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SENDER	SENDER'S FAX NUMBER	SENDER'S PHONE NUMBER
Allison Foley		

DATE	CLIENT/MATTER NUMBER	PAGES, EXCLUDING COVER
March 31, 2009		7

MESSAGE

Dear Ms. Echols:

Attached please find the comments of the Utility Solid Waste Activities Group ("USWAG") in response to the invitation of the Office of Management and Budget for public comment on recommendations to the President of the United States for a new Executive Order on Federal Regulatory Review (74 Fed. Reg. 8819 (Feb. 26, 2009)). Please note that this is a duplicate submission of USWAG's comments, which were submitted electronically to oira_submission@omb.eop.gov at 3:30 p.m. this afternoon. Please contact me with any questions.

Sincerely,

Allison Foley

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USWAG

March 31, 2009

VIA ELECTRONIC AND MESSENGER DELIVERY

The Honorable Peter R. Orszag
Director, Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503

Re: Comments on Recommendations for a New Executive Order on Federal Regulatory Review (74 Fed. Reg. 8819 (Feb. 26, 2009))

Dear Mr. Orszag:

The Utility Solid Waste Activities Group ("USWAG") submits this response to the invitation of the Office of Management and Budget ("OMB") for public comment on recommendations to the President of the United States for a new Executive Order on Federal Regulatory Review. 74 Fed. Reg. 8819 (Feb. 26, 2009). USWAG, formed in 1978, is an association of over 100 energy industry operating companies and associations including the Edison Electric Institute ("EEI"), the National Rural Electric Cooperative Association ("NRECA"), and the American Gas Association ("AGA").[1]

USWAG supports the mandate President Obama gave to you in his Memorandum for the Heads of Executive Departments and Agencies "to produce within 100 days a set of recommendations for a new Executive Order on Federal regulatory review." 74 Fed. Reg. 5977 (Feb. 3, 2009). We particularly applaud your decision to open up to the public this process of developing recommendations to the President. USWAG welcomes the opportunity to share with you our 30 years of experience with active participation in Federal agency rulemakings and the regulatory review process administered by OMB through the Office of Information and Regulatory Affairs ("OIRA").

Centralized regulatory review has been a fixture of the Executive Branch through eight Presidential administrations of both parties (including this one) beginning with President Nixon. The requirement for centralized review of significant rulemakings began during the Carter administration. The present Executive Order 12866 ("E.O. 12866") was adopted by President Clinton early in his administration, and it has remained in force for more than 15 years with its core principles largely intact through the Bush administration. *See* 58 Fed. Reg. 51735 (Oct. 4,

[1] EEI is the principal national association of investor-owned electric power and light companies. NRECA is the national association of rural electric cooperatives. AGA is the principal national association of natural gas utilities. Together, USWAG members represent more than 85% of the total electric generating capacity of the U.S., servicing more than 95% of the nation's consumers of electricity and over 93% of the nation's consumers of natural gas.

1993). The basic approach of E.O. 12866 is sound and merits retention. However, it makes perfect sense for a new President to take a fresh look at the regulatory review process to determine whether some adjustments could enhance efficiency and transparency of the review process. As discussed further below, our suggestions to achieve this include the following:

- OIRA should continue to oversee and coordinate rulemaking activities of the various Executive Branch agencies;
- Cost-benefit analysis should remain an important tool for review of individual rulemakings;
- The Federal regulatory review framework should be characterized by openness, transparency, and accountability, and should continue to extend to major guidance documents as well as to the activities of the new high-level Executive Branch "czar" positions; and
- The Federal regulatory review framework should protect against undue delay and should preserve OIRA review of individual rules.

DISCUSSION

I. OIRA Should Continue to Oversee and Coordinate Rulemaking Activities of the Various Executive Branch Agencies.

For over three decades, OIRA has played a central role in coordinating rulemaking activities by Executive Branch agencies. Acting as the agent of the President, OIRA has discharged the Chief Executive's constitutional duty of overseeing the rulemaking functions of the Executive Branch Departments and agencies and ensuring that the policies adopted by the Executive Branch truly reflect the policies of the one official elected by the nation as a whole, subject, of course, to the requirement that its actions be consistent with law. As an arm of the White House, OIRA is in a unique position to detect and prevent unintended consequences from overlapping regulations drafted by various agencies. A central reviewing office such as OIRA is best suited to determine when rules from different agencies may interact to result in a duplicative, contradictory, or overly burdensome regulatory framework, or when the policy judgments of an individual agency may stray from the policy preferences of the President. This critical function of OIRA should not be diluted.

As our nation struggles with the current economic crisis, it is more important than ever that the President, through OIRA, coordinate agency rulemakings to ensure that the nation's limited resources are allocated wisely. It would be reckless to allow agencies to promulgate regulations without Presidential review, particularly when those regulations may have an impact on the weakened economy, whether intended or otherwise. In fact, Professor Cass Sunstein, the President's designated Administrator of OIRA, made this point in a 2002 article when he and his co-author wrote: "Expensive regulation may well increase prices, reduce wages, and increase unemployment (and hence poverty)." Robert W. Hahn & Cass R. Sunstein, *A New Executive*

Order for Improving Federal Regulation? Deeper and Wider Cost Benefit Analysis, 150 U. Pa. L. Rev. 1489, 1493 (May 2002) (footnote omitted).

Many sectors, including energy and environment, public health and safety, and finance, are regulated by a number of agencies with overlapping functions. In the absence of review by a central and independent office such as OIRA, it is foreseeable, even likely, that regulation by multiple agencies in a single field would lead to unintended "layering" effects. By reviewing individual agency actions, OIRA can minimize the overlap and potential conflicts between regulatory actions from various agencies, dramatically increasing the efficiency of the regulatory system. As part of this review, we recommend that OIRA be required to determine in the case of each proposed regulatory action whether an agency is issuing regulations to cover activity already regulated by another Federal agency or at the state level. In some cases, statutory requirements will compel duplicative regulatory schemes; however, in the absence of statutory necessity, regulatory duplication should be avoided.

To the extent that a statute gives an agency discretion to fulfill its regulatory mission, it is of the utmost importance that the agency exercise that discretion in a manner consistent with the President's policy judgments. As discussed above, the President was chosen by the American people as Chief Executive; part of his constitutional duty in this capacity is to oversee the actions of the unelected appointees in the Executive Branch. Even where the authorizing statute leaves little or no room for agency discretion, the Constitution charges the President "to take Care that the Laws be faithfully executed." U.S. Const. Art. II, Sec. 3. OIRA's ability to discharge this obligation as the agent of the President should not be diminished.

Independent review of individual agency actions by a centralized office such as OIRA also serves to minimize the risk of "agency capture," the potential for which is inherent in the close working relationships that often form between agencies and limited stakeholder groups. Whether a stakeholder group represents economic interests or acts as a self-appointed spokesman for the public, this situation can lead an agency to blur the distinction between serving the public interest and serving the stakeholder interest.

We are aware that E.O. 12866 has its critics; however, these critics have proposed no adequate alternative to take the place of centralized rulemaking review. Giving the agencies free rein to adopt rules without taking into account the President's policies or being held accountable to the President is wholly inconsistent with the prevailing trend of every administration during the latter part of the 20th century through the present. It is inconceivable that this administration would turn the clock back to an era of Federal agency Balkanization in which the President would abdicate his Executive Branch policymaking role to the individual agencies with their varying missions and agendas.

II. Cost-Benefit Analysis Should Remain an Important Tool for Review of Individual Rulemakings.

Cost-benefit analysis ("CBA") is an effective element of the current regulatory review process and should remain a central part of the regulatory review framework. CBA is the most efficient way to anticipate and measure the consequences – both those easily quantified and those

more qualitative in nature – of proposed regulatory actions. The current economic crisis underscores the importance of this tool in determining how best to allocate limited resources and maximize net benefit from regulatory action. In a world of unlimited resources, addressing less significant concerns regardless of cost might be acceptable public policy. But that is not the condition of our country today. CBA is a disciplinary tool with considerable flexibility for making sound choices among competing policy goals where limited resources are available to address those concerns, always subject to priorities determined by law.

An amended regulatory review framework should therefore retain specific CBA requirements established by E.O. 12866, including the requirements that (1) agencies provide OIRA with an assessment of potential costs and benefits of a significant rule, and (2) in the case of regulatory actions having an economic effect of at least $100 million or having an adverse impact on the economy, public health or safety, or certain other sectors, agencies provide OIRA with the analysis underlying the cost-benefit calculations. 58 Fed. Reg. at 51741.

Agencies undertaking CBA for a given regulatory action should include analysis not only of the costs and benefits associated with the proposed regulatory action but also those associated with available alternatives, including the alternative of taking no regulatory action. *See id.* at 51735. We also urge that the Executive Order retain the directive that, following CBA, agencies select the regulatory approach that will "maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach." *Ibid.* This focus on maximizing net benefit from regulatory action should similarly guide OIRA in its review of agency action.

III. The Federal Regulatory Review Framework Should be Characterized by Openness, Transparency, and Accountability.

A stated goal of E.O. 12866 was to "ensure greater openness, accessibility, and accountability in the regulatory review process." *Id.* at 51742. USWAG appreciates the measures already in place to ensure that the role played by OIRA is readily apparent to the public, including the regulated community. For example, section 6(b)(4) of E.O. 12866 requires, *inter alia*, disclosure to the issuing agency and to the public of all written communications between OIRA personnel "and any person who is not employed by the executive branch of the Federal Government" if those communications concern a regulatory action under review. *Id.* at 51742-43. This is an entirely appropriate requirement and we support retaining it.

One area where we believe additional transparency safeguards are necessary stems from the creation of new high-level Executive Branch positions, frequently referred to as "czars" of specific policy issues. These positions have the potential to significantly affect the regulatory process but may not fall within E.O. 12866's existing disclosure requirements. The new Executive Order should require disclosure of all written and oral communications between high-ranking Executive Branch officials, including *but not limited to* OIRA officials, and any agency proposing regulations during the regulatory review for those regulations. No doubt, the counter-argument will be made that this sort of communication is akin to the garden variety behind-the-scenes consultation that routinely occurs in the Executive Branch. However, given the relative novelty of the "czar" positions and the record-based nature of the rulemaking process, the

justification for greater transparency arises out of the President's public commitment to greater transparency in government decision-making. Disclosure of the communications of these new officials, whose roles are yet to be clearly defined for the public and for Congress, when those communications bear on rulemaking decisions may help to allay concerns about the officials' activities. What we suggest is similar to the current requirement for public disclosure of OIRA's recommendations for changes in rulemakings under review.

OMB should also use this opportunity to increase agency accountability on major guidance documents (*i.e.*, having an economic impact of at least $100 million). *See* 5 U.S.C. § 804(2). Agencies routinely promulgate "legislative rules" – those which "the agency has duly promulgated in compliance with the procedures laid down in the statute or in the Administrative Procedure Act." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000). Legislative rules generally have the force of law on both the regulated community and the issuing agency and OIRA's primary regulatory review responsibility focuses on these legislative rules. By contrast, guidance is a more informal document ostensibly not intended to be legally binding. In reality, however, guidance is often treated by agency staff as though it were a binding regulation. Because guidance documents can have the same *de facto* effect as a formal rule, guidance documents that will by definition have a major economic impact should be subject to a similar review by OIRA as would any rulemaking action of comparable significance. This was the rationale underlying Executive Order 13422's provisions for review of guidance documents. 72 Fed. Reg. 2763 (Jan. 23, 2007) ("E.O. 13422"). This rationale remains valid today and we respectfully request that the President reconsider his decision to drop this requirement. *See* Executive Order 13497, 74 Fed. Reg. 6113 (Feb. 4, 2009). We urge the President to reinstate the requirement for OIRA review of significant agency guidance documents, subject to appropriate safeguards to ensure transparency and protect against undue delay.

IV. The Federal Regulatory Review Framework Should Protect Against Undue Delay and Should Preserve OIRA Review of Individual Rules.

Critics of centralized regulatory review often allege that the OIRA review process results in undue delay in promulgating regulations or sounds the death knell of sensible regulation. With 30 years of participation in the Federal rulemaking process, USWAG believes that careful study of the facts will show that these criticisms are overstated. Public statements by agency officials describing the Federal regulatory review process reveal that resolution of inter-agency disagreements is the most time-consuming part of the review process. OIRA's role in addressing agency disagreements is a core function of the review process. Dispensing with OIRA review of individual regulations is unlikely to alleviate any delays and will only mean that a rule's flaws will be discovered *after* it has become effective rather than during the rulemaking process.

We believe that E.O. 12866 properly addressed the potential for undue delay in the regulatory review process. Under E.O. 12866, OIRA must notify the issuing agency of the results of the review (1) for preliminary actions (such as advanced notices of proposed rulemakings and notices of proposed rulemakings), within 10 working days of submission of draft preliminary action, and (2) for all other regulatory actions, within 90 calendar days following the submission of regulatory information required under subsections (a)(3)(B) and (C)

of E.O. 12866. 58 Fed. Reg. at 51742. These provisions should be incorporated in President Obama's Executive Order. We also suggest retaining E.O. 12866's provision for limited extensions (as necessary at the request of the head of the issuing agency or once, for 30 days, upon the written approval of the OMB Director). *Ibid.*

* * * * *

USWAG recognizes that the Executive Branch is not obligated to provide opportunity for comment on executive orders, and we appreciate that OMB has invited public input on the substantive and procedural issues related to Federal regulatory review. As explained above, we recognize the need to amend certain provisions of E.O. 12866 but encourage OMB to carry over those provisions that have promoted transparent and efficient regulatory review over the past several years. In particular, the regulatory review framework should retain OIRA as the central reviewing body. Oversight of each significant rule and guidance will enable OIRA to coordinate the many agencies' regulatory goals and minimize overlap and conflict. If you have any questions regarding these comments, please contact me at
Bill Weissman of Venable LLP

Sincerely,

James R. Roewer
Executive Director