard, as stayed by the Supreme Court, should remain in effect and continue to be enforced. Specifically, all but the following provisions are in effect:

(1) Section 1910.25(e) (1), (4), (5), (6), which provide for compliance by engineering and work practice controls.

(2) Section 1910.1025(e)(3), which governs written compliance programs, except for paragraph (F).

(3) Section 1910.1025(f)(2)(ii), which relates to the use of respirators in situations in which engineering and work practice controls are not sufficient. During the period of this stay, employers shall provide a powered, air-purifying respirator in lieu of the respirator specified in Table II of (f)(2)(i) when the physical characteristics of the employee are such that the respirators specified in Table II are inadequate for his or her protection. All other sections of the regulation that refer to paragraph (f) shall incorporate only those portions of (f) not stayed.

(4) Section 1910.1025(i), governing hygiene facilities and practices, to the extent that it requires the construction of new facilities or substantial renovation of existing facilities.

(5) Sections 1910.1025 (j)(2) and (j)(3)(ii)(D) insofar as they require biological monitoring and medical examination for zinc protoprohyrin; and Section 1910.1025(j)(3)(iii), which requires a multiple physician review mechanism.

(6) Section 1910.1025(m), dealing with signs.

(7) Section 1910.1025(r), startup dates, to the extent that its obligations are inconsistent with the substantive requirements of this order.

Protection for employees at risk must be maintained because lead has long been recognized as a major industrial health hazard. During the past several years, employers have been obligated to bring most of the standard's protective measures into place with the exception of the requirement to install engineering controls, which has been judicially stayed. There was general agreement during the rulemaking and judicial proceedings on the necessity of such provisions as respiratory usage, safe work practices, and a medical surveillance program, although the particulars may not have been resolved to the satisfaction of all affected employers. The deferral of the next

major step, engineering controls, means, however, that there is more than sufficient time for the agency to review the provisions of the standard as a whole and provide adequate notice if changes to the standard seem warranted. New effective dates may well be necessary in such a case. Consequently, there seems little justification for disrupting the compliance schedules and activities during this period of review. As discussed above, however, the agency is separately addressing whether the effective date for the 60/40 MRP trigger should be delayed.

Any comments and suggestions should be sent to the address noted above. Comments should be submitted by June 1, 1981.

5. Authority

This document was prepared under the direction of Thorne G. Auchter, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue, NW., Washington, D.C. 20210. It is issued pursuant to section 6(b) of the Occupational Safety and Health Act (84 Stat. 1593; 29 U.S.C. 655).

Signed at Washington, D.C., this 14th day of April 1981.

Thorne G. Auchter,

Assistant Secretary of Labor.

[FR Doc. 81-11925 Filed 4-17-81; 12:03 pm]

BILLING CODE 4510-26-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[AD-FRL-1799-3]

Standards of Performance for New Stationary Sources; Organic Solvent Cleaners

AGENCY: Environmental Protection Agency (EPA).

ACTION: Amendment of proposed rule.

SUMMARY: On June 11, 1980, the Environmental Protection Agency (EPA) proposed standards of performance for organic solvent cleaners (degreasers) (45 FR 39765). The proposed standards would limit emissions of volatile organic compounds (VOC) and trichloroethylene, perchloroethylene, methylene chloride, 1,1,1-trichloroethane, and trichlorotrifluoroethane from new, modified, and reconstructed organic solvent cleaners by specifying a combination of equipment requirements and operational procedures. The affected facilities are cold cleaners, open top vapor degreasers, and conveyorized degreasers. Today's action proposes to defer the applicability date of the proposed standards. The effect of today's action is to exempt from coverage any sources constructed or modified on or before the new applicability date is established. The new date will be fixed later, by publication of a notice in the **Federal Register.**

DATES: Comments on the amendment to the proposed rule must be received on or before May 21, 1981.

ADDRESS: Comments should be submitted (in duplicate if possible) to: Central Docket Section (A-130), U.S. Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460, Attention: Docket No. OAQPS-78-12.

Docket. Docket No. OAQPS-78-12, containing supporting information used in developing the proposed standards, is available for public inspection and copying between 8:00 a.m. and 4:00 p.m., Monday through Friday, at EPA's Central Docket Section, West Tower Lobby, Gallery 1, Waterside Mall, 401 M Street SW., Washington, D.C. 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Mr. John D. Crenshaw, Standards Development Branch, Emission Standards and Engineering Division (MD-13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number (919) 541-5421.

SUPPLEMENTARY INFORMATION: EPA proposed new source performance standards for organic solvent cleaners on June 11, 1980 (45 FR 39765). Under the provisions of Section 111 of the Clean Air Act, these standards, when finally promulgated, would have applied to any organic solvent cleaner manufactured after June 11, 1980.

At proposal, the Agency concluded that the cost impacts of the proposed standards were reasonable. Based on the public comments received, however, we now believe that there are a number of types of degreasers which are specifically designed to minimize solvent loss and emissions, but which could not comply with the proposed design and equipment standards at reasonable cost. Manufacturers of such degreasers would therefore be unable to sell them at competitive prices. We are now analyzing these types of degreasers to determine what constitutes best demonstrated technology for them and what standard should be applied to them. Information about this problem has been supplied by several manufacturers and is available in the docket for public review and comment.

We expect this analysis to take several months. Because the analysis is not yet complete, we are not yet able to specify which types of degreasers can comply with the proposed standards at reasonable cost and which cannot. In the interim, however, many prudent purchasers of degreasers are willing to buy only degreasers conforming to the proposed standards. As a result, manufacturers of degreasers which cannot comply with the proposed standards at reasonable cost face now the competitive barrier they would have faced if the standards were promulgated as proposed, despite the Agency's conclusion that application of the proposed standards to at least some of those products will not be required by the final standards.

Ordinarily, if EPA were to conclude that the proposed standards would impose unreasonable costs and that the standards therefore should be substantially changed, it would alleviate this situation promptly by proceeding to repropose or promulgate the standard with appropriate changes. Here, however, we believe that the proposed standards would impose unreasonable cost for some degreasers, but are unable to relieve the interim effects of the proposal until technical analysis is complete. Under these circumstances, we believe that the action most consistent with the congressional intent is to defer the applicability date beyond the date of proposal. See, *Commonwealth of Pennsylvania* v. *EPA*, 618 F. 2d 991, 1000 n. 1. (3rd Cir. 1980).

This action, therefore, amends § 60.360 of the proposed rule to delete June 11, 1980, (the date of the proposal) as the applicability date. The promulgated standard will apply to degreasers constructed or modified after some later applicability date. The Agency will give notice of that later applicability date in the **Federal Register**, and the applicability date will be no earlier than the date of publication of such notice.

Under Executive Order 12291, EPA is required to judge whether a regulation is a "major rule" and therefore subject to certain requirements of the Order. The Agency has determined that this regulation would result in none of the adverse economic effects set forth in Section 1 of the Order as grounds for finding a regulation to be a "major rule." In fact, this action would impose no additional regulatory requirements, but instead would defer the effective date of the standard in order to avoid adverse economic impacts on manufacturers of

HHS NEWS

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

FOR IMMEDIATE RELEASE
Thursday, April 23, 1981

Laura Genero - (202) 245-6343

Secretary of Health and Human Services Richard S. Schweiker today announced that FDA Commissioner Arthur Hull Hayes Jr. will conduct a complete review of ways to provide health and safety information to consumers about drugs.

"Consumers need to be well informed about the risks and benefits of drugs prescribed for them," Schweiker said. "We have an obligation to find the best way to provide this important health and safety information."

The review will solicit the recommendations of consumers, health care professionals, the pharmaceutical industry, independent expert groups and other interested parties.

The review by Commissioner Hayes will attempt to:

--Determine whether the Patient Package Insert (PPIs) pilot program, as previously developed is appropriately constructed to produce reliable data on the effectiveness of PPIs;

--Consider alternative means of providing needed information to patients about drugs prescribed for their use; and to

--Examine the cost-effectiveness of PPIs and other methods of providing drug information to patients.

To permit this review, the FDA will postpone by Federal Register notice the May 25 and July 2 effective dates of the pilot program requiring patient package inserts for five new classes of drugs: cimetidine, clofibrate, propoxyphene, ampicillin and phenytoin.

(More)

PPIs are already required for some classes of drugs, and there are no plans to change this. These classes are oral contraceptives, estrogens and progestins.

Preliminary estimates show that the pilot program, which would provide 120 million more PPIs to consumers, would cost an estimated $21 million, or an average of 18 cents per new prescription which would be passed along to the consumer.

# # #

DEPARTMENT OF EDUCATION

34 CFR Part 106

Office for Civil Rights

Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance.

AGENCY: Department of Education.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Secretary of Education proposes to amend the Title IX regulations (nondiscrimination on the basis of sex) by revoking a provision which prohibits discrimination in the application of codes of personal appearance.

DATES: Comments must be received on or before [insert 30th day after publication in the FEDERAL REGISTER.]

ADDRESSES: Comments should be addressed to Mr. Frederick T. Cioffi, Acting Assistant Secretary for Civil Rights, 400 Maryland Avenue, S.W. (Room 5000, Switzer Building), Washington, D.C. 20202.

FOR FURTHER INFORMATION CONTACT: Mr. Antonio J. Califa, Telephone No. (202) 245-0843.

SUPPLEMENTARY INFORMATION: On December 11, 1978, the Department of Health, Education, and Welfare (HEW) issued a notice proposing the revocation of a subparagraph of the regulations implementing Title IX of the Education Amendments of 1972. The subparagraph proposed for revocation prohibits discrimination on the basis of sex in rules relating to personal appearance (43 F.R. 58076). The reasons given for that proposal were to permit issues involving codes of personal appearance to be resolved at the

local level and to permit the Federal government to concentrate its resources on the enforcement of other parts of the Title IX regulations. That proposed rule was withdrawn on November 13, 1979 (44 F.R. 66626).

The Department of Education believes that there are substantial arguments that support the revocation of the provision on appearance codes. The issue of sex discrimination in codes of personal appearance, such as rules governing hair length, is more properly resolved at the local level. Federal regulations in this area are likely to be overly intrusive. In addition, by freeing the Office for Civil Rights from devoting its resources to resolving complaints involving personal appearance codes, issues that are more clearly related to the prohibition against sex discrimination under Title IX can be given the additional attention they require. As a result, the Department proposes to revoke subparagraph (5) of paragraph (b) of 34 CFR 106.31, renumbering the remainder of the section accordingly. Section 106.31(b)(5) presently reads as follows:

"(b) Specific prohibitions. Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

* * *

(5) Discriminate against any person in the application of any rules of appearance;"

Regulatory Flexibility Analysis

The regulation being amended affects all small entities that are recipients of Federal financial assistance provided by the Department of Education. Since the proposal involves elimination of a requirement, there are no recordkeeping or reporting burdens. If anything, the revocation of the rule would lessen these burdens since the Department would no longer investigate complaints related to rules of appearance. Revocation of the rule is the alternative providing the maximum reduction in burden on small entities.

Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding this proposed rulemaking. Written comments and recommendations may be sent to the address given at the beginning of this notice. All comments received on or before the 30th day after publication of this document will be considered. All comments submitted in response to this notice will be available for public inspection, during and after the comment period, in Room 5000, Switzer Building, 4th and C Streets, S.W., Washington, D.C. between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week, except Federal holidays.

Dated:

4-16-81

T. H. Bell
Secretary of Education

To FRANK

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 17, 1981

File
Reg Relief

MEMORANDUM FOR THE VICE PRESIDENT AND THE DIRECTOR

FROM: Jim Miller

SUBJECT: Status Report on Regulatory Relief

Section 504 Legislation: Two major options for legislation to alter handicap accessibility requirements for public transit were developed by Task Force staff in coordination with the Department of Transportation. Since the matter raises a series of issues that transcend transportation, a memorandum is being prepared for the Cabinet meeting next week.

DOT Exemptions: Agreement was reached with DOT officials regarding a limited exemption from the Executive Order for certain routine Federal Aviation Administration, Coast Guard, and other DOT regulations. (See Attachment 1.)

Office of Regulatory Impact Analysis: A presidential memorandum establishing a temporary Office of Regulatory Impact Analysis within OMB was drafted and forwarded to the White House staff for review. This memorandum is a necessary step in bringing the CWPS regulatory review staff permanently to OMB. (See Attachment 2.)

Vice President's Meeting with Environmental Groups: On Wednesday the Vice President met with representatives from seven major environmental groups. (See Attachment 3.)

Postal Service: Following consultations with White House and OMB officials, I sent a letter to Postmaster General William Bolger asking the Postal Service to perform a Regulatory Impact Analysis of the nine-digit ZIP code proposal. (See Attachment 4.)

Attachments

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 17, 1981

MEMORANDUM FOR: SECRETARY OF TRANSPORTATION

SUBJECT : LIMITED EXEMPTION FROM EXECUTIVE ORDER 12291

By virtue of the authority vested in me under Executive Order 12291, and pursuant to discussions between our respective staffs, I hereby exempt from Sections 3, 4, 7, and 8 of the Order the following regulations when they are not major as defined in Section 1 (b) of the Order:

A. ALL OFFICES OF THE DEPARTMENT OF TRANSPORTATION

1. Amendments to regulations that merely delay the compliance dates of regulations already in effect.

B. COAST GUARD

1. Regatta regulations.

2. Safety zone regulations.

3. Security zone regulations.

C. FEDERAL AVIATION ADMINISTRATION

1. Standard instrument approach procedure regulations.

2. Enroute altitude regulations.

3. Routine air space actions.

4. Airworthiness directives.

OMB retains the right to designate as major any of the regulations exempted by this memorandum under the Order.

This limited exemption expires automatically one year hence.

David A. Stockman
Director

MEMORANDUM FOR: David A. Stockman

SUBJECT : ESTABLISHMENT OF THE OFFICE OF REGULATORY IMPACT ANALYSES

Effective June 5, 1981 there is established within the Office of Management and Budget a unit designated as the "Office of Regulatory Impact Analyses." This unit shall report to the Administrator for Information and Regulatory Affairs.

In addition to the Office Director, the Office shall be staffed by not more than 20 employees. The function of the Office shall be to perform those functions relating to the regulatory impact analysis under Executive Order No. 12291 which are essential to the initial implementation of the President's regulatory review program. In particular, the Office shall, subject to the direction of the Director of the Office of Management and Budget and the Administrator for Information and Regulatory Affairs, be responsible for those regulatory impact analysis functions set forth in Sections 3(e)(1), 5, and 6(a)(6) of Executive Order No. 12291.

This Office shall terminate on March 1, 1982, or at such time as two or more of the cited Executive Order functions shall be revoked, whichever is sooner. Upon termination of the Office, if there are any continuing regulatory impact analysis functions they shall be assumed by the Office of Information and Regulatory Affairs or left to the agencies to perform under reduced OMB guidance.

The authority of this memorandum expires on March 1, 1982.

Ronald Reagan

THE WHITE HOUSE
April , 1981

MEMORANDUM

OFFICE OF THE VICE PRESIDENT

WASHINGTON

April 14, 1981

MEMORANDUM TO THE VICE PRESIDENT

FROM: C. Boyden Gray CBG

RE: Meeting with Environmental Groups -- April 15, 1981

Attached is a description of each of the environmental groups represented at tomorrow's meeting, and an outline of talking points (with respect to which I could use 5-10 minutes briefing prior to the meeting).

Attachments

DESCRIPTION OF ENVIRONMENTAL GROUPS

1. NRDC - Natural Resources Defense Council — Adrian DeWind, Chairman

NRDC is the country's foremost environmental legal group. It is widely respected by environmentalists and has been involved in the majority of the major EPA cases.

NRDC has an annual budget of $4 million and employs some 35-40 lawyers and scientists in New York, Washington and San Francisco. It is a 501(c)(3) organization and thus devotes some 20% of its time to lobbying. It has been an EPA watchdog. Its other areas of interest include: air, anti-nuclear, forest service, wetlands and barrier islands, international, and mass transportation.

2. Conservation Foundation — ~~J. Clarence Davies, Ex. V.P.~~ William Reilly, Pres.

The Conservation Foundation is a conservative environmental think tank which emphasizes scientific research. It is purely analytical and does no lobbying. Lately it has specialized in large studies by groups representing a cross section of industrial and public interests.

3. National Wildlife Federation — Dr. Jay Hair, Exec. V.P. Mr. Thomas Kimball, Past Exec VP

The National Wildlife Federation is the largest, most prosperous environmental organization and is generally regarded as among the most conservative. It is composed of affiliated hunting and fishing clubs and also has a national membership. Its Resources Defense branch, composed of scientists and lawyers, has become much more activist recently -- particularly in the energy area.

4. The Wilderness Society — Charles M. Clusen, Conservation Director

The Wilderness Society has undergone a renaissance of late, having taken on former Senator Gaylord Nelson and former Congressman Joe Fisher. The Society is primarily involved in lobbying and public education. It focuses on wilderness and public lands issues with an emphasis on issues of importance in the West. Its staff tends to be considerably more liberal and activist than its membership.

5. The International Institute for Environment and Development

The Institute, formed by Barbara Ward, is not very well known in the United States but is highly respected internationally. It is a non-lobbying, analytical organization.

Ambassador Robert Blake

6. The Sierra Club John A. McComb, Wash. office

The Sierra Club was founded by David Brower and has remained an activist and aggressive environmental organization. While it tends to tilt heavily towards items of concern to California and West coast environmentalists, it has a large national membership with chapters in every state. It does a lot of lobbying (it does not claim tax exempt status) and often speaks for environmentalists on the Hill.

7. The World Wildlife Fund Russell Train, President

World Wildlife Fund -- which is headed by Russ Train -- is an organization concerned with wildlife protection in the United States and abroad. It is involved predominantly in fund raising and giving grants to projects designed to promote and protect wildlife.

ENVIRONMENTALISTS -- TALKING POINTS

1. Input

a) We want to make sure all points of view are heard. We've seen numerous industry, governmental and university groups at their request, but no environmental groups have sought input.

b) Agencies will be making decisions, so make sure your input is heard. We would rather work it out here and in Congress than in the courts.

2. Task Force Goals -- Task Force goal is to achieve a better balance between environmental concerns and economic growth. We think more cost effective means can be found to protect environmental concerns.

3. Substantive Programs -- No intention of eliminating programs. We simply want to make them mesh better with each other and work better by eliminating waste, conflict and duplication.

a) Clean Air Act -- Need to cut permitting delays, strengthen scientific basis for standards, provide states greater leeway, and get better understanding of Acid Rain.

b) Hazardous Waste Management -- EPA budget here has been increased. Want to make it workable.

c) Superfund -- Intend to implement cost-effective method for clean-up of emergency hazardous cites

d) Toxic Substances Control Act -- Want this law to work with Clean Air Act and Clean Water Act to prevent public health hazards.

4. Energy Development -- We must develop domestic resources without sacrificing environmental or health concerns protected by programs outlined above.

5. Foreign Competition -- In a global economy, do not want to export jobs because other countries have met environmental and health concerns in a more efficient way.

6. Adversary Relationships -- Much of the above depends on avoiding adversary relationships and in developing better concensus for striking the necessary balance.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 10, 1981

Honorable William F. Bolger
Postmaster General
U.S. Postal Service
Washington, D.C. 20260

Dear Mr. Postmaster General:

As you know, serious questions have been raised about the ramifications of the Postal Service's proposed 9-digit zip code. In order to clear the air on this important issue, I ask that your organization perform a Regulatory Impact Analysis of the proposal in accordance with Section 3 of Executive Order 12291.

I wish to emphasize that this request does not in any way imply our endorsement of the proposal or criticism of it. We fully support actions by the Postal Service to reduce costs and increase productivity. But I think a thorough analysis of the proposal would contribute toward achieving these objectives.

Sincerely yours,

James C. Miller III
Administrator for Information
and Regulatory Affairs

c: Senator Durenberger
Senator Jepsen
Congressman English