

Is Cost-Benefit Analysis Neutral? An Analysis of the Bush Administration's Approach to Environmental, Health, and Safety Protection

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The Bush administration and its supporters claim that the administration is not anti-environmental. Rather, they suggest, the administration just believes in cost-benefit analysis (CBA) as a tool for strengthening good regulation and weeding out the bad.

This report examines the issue of whether the President's Office of Management and Budget (OMB) has used CBA neutrally by strengthening some environmental, health, and safety regulations while weakening others, or instead, used CBA simply as a means of weakening standards protecting our environment, health and safety. It examines a sample of the environmental, health, and safety rules that OMB has determined are significant enough to warrant review to determine the role CBA played in these regulations. It asks a simple question: Has OMB, the principal advocate of CBA in the federal government, used CBA neutrally, or has it instead used CBA consistently to try and weaken or block regulation?

Executive Summary

The Bush administration describes its use of cost-benefit analysis as a neutral test of whether the benefits of proposed regulations exceed the costs – a rational, dispassionate weighing of the pluses and minuses of rules. A careful examination of the record reveals something very different. CBA has not performed a neutral rationalizing function in this administration. OMB has never used CBA to urge more stringent or extensive regulation than a federal agency had proposed.^a In numerous cases, however, OMB used CBA to suggest that the regulatory agencies it supervises should make regulation less stringent or extensive. Indeed, in 96 percent of the cases where formal OMB review led to significant changes^b in rules from major environmental, health, and safety agencies during a one year period, OMB sought to weaken the rules. In one case the significant

change had no influence on health, safety, or environmental protection.

This paper reaches this conclusion through an examination OMB's position on all 25 of the rules from major health, environmental, and safety agencies where the General Accounting Office (GAO) found that OMB had proposed significant changes in the rule between July 2001 and June 2002. OMB positions were ascertained through a review of copies of correspondence between OMB and the agency, versions of rules before and after OMB review, judicial proceedings, interviews, and reports issued by GAO and other groups. The paper also carefully examines the effect of OMB prompt letters, which OMB cites as examples of efforts to strengthen environmental regulation.

This is not to say that the OMB always favored laxer regulation than the government agencies it oversees. In many cases, OMB supported the regulations agencies had proposed without changes or with only minor changes. While past studies of OMB reviews have claimed that agencies weaken regulation prior to OMB review in order to assure their survival, this study generally has not examined the reasons that OMB has approved some regulations. Nevertheless, OMB increasingly influences rulemaking before its formal review of a completed package begins, which means that it has opportunities to weaken rules that it does not significantly change in the formal review process. In no

^a This study uses the word "propose" in a broad sense to include proposals the agency submits to OMB review or otherwise puts forward prior to issuing a formal notice of proposed rulemaking in the federal register, as well as notices of proposed rulemakings.

^b This study uses the term "significant change" to track GAO's definition, i.e. changes affecting a rule's "scope, impact, or estimated costs and benefits."

case did OMB look at an agency proposal and conclude that the agency should seize additional benefits available from strengthening standards, even when CBA could support much more stringent regulation than the agencies had proposed. OMB has used CBA as a one-way ratchet that moves in a single direction if it moves at all, frequently weakening agency proposals, but never strengthening them.

Supporters of CBA often point to OMB prompt letters, letters sent to agencies to prompt various kinds of action, as evidence that CBA is neutral. OMB and its supporters have suggested that these letters show that CBA supports stricter and more extensive regulation. A careful review of the letters, however, reveals that none of the letters involving regulation to protect the environment, health, or safety sought promulgation of new regulations. Instead, they “prompted” agencies to finish regulations the agencies had already committed themselves to or to take new non-regulatory actions to encourage voluntary measures. Moreover, most of them were not based on CBA.

OMB’s support for deregulation has been more consistent than its reliance on CBA. While it often relied upon CBA to support its deregulatory agenda, it cannot be said that CBA drove all of its actions. First, many of its prompt letters and its recommendations for relaxing regulations come from its staff’s views about regulation, uninformed by CBA. Second, in many cases, the CBA could have been used in a variety of ways, but OMB made the choice to use it as a deregulatory vehicle. Third, even when CBA showed that the benefits of a regulation far outweighed its costs, OMB asked agencies to further weaken the rules.

Overall, the rules examined in this study offer no evidence that CBA has functioned as a neutral rationalizing reform in the Bush Administration. Rather, it has been a tool often used to weaken standards, and never used by OMB to make agency proposals stricter or more extensive than what the agency was inclined to do on its own.

- In all 25 cases, OMB supported changes that would benefit the regulated entity.
- In 24 out of 25 cases where OMB sought significant changes through its regulatory review process, OMB sought to weaken environmental, health, and safety protections.
- In no case did the Bush Administration’s OMB seek to strengthen an agency proposal to improve environmental, health, or safety protection, or promote expansion of an agency’s preexisting regulatory agenda.
- In the overwhelming majority of cases where OMB seeks to veto or weaken a standard, it has no basis for concluding that costs exceed benefits.
- In all of the cases in the data set where benefits clearly exceeded costs, OMB sought weaker regulation anyway. But there are cases outside the data set where OMB has taken no significant action, allowing regulations to stay in place with no significant change.

I. Cost-Benefit Analysis: An Introduction

Many laws seek to protect public health and the environment. They typically do so through some reliance on health-based (or more broadly, effects-based) statutory provisions. Such provisions require, for example, emission reductions adequate to protect the public health. More often, environmental statutes rely upon technology-based standards, which require those pollution reductions that can be made with use of available technology. These technology-based statutory provisions require the consideration of cost, but typically do not require comparison of costs to quantified benefits.

The Toxic Substances Control Act (TSCA) and FIFRA, a federal pesticide law, however, have required CBA of the most important rules. The statutory provisions requiring CBA have completely stymied efforts to use the

regulatory authority granted in these statutes to ban especially dangerous chemicals. In the late 1980s, the

<i>Nature of Changes OMB Sought</i>			
	<i>Anti-Environmental, Health, or Safety</i>	<i>Burden Reducing</i>	<i>Stricter</i>
<i>Yes</i>	24	25	0
<i>No</i>	1	0	25

Environmental Protection Agency (EPA) sought to phase out asbestos, one of the most serious and well understood hazards it has ever sought to regulate, under section 6 of TSCA, which the courts have interpreted as requiring application of a cost-benefit test. EPA was unable to quantify the harms from asbestosis, and the court reversed the phase-out. In so doing, the court faulted EPA for giving substantial weight to the benefits of preventing asbestosis. We now know that asbestosis has proven an extremely widespread and serious harm. In the wake of the court decision reversing this obviously needed environmental measure, EPA has never again sought to exercise its section 6 authority to ban any substance. A cost-benefit test in the pesticide law has also had a paralyzing effect.

As part of an effort to “reduce regulatory burdens,” the Reagan administration promulgated an executive order requiring use of cost-benefit analysis to the extent permitted by law. President Clinton promulgated a similar executive order, numbered 12866, requiring analysis of the question of whether the benefits of regulation justify the costs for major rulemakings, which remains in place today. Congress disapproved of CBA for a very long time, but in 1995 codified a CBA requirement in the Unfunded Mandates Act.

OMB reviews major rules under the executive order. While the executive order exempts rules from review where CBA is illegal, in practice OMB demands cost-benefit analysis of rules promulgated under statutory provisions that do not authorize CBA-based decisions.

Executive Order 12866 currently governs OMB review of agency rules. It authorizes review of “significant” regulatory action, defined to include rules have “an annual effect on the economy of \$100 million or more.” Supporters of CBA often point to this threshold as evidence that CBA acts as a check to prevent

very expensive rules that offer little in the way of benefits. E.O. 12866’s definition of “significant” regulatory actions, however, encompasses much more than \$100 million rules. It offers OMB authority to review almost any rule it wants to by including authority to review rules having a “material adverse affect” on the economy, the environment, or local government, interfering with another agencies’ plans, materially altering user fees, grants or entitlements, or raising novel legal or policy issues (something that almost every rule does in one sense or another).

Sometimes, OMB issues return letters, which some commentators have claimed amount to a veto of agency rules. At times, agencies withdraw rules they believe are needed, because they believe they cannot survive OMB review. Agencies also censor themselves when they submit rules to OMB, avoiding inclusion of strict health and safety protections that they think OMB will not approve. In addition, OMB increasingly involves itself in the rulemaking process before an agency submits a rule for formal review. Opportunities to weaken a rule before its submission may make it unnecessary to weaken it during the formal review process.

During OMB review, OMB often asks agencies to modify the rules and or the analysis underlying the rule. In the past, the ensuing interagency controversy has often led to protracted delays. Under the Bush Administration, long delay has apparently become less frequent, because the current administrator of OMB’s Office of Information and Regulatory Affairs, John Graham, has made reduction of delay a goal, and perhaps because President Bush’s agency heads often support the sorts of changes that OMB would like anyway.

In order to complete a CBA, agencies must estimate the cost that polluters will have to incur to comply with

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proposed regulations, just as they would if they were engaged in technology-based rulemaking. CBA, however, differs from other analytical procedures in how it approaches the issue of regulatory benefits - i.e. the avoidance of harms to public health and the environment that occurs when government demands reductions in pollution and other hazards. Agencies carrying out CBA must not only decide which hazards are significant, something that is routine in statutes not requiring CBA, but must seek to quantify the benefits likely to flow from a particular regulation in dollar terms.

Quantification of benefits requires two basic steps, quantitative risk assessment and monetization. Quantitative risk assessment's goal is to tell agencies how many cancer deaths, asthma attacks, etc. a particular regulation will avoid. Data gaps usually make quantitative risk assessment impossible or very difficult. Some health effects and most environmental effects cannot be quantified at all, because of large data gaps. While techniques exist to quantify some significant health benefits, such as cancer, these techniques require risk assessors to extrapolate quantitative predictions about human health effects from very limited data. Because the numbers generated can vary widely depending on the assumptions used in risk assessment models, the National Academy of Sciences has recommended reporting a range of benefits, so as to honestly report the uncertainty. This range can prove so huge, that scientifically honest quantification provides no meaningful guidance to decision-makers.

Once regulators have completed the risk assessment, they must then monetize the quantified benefits. Monetization involves the assignment of dollar value to human life and various kinds of illness. The choice of dollar values requires controversial value choices. OMB's methodological choices regarding quantification are designed to discourage protective standards, but that is not the focus on this report.

This report follows the practice of the most precise scholars studying regulatory reform and reserves the term

cost-benefit analysis for an analysis that monetizes at least some of a regulation's benefits. Several other forms of analysis consider cost. For example, EPA quite often employs marginal cost effectiveness analysis, which estimates the dollars per ton of pollution reduction. This report treats this as an alternative to, not an example of, cost-benefit analysis, because marginal cost effectiveness analysis does not monetize any benefits.

Under the existing executive order, CBA is used to determine if the benefits of regulation justify the cost.

This standard is amenable to a variety of interpretations. The Executive Order, however, only permits this criterion to govern to the extent permitted by law. In practice, however, many studies have argued that OMB does not respect this limitation, tending to ignore statutory standards that do not incorporate cost-benefit tests.

CBA has proven controversial. It enjoys strong support from regulated industry and the think tanks it funds. They have promoted it as a rationalizing reform. Environmentalists on the other hand generally oppose CBA. They believe that soft variables, like the health and environmental benefits associated with regulation, receive short shrift in CBA, because of the difficulty of quantifying the benefits.

CBA's supporters portray CBA as a neutral reform, arguing that it does not simply weaken rules protecting the public, but instead strengthens some rules and weakens others. They portray it as avoiding lavish expenditures on obviously trivial risks, while it strengthens efforts to actually do some good. Republican politicians have been instructed to support CBA by associating CBA with the idea of avoiding regulations that "do more harm than good." This phrase might be considered a euphemism for the proposition that the benefits of regulation should outweigh the costs, which is one of the possible constructions of executive order 12866's requirement that benefits justify costs.

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II. OMB's Position on Rules

This report asks a fairly simple question: When OMB intervenes in rulemaking, does the direction of its significant interventions vary, or does OMB consistently advocate weakened regulation? It also will engage in some analysis of the reasons for OMB's interventions and what this says about the neutrality of government use of CBA. In order to get at these questions, this study worked with a data set created by a 2003 Government Accounting Office (GAO) report on OMB review. This GAO report primarily addressed the question of whether OMB had made its review sufficiently transparent, concluding that OMB had made progress on this issue, but that more remained to be done. As part of its analysis, GAO sought to identify those rules where formal OMB review had significantly affected the costs and benefits of a regulation.^c GAO found that in examining OMB's actions across the board, OMB did not seek significant changes to most rules. But when it came to rules protecting safety, environment and public health, OMB was much more active, very often obtaining changes that would significantly affect costs and benefits.

This study uses the GAO report data set, because reliance on an external source to identify cases to investigate helps avoid problems of selection bias. GAO compiled statistics on all OMB reviews completed between July 2001 and June 2002. With respect to rules from the agencies producing more than four significant proposals addressing the environment, public health, and safety, GAO engaged in an effort to identify those proposals where formal OMB review sought to significantly influence the rules. This study focuses on those rules that GAO had identified as cases in which OMB had taken some significant action through formal review (set out in the Appendix), rather than those cases where OMB had not sought any significant changes. If OMB review is neutral, then one would expect significant OMB intervention to include a number of cases where it recommended strengthening rules in this data set, unless it was clear that all of the rules had costs in excess of benefits. For example, if benefits are four times cost, one could seize additional benefits by strengthening the rule cost effectively.

GAO, however, did not state whether the positions OMB advocated in these significant interventions would

strengthen or weaken protection of safety, public health, and the environment if adopted. Therefore, this study reflects investigation of OMB's positions in these rulemakings to determine whether the changes OMB sought consistently favored regulated parties, or whether, instead, OMB frequently advocated changes that strengthened protection of the public from threats to the environment and their health and safety. This report relies upon a review of GAO's description of regulatory changes, copies of inter-agency correspondence between OMB found in regulatory dockets, judicial opinions, federal register notice, agency reports of changes made in response to OMB review, and environmental groups' reports on regulatory actions.^d Where documentation was inadequate, supplemental interviews helped flesh out the picture.^e

The case studies below explain the positions OMB took and seek, insofar as possible, to determine the relationship between OMB's position and CBA. This provides some means of testing the idea that CBA is neutral and that OMB's review simply uses CBA to ensure that regulations' costs do not outweigh its benefits.

This report concerns itself only with the direction of OMB-recommended changes and their relationship to CBA. It does not attempt to assess the wisdom of OMB's recommendations. This report seeks to test the idea that OMB uses CBA as a neutral tool, rather than as a means of discouraging protection of health, safety, and the environment.

^c GAO included significant effects on proposals, not just final rules.

^d This study minimizes reliance on environmental groups' reports by verifying their information from government documents and interviews with government officials wherever possible. In no case, did an independent source contradict an assertion in one of these reports.

^e The author sought interviews with agency officials, OMB officials, and environmental group members and offered anonymity where appropriate. The interviews usually functioned as aids to interpreting the documentary record, rather than as completely independent sources of information.

A. Rules Under the Clean Water Act

1. Mountaintop Mining

During the mid-1990s mining companies in the Appalachian region began “mountaintop mining,” a technique that involves blasting the tops off mountains and then dumping the overburden of rocks and soil into streams.¹ This process has buried more than 1,000 miles of streams in West Virginia, destroyed forest land, and threatened wildlife.² The Army Corps of Engineers proposed an Amendment to the regulatory definition of “fill” material designed to make sure that the Army Corps of Engineers had authority to authorize mountaintop mining through general permits.³ OMB advocated a change in the rule that broadened the definition of fill material subject to Army Corps regulation authorizing pollution through general permits. The Bush Administration finalized its rule redefining fill to include overburden in 2002.⁴ OMB’s action helped cement this anti-environmental regulation.

2. Stormwater Regulations

EPA describes urban runoff of stormwater into water bodies as “one of the single largest causes of water pollution.”⁵ Runoff is the largest known source of bacterial contamination, which leads to thousands of annual beach closures in the United States. Construction and development activities create much of this impact. Accordingly EPA drafted a rule proposing a design goal of an 80 percent reduction in total suspended solids discharged from both sites under construction and completed development projects. OMB suggested that EPA eliminate stormwater management and long-term post-construction management requirements.⁶ EPA accepted OMB’s request and promulgated a final rule withdrawing its earlier proposal to promulgate effluent limitation guidelines for pre-construction activity and post-construction management.⁷ In this case, OMB used

CBA to eviscerate a rule addressing a critical environmental problem.

3. Effluent Limitations for the Iron & Steel Industry

In writing effluent guidelines for the iron and steel industry, EPA proposed allowing the industry to meet its pollution reduction obligations through use of a “bubble.” A bubble allows the industry to meet discharge limits on a plant-wide basis rather than at each point from

which pollution is discharged. It provides lower cost and greater flexibility, but can complicate compliance monitoring (since multiple data points must be compared to verify compliance). EPA proposed that companies using this cost saving option devote some of the cost savings to improving

environmental protection, requiring 10-15 percent additional reductions from companies using bubbles.⁸ OMB had EPA delete this limitation, thus allowing the polluting company to keep all of the cost savings realized through use of a bubble. Again, OMB supported an anti-environmental change, eliminating a requirement that would have increased reductions from plants using bubbles.

4. Fish Killed by Power Plants (2 Rules)

Each year, plants generating electricity take in more than 70 billion gallons of water,⁹ killing numerous aquatic organisms, including fish, marine mammals, sea turtles, shellfish, and crustaceans. Indeed, one large facility, the Salem nuclear power plant, kills 359.4 million fish annually through water intake. Accordingly, EPA proposed that 59 large plants in ecologically sensitive areas recirculate or reuse water to reduce fish kills by 72 to 98 percent.¹⁰ It estimated that this rule would generate net benefits of \$65 million.¹¹ After OMB disapproved of this proposal, EPA adopted a rule nominally requiring a 60 percent reduction in fish kills. But OMB had EPA add loopholes,

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including one that allows facilities to avoid any requirement to prevent fish kills by agreeing to “restoration” measures of dubious efficacy. The United States Court of Appeals invalidated this restoration loophole as contrary to the Clean Water Act.¹² OMB favored changes in this rule that greatly reduced its capacity to protect the environment.

5. Federal Water Quality Standards in Indian Country

EPA drafted a rule establishing water quality standards for waters on the lands of Indian tribes. Water quality standards focus as goals for efforts to improve water quality. EPA proposed establishing numeric criteria for over 100 specific pollutants.¹³ Indian tribes and states seek to obtain these goals by regulating to reduce the concentrations of pollutants in the water. These efforts should help restore water quality. OMB effectively killed this rule.

B. Safe Drinking Water Act Rule on Surface Treatment

Microbiological contaminants in drinking water cause a substantial health risk, often causing diarrhea, cramps, nausea, jaundice, headaches, and fatigue.¹⁴ EPA has been especially concerned about removing *Cryptosporidium*, which can cause a serious infection called cryptosporidiosis. In 1993, *Cryptosporidium* caused more than 400,000 people in Milwaukee, Wisconsin to suffer intestinal illness. This outbreak hospitalized 4,000 people and killed at least 50.

To address these hazards, EPA proposed regulations addressing *Cryptosporidium* and other microbial pathogens in drinking water. In the end, EPA estimated the costs of the rule as \$39.5 million (\$44.8 million if a higher discount rate is chosen).¹⁵ It estimated the monetized benefits at \$18.9 million to \$90.9.¹⁶ EPA was only able to monetize benefits from endemic cryptosporidiosis.¹⁷ EPA was unable to quantify illnesses stemming from epidemics caused by *Cryptosporidium*, the benefits from limiting exposure to other pathogens (such as *Giardia*), or the purely economic costs associated with outbreaks of disease, such as losses from closing restaurants and purchasing bottled water.¹⁸ So, the monetized benefit total effectively gave these benefits a value of zero.

OMB’s suggestions all tended to weaken its protections. OMB questioned “special primacy requirements for states,” which are designed to make sure that states properly supervise local water systems’ compliance with the rule, but ultimately withdrew these objections for the time being.¹⁹ OMB also sought lower valuation of the benefits.²⁰ Also, apparently at OMB’s suggestion, EPA allowed states to accept “a more representative data set” than that required by EPA rules to determine a water system’s level of *Giardia lamblia* or virus inactivation.²¹ This flexibility may weaken environmental protection by allowing local governments and other water suppliers to substitute cheaper and less reliable monitoring.^f OMB sought concrete changes that would weaken the rule’s protection of public health through laxer monitoring and enforcement and sought changes in economic analysis that could support laxer standards.

C. Rules Under the Clean Air Act

1. Air Pollution from Large Ships and Tankers

Large ships and tankers burn diesel fuel, generating more than 200,000 tons of nitrogen oxide emissions per year. Nitrogen oxide emissions contribute to particulate pollution, which scientists associate with tens of thousands of annual deaths in the United States. These emissions also act as key ingredients in the formation of ground level ozone, which causes lung damage and exacerbates asthma, leading to thousands of emergency room visits every summer.

EPA prepared a proposal to implement modest “tier 1” limits on emissions already agreed to by international treaty and which embody the limits already achieved by industry.²² It also planned to propose a second tier of standards providing a 30 percent reduction below the tier 1 levels. OMB opposed the tier 2 standards, and EPA did not promulgate them.²³ OMB again favored changes greatly weakening environmental protection.

^f The rule does not specify what the data set must represent better than the standard data set. Because of the political pressures on EPA, provisions authorizing a “more representative” data set or monitoring method have often led to politically motivated decisions to weaken data reporting and monitoring requirements in the past.

2. Snowmobiles

Snowmobiles annually discharge about 530,000 tons of carbon monoxide and 200,000 tons of hydrocarbons. This pollution often occurs in national parks, where it impairs visibility and harms natural habitat. This pollution also harms public health. Snowmobiles emit as much pollution in seven hours as a car does over 100,000 miles. Because EPA found that pollution from snowmobiles and other nonroad engines significantly contribute to air pollution endangering public health and welfare, the Clean Air Act required it to regulate snowmobile and other nonroad engines' emissions.

EPA originally proposed a 50 percent reduction in both pollutants and produced a CBA showing that the monetary benefit from the fuel savings alone was more than double the implementation cost, even without considering any environmental benefit.²⁴ Nevertheless, OMB complained about EPA's failure to discuss whether particular models of snowmobiles might be forced off the market, suggested EPA consider more regulatory alternatives, and demanded that EPA quantify the environmental benefits. EPA weakened the regulation, promulgating a rule demanding only a 30-percent reduction in carbon monoxide.²⁵ In justifying this relatively weak standard, it relied rather heavily upon OMB's concern that stricter standards might force some models of snowmobiles off the market.²⁶ OMB again used its influence to weaken environmental and health protection in this case.

3. Spark-Ignition Marine Vessels and Highway Motorcycles

EPA sought to regulate recreational marine and highway motorcycle engines, which contribute to ground level ozone (smog), particulate (soot), and carbon

monoxide, as part of the snowmobile rule (all of these vehicles use somewhat similar engines).²⁷ OMB asked EPA to strip the motorcycle and marine engine provisions from its draft rule to allow OMB more time to review the rule, and EPA did just that. As of this writing, EPA still has not finalized a rule regulating spark-ignition marine engines. EPA ultimately regulated motorcycles in January of 2004.²⁸

OMB used the additional time to question the value and need for the motorcycle standards. OMB repeatedly raised questions about whether the catalytic converters that would likely be installed to meet EPA's standards would produce safety hazards, echoing concerns raised

by some motorcycle user groups.²⁹ OMB seems to finally have dropped this particular objection when a motorcycle company met with OMB and EPA, and stated that this was not a serious concern.³⁰ OMB suggested changing an emissions averaging program in ways that would weaken stringency and suggested some additional exemptions from the proposed standards for small manufacturers.³¹ After it became clear that the industry did not want the averaging change, because of competitiveness concerns

within the industry, OMB dropped this effort. EPA also persuaded OMB to live with the limited exemptions EPA was already prepared to offer small manufacturers and not demand expansion of the exemptions. OMB suggested several changes weakening environmental protection, but EPA persuaded OMB to drop its most damaging requests.

Thus, OMB sought to delay and weaken the environmental and health protections in the marine and motorcycle rules. The marine rule has been derailed, but the motorcycle rule eventually emerged in tact.

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4. Wood Coating

Manufacturers of wood products, such as flooring, doors, and wood paneling, laminate or otherwise coat their products. These coating operations generate hazardous air pollution, including emissions of xylene, toluene, ethyl benzene, glycol ethers, methanol, styrene, and formaldehyde.³² These pollutants irritate the lungs and eyes and affect the nervous system. OMB asked EPA to delay compliance for a year, thereby reducing industry costs and subjecting the public to additional health risks for that year.³³

5. Compliance Program Fees for New Vehicles

The Clean Air Act requires manufacturers of vehicle engines regulated under the Act to pay EPA fees, which finance agency testing needed to certify engines as complying with vehicle emission standards. EPA proposed raising the fees to reflect its increased costs and to impose fees for the first time on non-road engine manufacturers, who have not been regulated in the past. After OMB review, a provision requiring that manufacturers “certify” the accuracy of their statements regarding eligibility for a reduced fee provided for in the rule disappeared from the rule. “Certify” is a term of art that carries the implication that incorrect statements can trigger criminal penalties. This change reduces deterrents to claiming reduced fees without adequate justification. OMB review also produced a reduction in the fees charged owners of light-duty vehicles certified only for California through a change in the formula governing inflation adjustments.³⁴ These changes benefit regulated manufacturers, but may reduce EPA’s capacity to properly and thoroughly test vehicles.

6. Non-Performance Penalties for Heavy Duty Diesel Engines

The Clean Air Act requires that vehicle manufacturers pay penalties when tests of their emissions show that they do not comply with environmental standards. For heavy duty diesel engines, EPA certifies engines that are technically out of compliance by a limited margin as in compliance upon payment of a monetary penalty.³⁵ OMB urged a reduction of penalties.³⁶ This reduction of penalties reduces compliance incentives and therefore constitutes an example of changes benefiting regulated

industry at the expense of public health and the environment.

7. Consolidated Emissions Reporting Rule

Under the Clean Air Act, state and local governments have the primary responsibility for meeting national ambient air quality standards. In order to monitor state progress in meeting these overall pollution reduction goals, EPA must track the results of state pollution control rules and therefore requires states to collect data on emissions from polluters in its jurisdiction and report the data to EPA. In order to clarify and simplify this task, EPA developed a rule consolidating many of the reporting requirements it has imposed on state and local governments.³⁷ OMB had EPA delay the compliance date for some of the information collection requests.³⁸

D. Hazardous Waste Regulation: Manganese Listing

Scientists have linked manganese to a variety of health problems, including respiratory problems, sexual dysfunction, and damage to the nervous system, mental and emotional disturbances, and magnesium, a disease with symptoms similar to Parkinson’s disease. Accordingly, EPA proposed to list manganese as a hazardous waste, which would trigger obligations to treat it properly to prevent contamination of drinking water and soil. After meeting with representatives of the steel industry, which claimed that EPA had failed to quantify the costs the industry would incur if required to remediate manganese, OMB opposed this listing.³⁹ EPA promised to study this issue further,⁴⁰ but has not subsequently taken up manganese listing. The decision not to list manganese may allow facilities to avoid treatment. OMB intervention weakened environmental, health, and safety protection by limiting the regulation of manganese as a hazardous waste.

E. Transportation

While cost-benefit proponents often cite vehicle safety as a cost effective opportunity to save lives, OMB has often used CBA to reject life saving improvements in the transportation area. In no case, did it use CBA to justify stricter requirements than DOT had proposed in order to maximize the saving of life.

1. Tire Pressure Monitoring Systems

In the wake of a Department of Transportation (DOT) investigation into tread separation on two models of Bridgestone/Firestone tires installed on Ford Explorers, the manufacturers recalled more than 14 million tires.⁴¹ Congress carried out its own investigation and passed the Transportation, Recall, Enhancement, Accountability, and Documentation Act in 2000, which included a provision requiring the DOT to issue a rule establishing warning systems for under-inflated tires.⁴² DOT found that its most stringent option⁴³ would save 79 lives per year and prevent or mitigate 10,635 injuries at a paltry cost of \$23.08 per vehicle.⁴⁴ Nevertheless, OMB issued a “return” letter opposing the final rule and urging the agency to ignore the focused Congressional mandate in favor of rule based on “overall vehicle safety” concerns.⁴⁵ OMB suggested that a laxer standard than that proposed by the agency would encourage more installing of anti-lock brakes.⁴⁶ DOT’s National Highway Traffic Safety Administration, however, did not believe that a relaxed standard would do anything to encourage installation of anti-lock brakes and did not have statistically reliable evidence that anti-lock brakes reduce fatalities.⁴⁷ Still, under pressure from OMB, DOT omitted the proposed stricter standard that OMB had rejected from its final rule and adopted a less stringent option.⁴⁸ The United States Court of Appeals for the Second Circuit rejected the approach that DOT adopted at the behest of OMB as contrary to the statute and unreasonable, because the record showed that a stricter standard would not only prevent more injuries and save more lives, but also be more cost effective than the laxer standard DOT adopted at OMB’s behest.⁴⁹ OMB weakened protection of public safety in this rule.

2. Operation of Light Sport Aircraft

Between 1995 and 2001, 36 accidents occurred involving light sport aircraft - airplanes, gliders, balloons, powered parachutes, weight-shift-control aircraft, and gyroplanes that are frequently faster and heavier than ultralights, killing 51.⁵⁰ To prevent future accidents, the

Federal Aviation Administration (FAA) proposed updates in its rules governing certification of both the planes and their operators.⁵¹ OMB reviewed and rejected the entire package on August 8 of 2001.⁵² Nevertheless, the FAA adopted a final rule, which OMB ultimately cleared, in July of 2004. OMB’s action delayed promulgation of requirements that would further protection of public safety.

3. Corrosion Control

The National Transportation Safety Board linked an airplane crash to the failure to adequately control corrosion, and found that many of the operators’ aircraft had the same problem. The Board recommended that in light of the danger corrosion presented to the aging airline fleet, the FAA should develop a model corrosion control program. The FAA followed up with a proposed rule to require prevention of corrosion that could cause planes to crash.⁵³ Consistent with the Congressional charge to protect the public from airline crashes, the FAA declared that “It does intend to wait for a series of accidents to provide justification for this proposed rule.”⁵⁴ But OMB insisted that it do precisely that. OMB rejected

[U]nder pressure from OMB, DOT omitted the proposed stricter standard that OMB had rejected from its final rule and adopted a less stringent option.

the rule on the grounds that the FAA had not performed an adequate cost-benefit analysis.⁵⁵ OMB also expressed concern about coordination of the requirements of this rule

with several other rules, including the Safety of Aging aircraft rule (see below). OMB ultimately persuaded the FAA to make better coordination a priority. Because of the cost-benefit concerns and FAA’s interest in better coordination, the FAA never finalized the corrosion prevention rule. OMB’s action increased the risks of an airline crash to the public, while protecting airline operators from requirements to adopt the recommended program to detect and limit corrosion.

4. Safety of Aging Aircraft

After a series of airplane accidents, safety experts became very concerned about the problem of aging planes. In one of these accidents, the hull cabin walls,

and roof of a Boeing 737 blew off.⁵⁶ While the pilot managed to land the plane safely, a flight attendant was swept overboard to her death. In response, Congress passed the Aging Aircraft Safety Act of 1991, which directed the FAA to write regulations that “ensure the continued air worthiness of aging aircraft.”⁵⁷ More than a decade later, FAA proposed an interim final rule to require government inspections and reviews of safety and maintenance records beginning in an aircraft’s 15th year of service and damage-tolerance-based inspections.⁵⁸ OMB vetoed the rule. OMB ultimately persuaded the FAA to place greater priority on coordinating its various inspection and maintenance requirements (see above). FAA finally promulgated a weakened rule in 2005.⁵⁹ OMB’s concerns have led to delays in this rule from becoming effective, thereby increasing safety risks.

5. Flight Data Safety Recorders

When an airplane goes down, determining the cause of the crash can prove difficult, especially if crucial witnesses die. In order to learn from the experience of airline disasters the government requires commercial airlines to use flight data recorders, sometimes known as “black boxes,” to record a variety of information about what happened to airplanes prior to a crash. These recorders also might help distinguish between a terrorist attack and a safety-related accident if an airplane crashes or explodes.

The FAA proposed to record additional data that would help determine the cause of accidents in Boeing 737s, after two Boeing 737 crashes, where the existing data recorders did not provide sufficient information to determine the causes of the crashes. OMB vetoed this rule,⁶⁰ because of doubts about the “cost effectiveness” of additional requirements. The FAA finalized a rule in 2003 that imposed zero cost on manufacturers and simply reimposed requirements already embodied in a 1997 rulemaking, rather than require the new data elements that would help it figure out the causes of any future crashes involving rudders.⁶¹ OMB again opposed requirements aimed at making airplanes safer.

6. Aircraft Repair Abroad

OMB returned a rule that revises existing requirements to certify stations that repair aircraft as capable of performing the work adequately.⁶² OMB

objected to continuation of existing requirements that foreign repair stations show that they are needed on grounds that this might create foreign relations problems and raise questions about whether the United States is properly complying with trade agreements. The agency eliminated a number of discriminatory requirements from the final rule, but retained this particular provision.⁶³ While OMB’s position on this rule favored business and free trade, it seems neutral from a safety standpoint.

F. Agriculture

1. ‘Mad Cow’ Disease

Concern about transmissible spongiform encephalopathy, sometimes known as mad cow disease, has increased. This disease destroys the brain and causes death. An outbreak in Britain led to a European ban on the import of British beef. Recently, a few cases of this disease have been detected in U.S. cattle, leading other countries to limit imports of United States beef.

Deer and elk in the western United States have also been infected with chronic wasting disease, a form of this “mad cow” disease. Because of the threat this disease poses to human and animal health, the Animal and Plant Health Inspection Service of the United States Department of Agriculture (USDA) decided to offer indemnity payments to compensate owners of captive deer and elk herds who kill their infected animals, disinfect the premises, and keep healthy deer and elk away from the area of infection.⁶⁴ These payments would encourage owners of deer and elk herds to take actions that would prevent the spread of the disease.

OMB, however, decided not to countenance a full indemnity. Instead it capped the payment at 95 percent of the appraised value.⁶⁵ This creates some risk that owners may feel that they cannot afford to take the actions necessary to prevent the disease from spreading. OMB also had USDA remove references to the risk to human health from the regulatory preamble explaining why USDA was creating an indemnity program, on the grounds that the risk to humans was remote.⁶⁶ This probably explains why the final rule claims no human health benefit at all as part of the regulatory analysis. In this rule, OMB acted to increase the risk to animal and human health and to eliminate statements acknowledging that a human health risk exists.

2. Foot and Mouth Disease

Concerned about an outbreak of “foot and mouth disease” in the United States, the United Kingdom, and other places around the world, the USDA proposed a program to indemnify owners of livestock that are required to destroy their animals because of this disease, pleuropneumonia, rinderpest, exotic Newcastle disease, highly pathogenic avian influenza, infectious salmon anemia, and other diseases.⁶⁷ As with the rule on “mad cow” disease, OMB acted to reduce payments that might discourage spread of the diseases involved. Specifically, OMB review induced the USDA to eliminate compensation for disinfection and vaccination, which are part of the program to treat animals with communicable diseases. According to a USDA official this increases risks of these diseases spreading. OMB again sought changes weakening protection of public health.

G. Caveats: Nonroad Diesel Emissions, and Deregulation

These case studies offer powerful evidence that OMB review weakens environmental, health, and safety protection, since they focus on all of the cases the GAO identified as involving significant OMB intervention in environmental, health, and safety regulation from June of 2001 and July of 2002. There is no reason why significant OMB intervention should not strengthen, rather than weaken rules, especially when some of the rules involved showed favorable cost-benefit ratios. This survey of all significant interventions in a time period offers powerful evidence of how normal day-to-day formal OMB review functions. This particular time period is probably a good indication of the norm, because it occurred long before a Presidential election, which might cause significant politically induced changes in the norm.

Nevertheless, OMB has reported that its formal review has left many regulations unchanged. The GAO concluded that OMB significantly changed 6 of the 8 rules proposed by EPA’s Office of Water, 7 of the 14 rules from EPA’s office of air and radiation, and 1 of 4 rules for its solid waste office.⁶⁸ From other health and safety agencies, OMB left more rules without significant changes, in GAO’s view. OMB never used its review process to strengthen regulation during the period

reviewed, since any strengthening would be a significant change. But this study is too limited to show that OMB review always weakens regulations. Its formal review process sometimes leaves regulations in tact. While this may often reflect agency decisions to write weak regulations, in at least one case OMB supported a very stringent standard.

1. Nonroad Diesel Emissions: OMB Support for Stringent Regulation

In the case of nonroad diesel engine emissions, OMB supported a regulation that promised very significant environmental improvements. EPA finalized standards regulating non-road diesel emissions in June of 2004.⁶⁹ These standards significantly limit emissions of nitrogen oxide, sulfur, particulate, and non-methane hydrocarbons. Together they address a very significant source of particulate emissions, ground level ozone, acid rain, and hazardous air pollutants (associated with cancer, birth defects and other serious risks). EPA estimated that the monetized benefits (which understate total benefits substantially) from this rule would equal approximately \$80 billion per year, whereas monetized costs would equal about \$2 billion per year.⁷⁰ EPA expected this rule to prevent more than 12,000 premature deaths, 8,900 hospitalizations (mostly asthma related), 15,000 nonfatal heart attacks, and approximately one million days of missed work from respiratory ailments.⁷¹

EPA involved OMB in a joint effort at creating a CBA early on in the rulemaking process. And EPA reports that OMB was supportive of the agency’s proposal. In spite of the enormously high ratio of benefits to costs, there is no evidence that OMB pushed EPA to promulgate a more stringent rule than the rule it ultimately adopted, which economic theory would support under these circumstances. Indeed, OMB reportedly urged EPA to reduce the dollar value it ascribed to the rule’s life saving benefits, because the rule would save the lives of many elderly people, who have fewer years remaining than a young person. Adoption of this reform would have paved the way for rejecting other rules on cost-benefit grounds by reducing the value assigned to many saved lives. OMB and EPA, however, retreated from use of this “senior death discount” in the face of virulent public criticism. Still, this rule shows

that OMB will sometimes support strict rules when monetized benefits exceed costs by an enormous margin.

2. The Dog that Did Not Bark: OMB's Failure to Demand Cost-Benefit Analysis of Significant Deregulation.

On the other hand, OMB generally gives significant deregulatory proposals a free ride.

While government officials report that Bush's OMB was particularly "relentless" in pressuring agencies to quantify the costs and benefits of their regulations protecting the environment, health and safety,⁷² OMB's interest in quantification and rigorous analysis sometimes does not extend to significant deregulatory proposals.

For example, after industry representatives met with Vice-President Cheney, EPA proposed rules allowing industry to avoid new source review requirements, which impose strict pollution control obligations upon electric utilities and other pollution sources when their owners modernize their plants. Because of the enormous volume of emissions involved, these changes had the potential to greatly harm human health. While OMB has pressed agencies establishing new safeguards to quantify costs and benefits, it did not insist upon CBA of this rule relaxing existing safeguards. It reviewed the rule, but allowed EPA to finalize a drastic relaxation of these requirements while relying only upon anecdotal information (according to a GAO report on new source review).

III. OMB's Prompt Letters

In order to counteract impressions that OMB only opposes regulations, OMB began issuing "prompt" letters. An OMB press release describes these letters as "encouraging life saving actions by regulators." And it cites them as "the first time that OMB . . . has publicly used its analytical resources to encourage new regulatory actions as opposed to reviewing decisions initiated by

agencies." Thus, the press release gives the impression that OMB has decided to encourage regulations that go beyond the regulatory agendas agencies have developed for themselves. If this were the case, and if the prompt letters were based on CBA, this would strengthen the case that CBA sometimes leads to broader regulation and that its use is neutral.

A review of all the prompt letters OMB has issued to date, however, however, reveals that none of the letters sent to agencies protecting safety, public health and the environment urged them to adopt new regulations not already underway at the agencies or required by statute. Nor do the letters prompt agencies to adopt more stringent requirements than they were already likely to adopt on their own. And, in only two cases, (interestingly, the two letters cited in the press release) did OMB refer to any CBA in its prompt letter as the basis for its action.

A third letter stated that OMB "suspect[ed]" that benefits would exceed cost, but contained no monetization of benefits.

The press release claims that an OMB prompt letter "urges acceleration of an ongoing rulemaking concerning the label of trans fatty acid content in foods." Thus, OMB concedes that this letter "prompted" the agency to continue what it was already doing. Indeed, the FDA was already drafting a final rule, when OMB "prompted" the FDA rule on trans fats. While this letter offers evidence that OMB sometimes supports agency regulation, the suggestion that

OMB prompts broader regulation than would exist without OMB is misleading. OMB simply "prompts" agencies to do what they are already doing.

Furthermore, every letter save one "prompted" actions that did not involve government regulation of private conduct. The trans fats letter is typical in this respect. The letter did not suggest that the agency explore whether it should limit the use of trans fatty acids in food, a proposal that would have broadened the FDA regulatory agenda. Rather, it expressed support for regulations that

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would require food manufacturers to label food to identify the presence of trans fats.⁸ Of course, to the extent that consumers are too busy or not informed enough to heed warnings, this approach provides less protection than direct reduction in hazard generation.

Nevertheless, the prompt letters overwhelmingly focus upon informational strategies of various kinds and voluntary action. The other “action by regulators” identified in the press release is a good example of the latter. OMB believed that placement of automatic external defibrillators in the workplace might save a number of lives cost effectively. But it did not squarely recommend that OSHA require their placement in work places. Instead, it urged OSHA to consider whether they should be “promoted” by “information, economic incentives, voluntary agreement” or, last and apparently least, “compulsory regulation.” Subsequently, OSHA decided to promote them through an information strategy. While this letter may have added an action item to OSHA’s agenda, it did not prompt an OSHA regulation. In another prompt letter, OMB cited the avoidance of the need for regulation as a benefit to be derived from focusing funding conservation efforts by farmers on areas that might become the subject of government regulation.

In two cases, however, OMB did recommend regulatory measures. It “prompted” EPA to promulgate regulations already required by the Beach Act of 2000 implementing guidance EPA had issued in 1986 updating water quality criteria for pathogens in marine waters. OMB also suggested that the Department of Transportation (DOT) require a high speed frontal offset crash test as part of DOT’s effort to enhance vehicle safety.⁷³ These tests measure how a vehicle performs in a frontal collision at an angle. Insurance companies and safety advocates have long supported such a test, because it provides important information about whether a vehicle’s structure intrudes on a driver during a crash and modifications to vehicles to enable them to pass such tests could prevent numerous injuries and deaths. DOT, however, already had this item on its agenda at the time.⁷⁴ So, this recommendation did not amount to a call to expand a regulatory agenda or make requirements stricter. Furthermore, OMB did not cite any CBA to support this prompt letter, so this does not appear to be an instance of CBA leading to support of a planned regulatory action.

Also, while this letter does seem to encourage a high speed frontal offset crash test, at the same time it signals that OMB might not approve a strict rule implementing such a test. OMB required far more burdensome analysis than applicable federal statutes demand, urging incremental CBA for each option, a consideration of possible “disbenefits” in other impact modes (such as side impacts), and use of time consuming peer review of the CBA. Given these additional demands, it is not surprising that DOT still has not proposed a rule implementing a frontal offset crash test,^h almost a decade after DOT began researching this issue and almost three years since OMB issued its “prompt letter.”⁷⁵

The overall conclusion is clear. CBA never helped strengthen any of the regulations reviewed here. OMB often tolerated regulations proposed by agencies, but very frequently used CBA to reduce the stringency and scope of regulation.

IV. Lessons Learned

In every rule in the GAO data set, OMB acted to benefit regulated parties. In 24 of the 25 cases,ⁱ it did so at the expense of the environment, safety, or public health.

The only case where OMB did not seek changes that would harm the environment, safety, or public health

<i>Nature of Changes OMB Sought</i>			
	<i>Anti-Environmental, Health, or Safety</i>	<i>Burden Reducing</i>	<i>Stricter</i>
<i>Yes</i>	24	25	0
<i>No</i>	1	0	25

⁸ The proposal would only limit use of trans fats when the manufacturer voluntarily chose to claim that the food was trans fat free or to make certain other health claims.

^h In fairness to DOT, this test raises an issue not explicitly flagged in the OMB letter: whether such a test can be designed in such a way as to avoid encouraging larger vehicles that would protect the occupants better when a crash occurs, but that would inflict more damage on passengers in smaller cars. See Request for Comments: Federal Motor Vehicle Safety Standards: Occupant Crash Protection, 69 Fed. Reg. 5108, 5111-13 (February 3, 2004).

ⁱ GAO considered a case as involving a completed review.

involved an FAA rule where OMB focused its attention on a provision that was primarily economic in nature, rather than safety-related. Overwhelmingly, OMB review of environmental, health, and safety safeguards weakens them.

Nor has this OMB ever “prompted” any environmental, health, or safety regulation not already underway at an agency. OMB has never urged an agency to regulate more extensively than the agency already planned to.

While CBA’s proponents portray it as a neutral tool that often strengthens regulation, in none of the studied cases did OMB recommended a more stringent standard than an agency proposed. In all six cases that involved a completed CBA, the agency analysis showed that the benefits exceeded the cost. Economic theory teaches that in that kind of situation, a more stringent regulation may be optimal. The executive order authorizes OMB to maximize net benefits, which textbook economics equates with setting costs equal to benefits at the margin.⁷⁶ Yet, OMB never urged agencies to increase the benefits to provide optimal regulation. Indeed, in all cases where economic theory might argue for more stringent regulation, OMB urged the agency to make the standards even weaker than those the agency had proposed, thereby reducing the standards’ benefits and costs.

In three of these six cases, OMB did not dispute the agency’s assertion that benefits exceed costs. But it did not allow the positive net benefits to influence the direction of its suggestions, urging the agency to weaken the regulations.

In three other cases, OMB did not agree with the agencies’ view that monetized benefits exceeded the costs. In one of these three rules, the Tire Pressure Monitoring Rule, a court eventually found that OMB’s view had no support in the record. In this case, OMB simply second-guessed the National Highway Transportation and Safety Administrations’ views about the merits of anti-lock break systems and the capacity of an unrelated rule to encourage their use. OMB’s view of the costs and

benefits differed from that of the agency primarily because of OMB’s view that a less stringent tire pressure monitoring system would save more lives because of encouragement of anti-lock brake systems, a view disputed by an agency with much more expertise on this sort of issue than OMB. The differences in assessment of costs and benefits stemmed not from the application of OMB’s economic expertise, but from its acting as an amateur engineer in assessing the safety consequences of anti-lock brakes and as an amateur transportation regulator in gauging likely indirect industry responses safety regulation. The other two cases involve disputes where different approaches to CBA would produce widely

divergent results. Even if one assumes that OMB’s view of these two rules was plausible, it remains true that OMB weakened three rules where the benefits clearly exceeded costs and a fourth rule where a court found the option it rejected the most

“cost effective” option.

If one looks beyond the GAO data set, one can find at least one instance in which OMB allowed an agency to promulgate a strict regulation. In that case, the non-road diesel rule, the benefits exceeded the costs by an enormous margin. The GAO report indicates that there are many other cases where OMB does not oppose an agency’s proposal. In the past, agencies have deliberately weakened proposals in order to survive OMB review. And in the Bush Administration, OMB has signed off on deregulatory proposals without any qualms at all. But this report has not analyzed the complete set of cases where OMB has not made significant changes in the formal review process, focusing instead on rules that OMB significantly influences during formal review, not just approves. None of these cases involve OMB strengthening an agency’s proposal on the basis of CBA. Even the non-road diesel engine case (which is outside the GAO data set) does not involve OMB urging the agency to increase the stringency of its proposed rule.

Although agency officials report that OMB has become more insistent in demanding agency

<i>OMB's Response to Favorable Cost-Benefit Ratios</i>	
	<i>Agency Found Favorable Cost-Benefit Ratio</i>
<i>Number of Rules</i>	6
<i>OMB Seeks Laxer Regulation</i>	6
<i>OMB Disputes Favorable Ratio</i>	3
<i>OMB Does not Dispute Favorable Ratio</i>	3

quantification of costs and benefits, OMB itself feels free to act with no support from any CBA. Indeed, in the 19 of the 25 cases where OMB sought significant changes in rules, it did so without any completed CBA to justify its actions. OMB often acts to reduce the “burdens” of regulation, even when it has no basis for knowing whether the associated benefits justify the burdens. Reducing burdens seems desirable in the abstract, but almost all actions reducing burdens for regulated parties increases exposure to health, safety, and environmental risks. In short, OMB regularly opposes federal regulation, but CBA does not usually explain its actions.

While it is difficult to fully explain OMB’s actions, several hypothesis emerge from this study and the GAO report that created the data set this study relies upon. First of all, the GAO reports that on at least seven occasions (out of 25) OMB’s position took a position similar to that of the regulated party it met with.⁷⁷ So, OMB may be, at least in those cases, simply serving as a conduit for well-healed interests to gain regulatory relief.

While this special interest influence explanation may explain some significant cases, it cannot account for the totality of OMB’s actions, for OMB frequently opposed environmental measures without meeting with industry, and even opposed some standards that industry helped negotiate (such as the Sport Airplane standards). A broader free market ideology explains OMB’s actions better than any devotion to objective analysis. A general presumption against government action regardless of the results of any regulatory analysis helps explain both the many instances of OMB opposing regulation supported by CBA and the pattern of recommendations found in the prompt letters. For those letters supported voluntary measures and standards increasing disclosure of information. This support for informational measures combined with such frequent opposition to conduct regulation is consistent with a world view of markets as places where perfect information allows for perfectly rational decisions. This free market worship might lead

adherents to suppose that government regulatory intervention restraining dangerous conduct is almost always unnecessary. In short, a decidedly non-neutral free market ideology explains OMB’s actions far better than the hypothesis that OMB improves the rationality of regulation through CBA.

In the majority of cases, OMB had no cost-benefit rationale for its actions, because the agency was unable to quantify health, environmental, or safety benefits. There is no reason to assume that benefits are trivial when agencies cannot quantify benefits. For example, EPA could not estimate the benefits from controlling emissions

of very dangerous pollutants from ships, because it lacked a good port specific emissions inventory, not because OMB had any basis for claiming that the problem was trivial. EPA could not quantify asbestosis cases years ago when a court used cost-benefit considerations to overrule its ban on asbestos, but we now know that

asbestos caused massive health damage.

Logically, the inability to quantify the benefits of a proposed rule indicates nothing about its value. Indeed, the cases in this data set show that inability to quantify was frequently linked with indirect exposure routes (which makes data too variable for nationwide quantitative assessment), ecological damages that resist quantification, and efforts to address new situations about which there is little data. Yet, OMB frequently rejected regulation when the agency could not quantify benefits. OMB has no authority to do this, and often its actions prevent an agency from carrying out statutory mandates. The executive order authorizing OMB review does not require it to reject agency rules under these circumstances. To the contrary, the order only authorizes CBA to the extent legally permissible and only requires quantification of benefits when possible. It does not authorize OMB to oppose agency actions carrying out laws to protect public health, safety and the environment when the agency is unable to give dollar values to avoided deaths, injuries, and environmental damage.

OMB frequently rejected regulation when the agency could not quantify benefits. OMB has no authority to do this, and often its actions prevent an agency from carrying out statutory mandates. The executive order...does not require it to reject agency rules under these circumstances.

One can understand why an agency dominated by economists would tend to veto rules that agencies could not support with an analysis monetizing the benefits, i.e. giving their price in dollars and cents. Since the economists like to see CBA, it must be very tempting to discipline agencies that do not produce them, even when there are scientifically valid reasons for an agency's inability to quantify benefits in a timely manner. But when OMB rejects regulatory proposals that are adequately justified under governing statutes just because the agency has not quantified benefits, it converts the demand for CBA into an engine for rejecting valid rules when quantification is not possible or appropriate. OMB has effectively created an additional hurdle that government officials must jump through to create enforceable standards protecting health, safety, and the environment. It has created a formidable presumption against the many rules that produce non-quantifiable benefits. And it has done so when it has no basis for knowing whether costs exceed benefits.

Whatever the reasons for OMB's actions, the data reviewed in this study strongly supports the following conclusions:

- In all 25 cases, OMB supported changes that would benefit the regulated entity.
- In 24 out of 25 cases where OMB sought significant changes through its regulatory review process, OMB sought to weaken environmental, health, and safety protections.
- In no case did the Bush Administration's OMB seek to strengthen an agency proposal to improve environmental, health, or safety protection, or promote expansion of an agency's preexisting regulatory agenda.
- In the overwhelming majority of cases where OMB seeks to veto or weaken a standard, it has no basis for concluding that costs exceed benefits.
- In all of the cases in the data set where benefits clearly exceeded costs, OMB sought weaker regulation anyway. But there are cases outside the data set where OMB has taken no significant action, allowing regulations to stay in place with no significant change.

Conclusion

CBA has not performed a rational neutral function in these cases. Rather, it has offered a pretext for weakening rules, regardless of what analysis might show.

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Appendix: Rules in Which OMB Sought Significant Changes During Formal Reviews Between June of 2001 and July of 2002

- Chronic Wasting Disease in Cervids: Indemnity Payment (Department of Agriculture)
- Foot and Mouth Disease: Indemnity Payments (Department of Agriculture)
- Tire Pressure Monitoring Systems (National Highway Transportation Safety Administration)¹⁰
- Control of Emissions of NonRoad Large Spark-Ignition Engines and Recreational Engines (EPA)
- Control of Emissions of Air Pollution from New Marine Compression Ignition Engines at or Above 30 liters/Cylinder (EPA)
- Control of Emissions from Spark Ignition Marine Vessels and Highway Motorcycles (EPA)
- Consolidated Emissions Reporting Rule (EPA)
- National Emissions Standards for Hazardous Air Pollutants: Surface Coating for Wood Building Products (EPA)
- Compliance Program Fees for Light-Duty Vehicles & Engines; Heavy Duty Vehicles & Engine; & Nonroad Engines & Motorcycles (EPA)
- Proposed Nonperformance Penalties for 2004 and Later Model Year Emission Standards for Heavy-Duty Diesel Engines & Heavy Duty Vehicles (EPA)
- Identification & Listing of Hazardous Waste; Addition of Manganese to Appendix VIII; Inorganic Chem. Man. Waste; & CERCLA Hazardous Substance Designations & Reportable Quantities (EPA)
- Minimizing Adverse Environmental Impact from Cooling Water Intake Structures at New Facilities Under Section 316(b) of the Clean Water Act, Phase I (EPA)
- National Point Discharge Effluent Standards: Proposed Regulations to Establish Requirements for Large Cooling Water Intake Structure at Existing Power Generating Facilities (EPA)
- National Primary Drinking Water Regulations: Long-Term Enhanced Surface Treatment Rule (EPA)
- Revisions to the Clean Water Act Regulatory Definition of “Fill Material” and Discharge of Fill Material” [The Mountaintop Mining Rule] (EPA)
- Effluent Limitation Guidelines and New Source Performance Standards for the Construction and Development Category (EPA)
- Effluent Limitation Guidelines, Pretreatment Standards, and NSPS for the Iron & Steel Man. Point Source Category (EPA)
- Part 145 Review: Repair Stations (EPA)
- Certification of Pilots, Aircraft and Repairmen for the Operation of Light Sport Aircraft (EPA)
- Corrosion Control Plan (EPA)
- Aging Airplane Safety (EPA)
- Revision of Digital Flight Data Recorder Regulations for Boeing 737 Airplanes for Part 125 Operations (EPA)
- Federal Water Quality Standards for Indian Country and Other Provisions Regarding Federal Water Quality Standards (EPA)
- Part 145 Review: Repair Stations (FAA)

^j This rule was subject to two formal reviews during this period. The 25 cases involve 25 reviews.

End Notes

- 1 Mindy Persofsky, Case Note: Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003), 22 TEMP. ENVTL. L. & TECH. J. 219 (2004).
- 2 *Id.* at 219, 232.
- 3 *See* Proposed Revisions to the Clean Water Act Regulatory Definition of “Fill Material” and “Discharge of Fill Material,” 65 Fed. Reg. 21292, 21296 (2000); Ohio Valley Environmental Coalition v. Bulen, 34 ELR 20048 (2004) (describing the use of general permits to authorize dumping of overburden from mountaintop mining).
- 4 Final Revisions to the Clean Water Act Regulatory Definitions of “Fill Material” and “Discharge of Fill Material,” 67 Fed. Reg. 31129, 31134 (May 9, 2002). *See* Kentuckians for the Commonwealth v. Rivenburgh, 317 F.3d 425, 447-48 (2003) (holding that the corps properly interpreted its older regulations as authorizing deposit of overburden).
- 5 U.S. EPA, April 5 Version of Draft Preamble and Rule at 49.
- 6 United States General Accounting Office, Rulemaking: OMB’s Role in Review of Agencies’ Draft Rules and the Transparency of those Reviews, 176 (2003) [hereinafter GAO 2003].
- 7 Effluent Limitations Guidelines and New Source Performance Standards for the Construction and Development Category, 69 Fed. Reg. 22472 (April 26, 2004).
- 8 GAO 2003 at 87.
- 9 EPA, Economic and Benefits Analysis for the Final Section 316(b) Phase II Existing Facilities, A2-2 (Feb. 2004) [hereinafter Existing Facilities Economic Analysis]; EPA, Economic Analysis of the Final Regulations Addressing Cooling Water Intake Structures for New Facilities, 2-2 (Nov. 2001).
- 10 National Pollutant Discharge Elimination System: Regulations Addressing Cooling Water Intake Structures for New Facilities, 65 Fed. Reg. 49,059, 49,103 (proposed Aug. 10, 2000).
- 11 Existing Facilities Economic Analysis, D1-4 (estimate for existing facilities in phase two).
- 12 *See* Riverkeeper v. EPA, 358 F.3d 174, 189-91 (2nd Cir. 2004). The court of appeals decision remanded the rule allowing new sources to employ restoration measures. EPA has subsequently maintained that this holding does not rule out restoration measures as substitutes for prevention of fish kills in the context of regulation of existing sources. National Pollutant Discharge Elimination System – Final Regulation to Establish Cooling Water Intake Structures at Phase II Existing Facilities, 69 Fed. Reg. 51,575, 41,627 – 41,628 (Jul. 9, 2004) (to be codified 40 CFR Parts 9, 122, et. al.). But the logic of the *Hudson River Keepers* case would seem to rule out the use of this approach for existing sources as well.
- 13 *See* Letter from John D. Graham, OIRA Administrator to Tracy Mehan, Assistant Administrator for Water, EPA (October 2, 2001), available at http://www.whitehouse.gov/omb/inforeg/return/print/epa_water_quality_rtnltr.html
- 14 National Primary Drinking Water Regulations: Long Term 1 Enhanced Surface Water Treatment Rule, 67 Fed. Reg. 1812, 1813 (January 14, 2002) [hereinafter, Treatment Rule]
- 15 *Id.* at 1822.
- 16 *Id.*
- 17 *Id.* at 1824.
- 18 *Id.* at 1824, 1826.
- 19 *See* Memorandum from Cayce Parrish to Docket, October 12, 2001, Docket No. W-99-10, LT1ESWTR FNL, Document No. III-C.1. OMB secured changes weakening special primacy requirements in a closely related rule addressing the return of recycling flows to a plant’s treatment process. *See* Memorandum from Jeffrey Robichaud to Docket, April 20, 2001, Docket No. W-99-10, FBR FNL, Document No. II-D.2. Both of these rules were proposed together, but ultimately promulgated separately. *See* Treatment Rule, 67 Fed. Reg. at 1812; National Primary Drinking Water; Filter Backwash Recycling Rule, 66 Fed. Reg. 31086 (June 8, 2001).
- 20 GAO 2003, at 173.
- 21 Attached Redline/Strikeout Version of Rule at 136.
- 22 Control of Emissions of Air Pollution from New Marine Compression-Ignition Engines At or Above 30 Liters/Cylinder, 67 Fed. Reg. 37548, 37551 (Proposed May 29, 2002).
- 23 Control of Emissions From New Marine Compression-Ignition Engines at or Above 30 Liters Per Cylinder, 68 Fed. Reg. 9746, 9748-49 (February 28, 2003) (to be codified at 40 C.F.R. parts 9 & 4); GAO 2003, at 160.
- 24 *See* Letter from John Graham, OIRA Administrator to Jeffrey Holmstead, Assistant Administrator for Air and Radiation (September 24, 2004), available at http://www.whitehouse.gov/omb/inforeg/spark_engines_epa_sep2001.html
- 25 *See* *Bluewater Network v. EPA*, 370 F.3d 1, 10 (D.C. Cir. 2004).
- 26 *Id.* at 21.
- 27 *See* Control of Emissions from Spark-Ignition Marine Vessels and Highway Motorcycles, 67 Fed. Reg. 53050 (August 14, 2002). Spark-Ignition engines run on gasoline. EPA regulated marine engines running on diesel fuel in the snowmobile rule discussed above, *see* Nonroad Large Spark-Ignition Engines, 67 Fed. Reg. at 68242 & n.1, but not the gasoline-burning spark-ignition engines.
- 28 *See* Control of Emissions for Highway Motorcycles, 69 Fed. Reg. 2938 (January 15, 2004), to be codified at 40 C.F.R. parts 9, 86, 90, 1051.

- 29 See Responses to OMB Questions/Issues Highway Motorcycles Final Rule, item 14, in Docket A-2000-02, IV-H-7.
- 30 See Memorandum from Karl Simon, OTAG to Air Docket A-2002-02, re Meeting Summary (December 1, 2003), air docket A-2000-02, IV-E-26 (recounting the meeting). See also Email from Karl Simon, USEPA to Amy Farrell, Office of Management and Budget re: Closure of NHTSA Investigation of Honda Gold Wing Frame Failure (October 17, 2003), air docket A-2000-02, IV-H-29.
- 31 See Responses to OMB Questions, *supra* note 29, item 13; Highway Motorcycle Rule, 69 Fed. Reg. at 2436, codified at 40 C.F.R. § 86.407-78; Letter from Robert French, EPA, to Amy L. Farrell, OMB, re: Limitations on Averaging (October 21, 2003), A-2000-02, IV-H-12.
- 32 See National Emission Standards for Hazardous Air Pollutants: Surface Coating of Wood Building Products, 67 Fed. Reg. 42400, 42402 (Proposed June 11, 2002) [Wood Products Rule].
- 33 GAO 2003, at 161.
- 34 See Motor Vehicle and Engine Compliance Program Fees for: Light Duty Vehicles; Light-Duty Trucks; Heavy Duty Vehicles and Engines; Non-road Engines; and Motorcycles 9-11 (Draft Rule April 22, 2004).
- 35 See Non-Conformance Penalties for 2004 and later Model Year Emission Standards for Heavy-Duty Diesel Engines and Heavy-Duty Diesel Vehicles Final Rule, 67 Fed. Reg. 51464 (August 8, 2002).
- 36 GAO 2003, at 163.
- 37 See Consolidated Emissions Reporting, 67 Fed. Reg. 39602 (June 10, 2002)
- 38 GAO 2003, at 161
- 39 See generally Memorandum from Robert Kaiser to RCRA Docket Number F-2001-ICMF-FFFF, Final Rule Changes Resulting from OMB Comments, 32-33 October 31, 2001 (alluding to economic impact upon the steel industry as a reason for not listing manganese).
- 40 See Hazardous Waste Management System; Identification and Listing of Hazardous waste: Inorganic Chemical Manufacturing Wastes; Land Disposal Restrictions for Newly Identified Wastes; and CERCLA Hazardous Substance Designation and Reportable Quantities, 66 Fed. Reg. 56258, 58260 (November 20, 2001).
- 41 Public Citizen v. Mineta, 340 F.3d 39, 43 (2nd Cir. 2003).
- 42 Id. at 43-44.
- 43 This option would require a direct monitoring system for all four tires capable of warming drives when any tire was 20 percent or more underinflated. Id. at 47
- 44 Id. at 48.
- 45 Letter from John D. Graham, Director, Office of Information and Regulatory Affairs, OMB, to Kirk K. Van Tine, Office of General Counsel, Department of Transportation (February 12, 2002), available at http://www.whitehouse.gov/omb/inforeg/return/dot_revised_tire_rtnltr.pdf.
- 46 Id.
- 47 Mineta, 340 F.3d at 50.
- 48 Id. at 50-51.
- 49 Id. at 42.
- 50 See Certification of Aircraft and Airmen for the Operation of Light-Sport Aircraft, 67 Fed. Reg. 5368, 5374 (Proposed February 5, 2002)
- 51 Id.
- 52 Letter from John D. Graham, Administrator, OIRA, OMB to Rosalind Knapp, Deputy General Counsel, Department of Transportation (August 8, 2001).
- 53 Corrosion Prevention and Control Program, 67 Fed. Reg. 62142 (October 3, 2002).
- 54 Id.
- 55 See GAO 2003, at 179.
- 56 William Stockton, *Changes in Maintenance Sought to Keep Old Planes Flying Safely*, N.Y. TIMES, December 30, 1988, at A14.
- 57 49 U.S.C. § 44717(a)(1).
- 58 Aging Airplane Safety, 67 Fed. Reg. 72726 (December 6, 2002).
- 59 Aging Airplane Safety, 70 Fed. Reg. 5518 (February 2, 2005).
- 60 Digital Flight Data Recorder Requirements—Changes to Recording Specifications and Additional Exceptions, 68 Fed. Reg. 42932, 42935 (July 18, 2003).
- 61 Digital Flight Data Recorder Requirements—Changes to Recording Specifications and Additional Exceptions, 68 Fed. Reg. 42932 (July 18, 2003).
- 62 See Letter From Donald R. Arbuckle, Deputy Administrator, Office of Information and Regulatory Affairs to Rosalind A. Knapp, General Counsel, Department of Transportation, July 20, 2001, available at http://www.whitehouse.gov/omb/inforeg/return/faa_repair_stations_rtnltr-dot.html
- 63 Repair Stations, 66 Fed. Reg. 41088, 41095 (August 6, 2001)
- 64 See Chronic Wasting Disease in Cervids; Payment of Indemnity, 67 Fed. Reg. 5925, 5927-28 (February 8, 2002). While deer and elk or the primary target, the indemnity program also applies to moose, caribou, reindeer, and related species. Id. at 5926.
- 65 GAO 2003, at 139.
- 66 Id.
- 67 Foot and Mouth Disease Payment of Indemnity; Update of Provisions, 67 Fed. Reg. 21934 (May 1, 2002).

68 GAO 2003, at 75.

69 Control of Emissions from Nonroad Diesel Engines and Fuel, 67 Fed. Reg. 38958 (June 29, 2004).

70 *Id.* at 38958.

71 *Id.* at 38958, 38960.

72 GAO 2003, at 44.

73 Letter from John D. Graham, Administrator, OIRA, OMB to Michael Jackson, Deputy Secretary, Department of Transportation (December 7, 2001).

74 *See id.*

75 *See* Request for Comments: Federal Motor Vehicle Safety Standards: Occupant Crash Protection, 69 Fed. Reg. 5108 (February 3, 2004) (requesting comments on the issue, but

advancing no specific proposal). DOT has also published an advanced notice of proposed rulemaking, not a notice of proposed rulemaking, on lower leg instrumentation that could be used in full frontal or offset crashes. *Id.* at 5108.

76 HORST SIEBERT, *ECONOMICS OF THE ENVIRONMENT: THEORY AND POLICY* 65 (5th Rev. ed. 1998) (maximum net benefit is reached when marginal abatement costs are set equal to benefits defined as marginal avoided damages)

77 GAO 2003, at 90. Because GAO's review was based on following up on meetings that OIRA specifically listed, and some meetings that came to GAO's attention were not initially docketed, it is possible that this understates regulated parties' influence. Also, OMB regularly reviews comments from regulated parties file with the agency, which could also influence its review.

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