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**TQMing OMB:
Or Why Regulatory Review Under Executive Order 12291
Works So Poorly And What President Clinton Can Do About It.**

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No feature of modern American government has been more controversial over the last decade than "review" of proposed and final agency rules by the Office of Information and Regulatory Affairs of the Office of Management and Budget ("OMB") and other parts of the Executive Office of the President.¹ And yet, despite all the controversy, no President, not Bill Clinton and probably not even Ross Perot, would dream of abolishing review of agency actions by OMB (or some other entity within the Executive Branch, however constituted or named). The reason is a simple one, aptly stated by Clark Clifford: "If the President does not

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¹ During the Bush Administration, OMB served as a "clearinghouse," collecting comments received from other agencies, members of the White House staff and other entities within the Executive Branch and transmitting them to EPA. In the balance of this article, references to OMB should be understood as referring to comments originating elsewhere in the Executive Branch and passed through OMB.

control the bureaucracy, the bureaucracy will control him."² OMB review is like God (in more ways than one): if it did not exist, we would need to invent it.

For two years, during 1989 - 1991, I found myself on the front lines in what is perhaps the most contentious and troubled of the relationships between OMB and the agencies, as General Counsel of the Environmental Protection Agency. This paper is my reflection on what I saw, and my thoughts on how the incoming Administration might improve a necessary, but deeply troubled, relationship.

I. What the Regulatory Review Controversy Obscures.

Most of the controversy about OMB-review of EPA rules has fallen into two categories: (1) the claim that OMB constitutes a secretive, "back-channel" by which groups with special access to the White House can make their views felt off the public record³; and/or (2) the claim that the emphasis on economics and cost-benefit analysis in Executive Order 12291 is inconsistent with

² CLARK CLIFFORD & RICHARD HOLBROOKE, COUNSEL TO THE PRESIDENT: A MEMOIR 325 (1991).

³ See, e.g. Robert V. Percival, Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency, 54 LAW & CONTEMP. PROB. 127, 151 & 165-172 (1991)(Congressional hearings showed OMB "served as a vehicle for secret, back door lobbying by industry" during Reagan Administration; secrecy in the rulemaking process); Erik Olson, The Quiet Shift of Power: Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291, 4 VA. J. NAT. RES. L. 1 (1984). See also Paul Verkuil, Jawboning Administrative Agencies: Ex Parte Contacts By the White House, 80 COLUM. L. REV. 943 (1980).

statutory mandates in the environmental statutes.⁴ Both of these controversies raise important issues, and for that reason, I wish to make my position on them clear at the outset.

In common with the Administrative Conference, I believe that communications by interested parties (such as industry) to OMB and the White House staff that provide significant *factual* information should be documented and placed in the public record.⁵ I would go even farther: if important policy issues are raised by OMB or other agencies during Executive Office review, either orally or in writing, I believe that as a prudential matter the nature and substance of the concerns raised should generally be made available to the public at an appropriate time, probably after deliberations within the Executive Branch are completed.⁶ In my view, excessive secrecy undermines public confidence in the policy process, and is not truly necessary to assure full and frank discussion of options.

On the other hand, I generally favor the use of economic analysis by OMB as a means of policy analysis. In my experience, EPA rules were generally improved, as well as delayed, by the

⁴ Percival, supra note 3, at p. 168 ("Decisions reached at the behest of Executive office reviewers are likely to be more vulnerable to judicial challenge than are other regulations because regulatory review usually emphasizes different factors than do the statutes and the administrative record."); See also THOMAS MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991) 1-17 (describing "clash of regulatory cultures" between OMB and agencies).

⁵ ACUS Recommendation 80-6, 1 C.F.R. §305.80.6.

⁶ Compare ACUS Recommendation No. 88-9, 1 C.F.R. §305.88-9 (distinguishing between oral and written policy guidance).

scrutiny they received at OMB.⁷ Indeed, a significant and troubling feature of my experience in government was that many (perhaps as much as 80%) of the major issues raised by OMB were not issues that had previously received substantial consideration in internal EPA deliberations. On one hand, this is encouraging, in that it suggests that the OMB process is "adding value," but, as is discussed in more detail below, it is also deeply disturbing, because fundamental issues are raised very late in the process, when it is virtually impossible to do anything productive about them.

While the issues raised by OMB are frequently fundamental questions about how to improve the agency's proposed approach to regulation, I do not subscribe to the view that as a general matter OMB is "over-riding" statutory mandates. The "constitution" of OMB review, Executive Order 12291,⁸ specifically provides that review may not disregard statutory requirements,⁹ but extends only to exercises of discretion by

⁷ See generally Agency Autonomy and the Unitary Executive, 68 WASHINGTON U. L. Q. 495-524 (1990) (panel discussion among Judge Stephen Breyer, Prof. E. Donald Elliott Judge Laurence Silberman, and former Justice Department official Terry Eastland at Federalist Society Symposium "The President and Congress: Constitutionally Shared and Separated Powers," Washington, D.C. Jan. 19, 1990).

⁸ Executive Order 12291, 3 C.F.R. 127 (1981).

⁹ Executive Order 12291, §2 ("to the extent permitted by law"), 3 C.F.R. 127 (1981). See also Memorandum from Larry L. Simms, Acting Assistant Attorney General, Office of Legal Counsel Re: Proposed Executive Order Entitled "Federal Regulation," February 13, 1981, reprinted as Attachment A to Appendix III, EXECUTIVE OFFICE OF THE PRESIDENT, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT APRIL 1, 1990-MARCH 31, 1991 608 (1990).

agencies. In my experience, if agencies could persuade OMB and the White House that provisions of their rules were truly required by statute, they had no difficulty in getting the rules out, even if their terms clearly would not pass muster under Executive Order 12291 on a cost/benefit basis.

Whether one thinks that the OMB process "frustrates statutory intent" depends upon how commodious a view one adopts of the Executive Branch's authority to interpret statutes in the wake of the Chevron decision,¹⁰ and even more upon ones view of the extent to which legislative history (particularly floor statements and Committee reports of a single house) are regarded as binding.¹¹ Much of the rhetoric about OMB frustrating the intent of statutes is, in my view, really an objection to recent Supreme Court decisions that have transferred power to construe ambiguous statutes from the lower courts and Congressional staff to the Executive branch.

While these two issues -- public oversight and the rise of a new culture of regulatory analysis draw from economics -- are important, they have tended to monopolize public debate about the OMB process to the exclusion of other important issues, which have not received similar attention. It is to these unexplored management issues that I wish to turn in the balance of this paper. The essence of my complaint is not that OMB is too

¹⁰ Chevron v. NRDC, 467 U.S. 837 (1984).

¹¹ Brock v. Pierce County, 476 U.S. 253, 263 (1986)(floor statements considered but not controlling).

powerful, but that because the regulatory review process is poorly designed, it is not effective enough at achieving its stated goals.

Although the entity that conducts regulatory review is part of the Office of *Management* and Budget, the design of the review process itself violates virtually every known tenet of good management -- probably because it was designed by lawyers.¹² The point is not a personal one, and in fact not all the designers of Executive Order 12291 were lawyers. The point is rather that the basic modalities of "review" under Executive Order 12291 were drawn, perhaps unconsciously, from case-by-case judicial review of agency rules on the record by appellate courts. This kind of episodic "review" of particular agency decisions has not proved to be the most effective way of re-shaping government policy in the case of judicial review, and it suffers from many of the same deficiencies as a management style when OMB, rather than a court, borrows the techniques.

The perspective of this paper will be different. It will look at the regulatory review process from a management perspective, and make suggestions for how to improve the process as a management system. Alternatively, as the title of this symposium suggests, one can conceive of the regulatory review process as itself constituting a *regulatory system* at the meta level: its goal is to regulate the regulators. From this

¹² Christopher C. DeMuth & Douglas H. Ginsburg, White House Review of Agency Rulemaking, 99 HARV. L. REV. 1975 (1986).

perspective as well, the design of the present system violates virtually all that we know about how to design effective regulatory systems.

In the next section, I will try to illustrate some of the recurrent problems of the present design of the regulatory review system with a hypothetical case drawn generally from my experience as EPA General Counsel.¹³ While the hypothetical does not represent a single, actual case, but is a composite based on my experiences in government, every feature of it occurred during the review of one or another rule during the time that I was at EPA. Many of the more outrageous features of the process illustrated by the hypothetical are also well-documented by other cases studies that are already in the published literature.¹⁴

In the third section, I use some of the principles of "Total Quality Management" ("TQM"), a management philosophy developed by Dr. W. Edwards Deming, to criticize the OMB regulatory review process. Although an American, Dr. Deming's ideas were originally adopted by the Japanese, who give him much of the credit for their economic success in recent years. More recently, American companies have begun adopting "TQM" as a

¹³ For examples of other scholars who have adapted the roman a clef technique to discuss their experiences in government, see Douglas Costle, *Brave New Chemical: The Future Regulatory History of Phlogisten*, 33 ADMIN. L. REV. 195 (1981); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

¹⁴ See, for example, JOHN QUARLES, *CLEANING UP AMERICA: AN INSIDER'S VIEW OF THE ENVIRONMENTAL PROTECTION AGENCY* 79-82, 138 and passim (1976).

management philosophy, with many extraordinary results.¹⁵ While Dr. Deming's ideas provide a convenient counter-point for analyzing what is wrong with the current regulatory review process, one need not fully "buy into" the principles of TQM to understand the nature of the organizational problems with the current regulatory review process. To some extent, TQM consists of common sense applied to the design of systems and organizations. The key move for understanding what is wrong with the present OMB regulatory review process consists of thinking about OMB review as a management or regulatory system, and asking how that system could be re-designed from case-by-case after-the-fact review to be more effective.

Of course, no application of TQM or any other management principles to re-design the regulatory review process is a panacea that would sweep away all conflict between OMB and the agencies whose rules it regulates/reviews. On the contrary, as others have shown, and my own experience confirms, many of the conflicts between OMB and EPA involve basic issues of public policy, and derive ultimately from fundamental differences in the weight to be accorded to competing values.¹⁶ Some policymakers value economic efficiency more than others, whose primary concern

¹⁵ See, e.g. Doing It for Mother Earth, BUSINESS WEEK 45 (Oct. 25, 1991)(Describing efforts by companies such as Xerox, Procter & Gamble, Allied-Signal and IBM using "TQM" to cut pollution and improve compliance, often while lowering their environmental costs.)

¹⁶ See McGarity, supra note --, at pp. 5-16.

is reducing risk to human health and the environment, without much regard to what it costs. To some degree, then, conflict along the OMB-EPA fault-line is healthy, and in any event, inevitable, but it is not irreducible. For the moment, I am more interested in focusing attention on the unnecessary inefficiencies in the OMB review process, not the inevitable frictions and delays.

To a surprising degree, the current guerilla warfare between OMB and EPA over the content of rules is not really necessary, in my judgment, and it is not really an inevitable outgrowth of core differences in values, although such cores differences admittedly do exist. Unnecessary conflict and inefficiency result from a defective process in which relevant actors do not understand one another's goals and objectives, do not share a common definition of the enterprise, and become locked into fixed positions from which retreat or compromise is difficult before they have heard the concerns of others. In many instances, mutually destructive delays and confrontations in the Bush Administration could have been avoided by people of good will on both sides if the process were designed to facilitate a more collaborative, less confrontational process of decisionmaking.

In the final section, I offer some practical suggestions for re-designing the way that regulatory review now operates in order to implement some of the principles of TQM.

II. The Imaginary OMB Regulatory Review of EPA's Phlogisten Rule.

[to be added]

III. Basic Principles of Total Quality Management.¹⁷

A. The Flaw Is In the System.

Training in Total Quality Management (TQM) often begins with the Parable of the Red Beads.¹⁸ Teams of six workers are formed and given the task of removing and separating red and white beads from a large tank. Red beads represent defects, while the white beads represent products that the customer wants. Teams usually consist of three workers, a foreman, an inspector and a top manager.

Using a paddle with a series of indentations to remove the beads, the "workers" are instructed by "management" that their goal is to remove as many of the white beads as possible, while leaving behind as many of the red beads as possible. The inspectors then remove by hand any extra red beads that have been lifted out of the tank. With Dr. Deming keeping careful statistical count of the results, the experiment begins.

Some "workers" do better than others at removing white beads with the paddles, but none is particularly successful. Lots of red beads come up with each scoop of the paddle and have to be

¹⁷ Numerous books, articles, lectures and even a PBS television program are now available about Dr. Deming's "Total Quality Management" philosophy. For convenience, I have used two readily-available sources for citations, RAPHAEL AGUAYO, DR. DEMING: THE AMERICAN WHO TAUGHT THE JAPANESE ABOUT QUALITY (1990)(hereafter "Aguayo") and MARY WALTON, THE DEMING MANAGEMENT METHOD (1986)(hereafter "Walton").

I want to pay special thanks to F. Henry Habicht, Deputy Administrator of EPA, 1989-1992, who first introduced me to Dr. Deming's ideas.

¹⁸ Walton, pp. 40-51; Aguayo, pp. 53-64.

removed by the "inspectors." Nothing that the "managers" try improves the workers' performance much: not competing with other teams; not dictating precise operating procedures; not setting quotas for how many white beads will be produced by each scoop of the paddle; not paying incentive compensation to those workers who produce more white beads than average; not firing those whose performance is sub-par; not studying the techniques used by those who are best; not exhorting the workers; not threatening the workers; not adding more resources; none of these conventional management strategies can really change the rate of the worker's average performance.

Finally, frustrated at their inability to improve the results, the group is encouraged to step back to reflect on the problem. At that point, Dr. Deming observes that while there is a great deal of statistical variability among workers, the *paddles* show remarkable consistency in their average efficiency in removing white beads over time. Prodded by this hint, the group begins to realize that the red beads and the white beads are of slightly different sizes, because the red ones have been made by dipping white ones into paint. If a paddle is made carefully, with holes just large enough to accommodate the white beads, it will easily scoop out many more white beads while leaving almost all of the red ones behind.

The Parable of the Red Beads is designed to make several points, the most important of which for our purposes is that "Workers work within a system that -- try as they might -- is

beyond their control. It is the system, not their individual skills, that determines how they perform."¹⁹

Unenlightened managers frequently blame individual "bad" workers for problems in the system that are really beyond the control of the workers; real progress is possible only by improving the system. It is ultimately the responsibility of managers to improve the design of the system -- or perhaps better said, to create the conditions in which those who understand the system better than the managers are motivated and empowered to improve the system continuously.

Similarly, in most Administrations, after a few years, OMB and White House "managers" generally come to hold in contempt their erstwhile colleagues in the agencies, believing that they have "gone native" and adopted the characteristic values of their agencies. Like the managers in the Parable of the Red Beads, political managers of the Executive Branch in the White House and OMB tend to blame the individual "workers" (i.e. political appointees) in the agencies, rather than transforming the system so that they can produce more effectively.

Statistics like those that Dr. Deming collects for the effectiveness of paddles at scooping up white beads can be compiled for the effectiveness of the present OMB review process under Executive Order 12291 for holding down the costs of EPA rules. A remarkable preliminary analysis by economist Kip Viscusi, presented during floor discussions at a previous Law and

¹⁹ Walton, p. 51.

Contemporary Problems conference, suggests that the "LD₅₀" for EPA rules was approximately \$100 million per statistical life saved -- i.e. at the \$100 million level, OMB was effective (only) about half the time at persuading EPA to withdraw or modify the rule.

While observers may differ over whether \$100 million per statistical life saved is a desirable, cost-effective level of risk reduction (see discussion infra under the heading "Defining Quality"), Viscusi's statistics do give some indication of the approximate average level of performance that can be expected over time from the current technology of case-by-case review of rules by OMB under Executive Order 12291. As in the Parable of the Red Beads, substantial improvement in the process will not come from blaming the workers, or motivating them to work harder; there must be changes to improve the process.

B. The Fallacy of Quality by Inspection.

A second, fundamental principal of Total Quality Management as explicated by Dr. Deming is that quality (however defined) cannot be "inspected into" a product:

"Inspection with the aim of finding the bad ones and throwing them out is too late, ineffective, costly," says Dr. Deming. "In the first place, you can't find the bad ones, not all of them. Second, it costs too much." The result of such inspection is scrap, downgrading and rework, which are expensive, ineffective and do not improve the process. "Quality comes not from inspection but from improvement of the process. The old way: Inspect bad quality out. The new way: Build good quality in."²⁰

²⁰ Walton, pp. 60. See also Aguayo, pp. 139-148.

The basic philosophy that underlies the concept of case-by-case "regulatory reviews" is of improving quality through inspections at the end of the line. In the governmental context, the costs of relying on an inspection strategy as the primary means to achieve quality may be different than in commerce, but they are nonetheless real. A great deal of the delay and frustration that all involved feel with the current OMB process is attributable to the costs of unnecessary "re-work." Re-work is an inevitable cost of detecting problems through inspection late in the process, rather than re-designing the system to "do it right the first time."

When OMB raises fundamental issues about a rule in the final days before promulgation after two years of agency work, agency staffers understandably scream "foul" and complain of "late hits." Moreover, from OMB's perspective, creative options are often unavailable when issues are raised late, because it is impossible to perform the necessary staff work and develop the record to support a change in approach (not to mention to comply with public notice-and-comment requirements) at that late date.

The truth of the matter is that the "inspector," OMB, has never given the "workers" in the agencies the basic tools that they would need to "do it right the first time." While there is extensive technical guidance about the required contents of a RIA ("Regulatory Impact Analyses," the written analyses that agencies are required to compile as the basis for review of their major rules), OMB has never clearly articulated for the political

managers at the agencies what it really takes to pass OMB review.²¹ Agency officials are like the worker who complained to Dr. Deming that she couldn't find out what her job really was.²² As a practical matter, agency managers are left to deduce from case-by-case experience what OMB requires in order to sign off on a rule. Correcting a worker's "errors" one-by-one is an extremely inefficient and frustrating way to train her.

To his credit, Arthur Fraas, chief of the Natural Resources Branch of the Office of Regulatory Affairs, Office of Management and Budget, the chief reviewer of EPA rules, recognizes that improved methods to help the agencies "get it right the first time" are needed. In an article published in 1991, Fraas mentions hopefully several new OMB guidelines dictating improvements to the contents of RIAs, but then concludes:

The new OMB guidelines and OMB efforts under Executive Order 12291 will not be sufficient, however, to improve federal agency analysis of proposed regulatory actions. These measures will need to be supplemented by *institutional changes within the agencies so that decisionmakers are provided with the analysis required to make effective and efficient regulatory decisions.*²³

To some degree, the promulgation of Executive Order 12498 in 1985 was a recognition of the inadequacy of case-by-case

²¹ To some degree, the absence of clear guidance for political appointees during the Bush Administration about what OMB considered acceptable may have resulted from the Senate's refusal to confirm President Bush's nominee to head OIRA in a dispute over procedures.

²² Walton, p. 69.

²³ Arthur Fraas, *The Role of Economic Analysis in Shaping Environmental Policy*, 54 LAW & CONTEMP. PROB. 113, 125 (1991)(emphasis supplied).

inspection alone to improve regulatory quality. Executive Order 12498 requires each agency head to submit annually for review by the Director of OMB a draft statement of its regulatory goals and plans for the coming year. These plans are then reviewed, and assembled, along with an introductory message (nominally signed by the President) as the annual Regulatory Program of the United States Government.

In theory, the process under Executive Order 12498 for compiling the annual Regulatory Program of the United States might have become a productive setting in which OMB and the agencies could reach a real, shared consensus about their goals and objectives for the future. Instead, it has become a not very productive process for producing massive amounts of paper (most of which isn't read, or if read, isn't taken seriously) on both sides.

At a recent panel discussion, OMB's Deputy Director for Regulatory Affairs, Frank Hodsell, admitted that the Executive Order 12498 process had not lived up to expectations.²⁴ Hodsell attributed the failure primarily to OMB's inability to devote sufficient resources to reviewing the agencies' draft plans, but the reasons run far deeper. The truth is that in the present adversarial climate, agencies like EPA perceive themselves as having no incentive or motivation to be forthcoming in sharing information or developing plans cooperatively with OMB. When

²⁴ ABA Administrative Law Section, Washington, D.C., October 2, 1992.

asked to identify the various options under consideration as part of the regulatory planning process, they typically "stonewall" by responding in generalities, or by stating that it is still too early in regulatory development to identify specific options -- even though the agency's work groups may already be considering several well-defined options.

As long as agencies continue to perceive themselves as locked in a competitive power struggle with OMB over the content of regulations, in which one side ultimately "wins" and the other side "loses,"²⁵ all the paper planning in the world will not lead to real improvements in the process. Agencies will continue to "hide the ball," and engage in other bureaucratic stratagems, fearing that greater involvement by OMB in the early stages of regulatory development will only increase OMB's power to work its will to the agency's detriment.

C. Increasing Alignment With Suppliers/Defining Quality.

Today's climate of mutual hostility and suspicion between agencies and OMB is similar to that which traditionally prevails between labor and management in poorly-run enterprises. Workers, who are in the best position to be aware of problems in the production process, are afraid to suggest improvements in productivity for fear that they will lead to lay-offs that are destructive of their interests.²⁶ Before workers can be empowered to improve the system, their fears must be overcome,

²⁵ See Percival, supra note --, at pp. ---.

²⁶ Walton, pp. 72-73.

they must perceive themselves as having a long-term stake in the enterprise, and a common sense of mission and purpose must be fostered.

This is where one of Dr. Deming's most revolutionary ideas comes into play. Rather than switching suppliers to take advantage of short-term cost differentials, Dr. Deming argues that enterprises should form stable relationships with suppliers, based on loyalty and trust, to make them long-term partners in improving the common enterprise.²⁷ "A buyer will serve his company best," he argues, not by striking deals with the cheapest supplier in the short-run, but "by developing a long-term relationship of loyalty and trust with a single vendor" so that customer and supplier can work "together to reduce costs and improve quality."²⁸

Adapting this principle to the context of government is not a simple task. EPA does not distrust OMB because it is afraid that OMB will take its business elsewhere. Rather, EPA and OMB are institutions that perceive themselves as committed to different values, different missions and different conceptions of what constitutes good policy. As long as they see themselves as locked into a competitive struggle over the content of particular rules, they will have no reason to cooperate.

One approach that has been tried to develop a more cooperative relationship between EPA and OMB is to internalize

²⁷ Aguayo, pp. 149-157.

²⁸ Walton, p. 62.

the OMB-review process within the agency by creating an internal "devil's advocate." Throughout the Reagan years, EPA's policy office, OPPE (the Office of Policy, Planning and Evaluation) served as a kind of "mini-OMB" within the agency. OPPE shared many of OMB's economic perspectives and values, and raised these concerns during internal agency policy deliberations before rules went to OMB for review.²⁹ While this was a useful development, which gave agency managers a valuable advance look at the kinds of arguments that they would face at OMB, and an opportunity to build creative responses into rules at the agency level, over time OPPE came to be viewed as "the enemy within." During the Bush Administration, on occasion OPPE analysts were actually "accused" of talking to their opposite numbers at OMB, a "charge" that they vehemently denied. Over time, OPPE's role as an advocate for regulatory creativity and efficiency on particular rules atrophied, as it took on new missions in the international arena and in promoting cross-media integration.

While bringing the culture of regulatory review inside the agency's doors is a useful first step, developing a relationship of trust and cooperation requires more fundamental changes. Deming's idea of stable, cooperative relationships between customers and suppliers depends not only upon mutual understanding and exchange of information, but also upon developing a common vision and shared stake in the long-term goals of the enterprise. This is at base what is presently

²⁹ See McGarity, supra note --, at pp. -- - --.

lacking between EPA and OMB.

In a commercial context, workers and suppliers can develop a shared sense of mission with management around the idea of improving "quality," which is a common purpose for the enterprise from which can benefit them all. According to Deming, "quality" is defined as anything that enhances the product from the viewpoint of the customer.³⁰ When quality is enhanced, all members of the enterprise can share the benefits. Is there any analogous lodestar for "quality" in government?

The first problem in applying the "quality" paradigm to government is determining whom one's "customers" really are. Do officials of the Executive Branch owe their ultimate allegiance to the President, to the Congress, to the statutes they administer, to constituent groups, to the best interests of the citizens of the United States, or to some abstract ideals of professionalism? These are not easy issues, and they underlie a great deal of the tensions between EPA and OMB, particularly during the last 12 years of "divided government," when one party has controlled the Congress and another the Presidency. Few career EPA employees believe in their heart of hearts that the temporary occupant of either the EPA Administrator's office, or of the White House is their ultimate "customer," and that giving him whatever he wants (even if that were knowable) necessarily translates into better "quality." On the other side of the street (or perhaps better put, at the other end of Pennsylvania

³⁰ Aguayo, p. 35.

Avenue), OMB will never be more effective at improving regulation if it does not recognize the legitimacy of the statutory missions that Congress has given the agencies -- and that agency employees have self-selected to perform through their choices of a career.

In his excellent book about the rise of OMB review, Reinventing Rationality, Professor Thomas McGarity portrays the conflict between OMB and EPA and other regulatory agencies as a seemingly irreconcilable clash of "two regulatory cultures" with different goals and values.³¹ While these problems are very real, there are two basic responses to them: first, the gulf between EPA's goals and OMB's goals may not actually be so wide that it is impossible to identify areas in which it is possible to agree on a common vision of good policy; second, and more fundamentally, in the same way that incentives must be created for workers and suppliers to become partners in the overall enterprise, so too EPA and other agencies must be given a stake in making their rules more efficient.

IV. What the Clinton Administration Can Do.

A. Defining Shared Goals.

The first step in developing a more cooperative relationship between OMB and the agencies would be to develop an agreed-upon definition of goals. Conflicts between the goals that EPA and OMB were set up to perform can best be accommodated if they are brought out into the open, and resolved through mutual discussion

³¹ THOMAS MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991).

to identify areas of agreement and common interests. Few, if anyone, at EPA actually believe that wasting economic resources is a good thing; it is simply a price that some are more willing than others to accept, if necessary to achieve their overarching goal of protecting public health and the environment. Similarly, on the other side, I never met an OMB analyst who was truly opposed to all government action to eliminate risks to health and the environment -- if she could be convinced that the risk was real and substantial, and that the government's action would produce net benefits in excess of costs. Despite their differences, there is room for a substantial area of agreement in reaching a shared definition of what "quality" means in the context of environmental regulation.

A Presidential edict, whether in the form of an Executive Order or the annual Regulatory Message, is no substitute for a dialogue at the working level to develop an agreed-upon statement of goals by which quality can be measured. A fundamental premise of the Deming management philosophy is that simply mandating a change in objectives from the "top down" won't work;³² top management must transform the system, but they can do so only by creating the conditions in which everyone becomes an active participant in improving quality.

Amazingly enough, however, this kind of dialogue to reach an agreed upon statement of goals and objectives across agencies

³² See Walton, pp. 90-92; Aguayo, pp. 11-12 (criticizing "management by objectives").

does not presently occur. EPA recently instituted an agency-wide strategic planning process, but the best of my knowledge, OMB is not brought into the process of developing the plans. Similarly, the Regulatory Program of the United States is largely an OMB document; while agencies may be given an opportunity to review nearly final drafts of limited portions of the document, they are not truly brought into the process of developing the statements of regulatory goals to nearly the same degree that they participate in other major policy initiatives, such as the State of the Union Address, or the National Energy Strategy.

Nor are there more informal mechanisms for developing a shared consensus about regulatory goals between agency managers and OMB reviewers. For example, in the Bush Administration, new political appointees were given a two-day orientation seminar at the White House, but no one from OMB briefed them on the goals of the regulatory review program, much less solicited their input. Nor was there any training by experienced agency "masters" about past successes and failures in making rules more efficient.

At the level of career staff, the lack of communication about goals and objectives is even more profound. As a matter of practice, EPA career staff who develop rules are generally excluded from the OMB meetings at which their work product is reviewed.

Obviously, increasing the opportunities for dialogue and communication about shared goals should be a high priority for the Clinton Administration. One way to structure and focus this

dialogue which is frequently used is to draft a "vision statement," which states a consensus view of the goals of the enterprise. My office at EPA went through this exercise, and found that it was a surprisingly rewarding way to think through and clarify what we were about.

B. Giving Agency Officials a Stake in Regulatory Efficiency.

While there is already some room for agreement on a shared definition of "quality" between OMB and agencies such as EPA, much more can and must be done to create a real community of interest around achieving regulatory goals as efficiently as possible.

Today, OMB's regulatory review effort relies exclusively on the "stick" of disapproval: rules that do not meet OMB's (often vague and subjective) minimum standards of efficiency are disapproved or delayed -- unless, of course, a statutory deadline or political pressure can be mounted to force OMB to sign off despite its objections. There are at present no positive rewards to induce agencies to come up with more creative ways to reduce costs while achieving their regulatory objectives. In the same way that a commercial enterprise must find ways to convince suppliers and workers that they will share in the profits from improvements in quality before they will become active partners in improving product quality, OMB must find ways to enlist agencies as partners in improving the quality of rules -- not just punish them when they fail to live up to OMB's standards.

There are several obvious ways in which positive incentives

for greater regulatory efficiency could be promoted. One means is professional recognition. The Deming Prize, established in 1951 in Japan for individuals and companies, is now awarded annually in a nationally-televised ceremony,³³ and is "the most prestigious award a Japanese company or industrialist can win."³⁴ On the other hand, I am unaware of any instance in which any President or other high level U.S. government official has ever given special public recognition to a government employee or agency for improving the quality or efficiency of its regulatory output; even if this has occurred on an occasional or episodic basis, there is no organized program to provide such recognition on a regular basis.

More fundamentally, agencies need to be convinced that it is their interest to improve the "quality" of their rules. If, as Professor McGarity and others posit, agencies such as EPA are primarily concerned with achieving their programmatic goals, incentives should be structured to enable them to achieve more of their own goals by promulgating economically efficient rules rather than inefficient ones. At present, the incentive structure for agencies offers no positive benefit to develop more efficient rules (other than possibly to overcome OMB and industry opposition), and may even have just the opposite effect. Innovative regulatory approaches may serve to minimize burdens on the regulatory community, but they are often riskier and more

³³ Walton, p. 15.

³⁴ Aguayo, p.6.

costly for agencies to develop. If the agency itself does not share appreciably in the benefits of regulatory innovation, it will have little incentive to pioneer new approaches, as opposed to sticking with tried and true, if inefficient, methods of regulating.³⁵

One unobserved advantage of the proposed "regulatory budget" is that by establishing a fixed ceiling on the costs of regulation over a given time period, it would give agencies a tangible incentive to make their rules more efficient, so that they could "afford" to address more of the risks to health and the environment within a fixed budget. Less radical incentives might include using the standard budgetary process to reward agencies for particularly successful regulatory initiatives.³⁶

C. Training and Skills.

In addition to motivating employees and suppliers to develop more efficient rules, managers must equip them with the skills and tools to improve the quality of what they produce.

Systematic training programs for agency program staff about past successes, useful techniques for making rules more efficient and what to look for in the future might be the single most cost-effective method to improve the efficiency of agency rules.

³⁵ See generally BRIAN COOK, BUREAUCRATIC POLITICS AND REGULATORY REFORM: THE EPA AND EMISSIONS TRADING (Greenwood Press, 1988).

³⁶ The conventional budgeting process is probably slightly perverse from the perspective of promoting efficient rules, in that it tends to reward bureaucratic empire-builders for promulgating inefficient rules that require more FTEs to operate.

Despite a substantial agency budget for training, no spending that I know of is specifically targeted on teaching agency program staff the skills and techniques of economic and policy analysis practiced by OMB and OPPE analysts. As long as improving the efficiency of agency rules is not regarded as part of everyone's job, but only as the special province of an adversarial group of "reviewers," there will be little, if any progress, in enhancing regulatory efficiency.

Just as a commercial enterprise must transform its existing culture to instill a "quality ethic" throughout the organization, enhancing the efficiency of government regulation cannot be achieved by an OMB inspection/review process that is tacked on at the end of the production line to ferret out defects. Real change will require transforming agency cultures to build quality into rules at every stage of the process.³⁷

³⁷ To their credit, EPA Administrator William Reilly and Deputy Administrator F. Henry Habicht have instituted a broadly-based program of TQM training for EPA employees. This paper can be understood as a plea to extend that program to OMB and the Executive Branch more generally.