United States General Accounting Office

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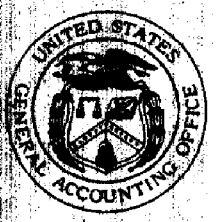
Report to Congressional Requesters

March 1995

CLEAN AIR RULEMAKING

Tracking System Would Help Measure Progress of Streamlining Initiatives



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GAO

United States
General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division

B-259647

March 2, 1995

The Honorable Max S. Baucus
Ranking Minority Member
Committee on Environment
and Public Works
United States Senate

The Honorable Joseph I. Lieberman
United States Senate

The Clean Air Act Amendments of 1990 established ambitious milestones for protecting and enhancing the quality of the nation's air. A key step in meeting these milestones—translating the act's statutory mandates into workable rules and regulations—requires that the Environmental Protection Agency (EPA) develop and issue rules at an unprecedented rate. At the time of the act's passage, EPA's rulemaking process averaged more than 3 years, and some rules took as many as 9 years to complete. According to EPA, this rulemaking process needed to be reformed if the agency was to meet the act's milestones. Consequently, EPA and the Office of Management and Budget (OMB) initiated changes to reduce the time required to promulgate clean air rules. Concerned that EPA has continued to miss statutory deadlines, you asked us to (1) describe EPA's progress in streamlining the process for developing and issuing clean air rules and identify improvements that might enhance EPA's streamlining activities and (2) describe OMB's corresponding efforts to reduce the time associated with reviewing EPA's rules. (App. I contains further details on our objectives, scope, and methodology.)

Results in Brief

EPA has taken several actions to expedite clean air rulemakings. In January 1991, EPA eliminated a duplicative step in the agency's internal review process, which officials estimate saved an average of about 4 months for rulemakings. In June 1994, EPA made its most far-reaching change—grouping rules into three categories and varying the amount of interoffice coordination and management review needed in each category. Under this process, over half of EPA's ongoing clean air rules have been assigned to a "fast track" category. EPA officials believe that if they involve senior managers earlier and eliminate unneeded coordination for the rules in this category, the rules will be completed 3 months sooner than the current average. However, despite efforts to reform the rulemaking process, the agency acknowledges having missed over 60 percent of the

statutory deadlines imposed by the 1990 act. Exacerbating this situation is the fact that the agency does not have a system for identifying problem areas in the rulemaking process or for assessing and tracking the impact of the streamlining efforts. Consequently, EPA can neither demonstrate that its streamlining efforts are actually reducing the time to issue clean air rules, nor assess the effectiveness of its various initiatives, such as reaching out to affected parties early in the rule development process. Although agency officials recognize that such a system could be useful, they said that in view of their limited resources, issuing rules warrants a higher priority.

Although OMB has reduced the number of rules it reviews, it is too early to tell if the changes that OMB has implemented will significantly enhance EPA's ability to expedite clean air rules because so few rules have been completed under the new process. Since October 1, 1993, OMB has eliminated its review of over one-third of EPA's ongoing clean air rulemakings in accordance with the requirement of Executive Order 12866 that OMB focus only on significant rules. OMB's past practice of reviewing most clean air rules may have contributed to the lengthy rulemaking process. EPA officials estimate that eliminating OMB's review of nonsignificant rules may save from several days to 6 months for each rule.

We are recommending that the Administrator of EPA implement a tracking system to record key dates, resources, and historical information needed to monitor and evaluate the agency's clean air rulemaking process.

Background

The passage of the Clean Air Act Amendments in November 1990 placed many new and increased requirements on EPA to address significant air pollution issues facing the nation, including ozone, acid rain, urban air pollution, mobile source emissions, and toxic air pollution. EPA and most other federal agencies use an informal (also known as notice-and-comment) rulemaking process to translate statutory mandates into rules and regulations.

In developing and issuing environmental rules, EPA must follow procedures enumerated in several statutes, including the Administrative Procedure Act, the Paperwork Reduction Act, and the Regulatory Flexibility Act, among others. Additionally, most clean air rulemakings must follow specific rulemaking procedures contained in the Clean Air Act to ensure that EPA has considered the views of interested and affected parties. EPA's standard rulemaking process, employed agencywide since 1986, entails a

multitude of activities in order to take a rulemaking from inception to promulgation. (App. II provides a flow chart (fig. II.1) and description of the major steps in this process.)

Since the passage of the 1990 act, EPA has issued more proposed and final air quality regulations and guidance documents in a shorter period of time than at any other time in its history—over 150 by the fall of 1993. However, delays in meeting many statutory deadlines have continued. These delays have resulted in lawsuits and, in some instances, court-ordered deadlines that, according to the EPA Administrator, have hindered effective planning efforts. For example, in the first 2 years of the act's implementation, EPA was sued for missing 42 statutory deadlines. Generally, agency officials cite three reasons for missing these deadlines: insufficient resources, unrealistic original deadlines, and the lengthy rulemaking process. As agreed with your offices, this report focuses only on the last of these reasons.[1]

EPA's Efforts to Streamline Clean Air Rulemakings

In 1990, EPA recognized that it needed to change its internal rulemaking process if the agency was to meet the expanded rulemaking responsibilities envisioned under the impending Clean Air Act Amendments.[2] In January 1991, EPA's Office of Air and Radiation (OAR)[3] modified the traditional rulemaking process by eliminating a duplicative step in the process. According to OAR officials, this action cut about 4 months out of a rulemaking process that was averaging over 3 years.

In a further effort to expedite clean air rules, in June 1994 EPA implemented its most far-reaching change—a revised agencywide process designed to improve the quality and efficiency of rulemakings. This new process groups rules into three categories, or tiers, designed to produce quality rules at the lowest management level practicable and with minimal administrative processes. The new process calls for fundamental changes in how EPA approaches rulemakings, including the early involvement of senior managers; early and frequent consultation and consensus-building with interested and affected parties outside of EPA; and, for many rules, minimal internal coordination.

[1]Resource issues were addressed separately in our report entitled Air Pollution: Reductions in EPA's 1994 Air Quality Program's Budget (GAO/RCED-95-31BR, Nov. 29, 1994).

[2]As noted in the July 1990 report by the Clean Air Act Implementation Task Force.

[3]OAR is responsible for promulgating clean air rules.

EPA envisions that tier 1 rules—generally expected to be those rules that are the most costly, controversial, or of significant concern to other EPA offices—will need the most management attention and internal coordination. For such tier 1 rules, the new process calls for ongoing involvement by the EPA Administrator's office and formal cross-agency coordination at four distinct stages in rule development: (1) early guidance, when EPA senior managers identify the priority issues that must be addressed; (2) analytic blueprint, when participants agree on the scientific, technical, economic, legal, and intergovernmental information and analyses needed; (3) alternatives selection, when the potential regulatory options are narrowed down to one, or a few, preferred alternatives; and (4) workgroup closure,[4] when workgroup members resolve all remaining issues. While EPA's guidelines state that the new tiered process will improve the quality and efficiency of rulemakings, agency officials told us they do not anticipate any time savings for the rules promulgated under tier 1 because of their complexity.

Rules promulgated under tier 2 need less high-level management attention but still require senior management involvement at two distinct stages in the rulemaking process—analytic blueprint and workgroup closure. Because no rules in tier 2 have been completed using the new process, OAR officials believe that it is too early to assess whether tier 2 rules will be issued more quickly.

According to senior OAR officials, tier 3 is EPA's "fast track" category. The clean air rules in this category are generally the least costly and controversial and often involve only OAR staff and management and EPA's Office of Enforcement and Office of General Counsel. No analytic blueprint or workgroup closure is required for the rules in tier 3. EPA officials anticipate that the rules in tier 3 will be promulgated faster than the rules in the other two tiers. Table 1 shows EPA's distribution of the 207 ongoing clean air rulemakings as of December 15, 1994.

Table 1: Ongoing Clean Air Rulemakings in Each Tier as of December 15, 1994, and Time Savings Predicted by EPA

Category	Number	Percent	Predicted time savings
Tier 1	9	4	None
Tier 2	90	43	Uncertain
Tier 3	108	52	Up to 3 months

[4]Workgroups are EPA-wide, staff-level groups formed to ensure that the agency's data collection and analysis methodology is sound and to identify, assess, and, if possible, resolve key technical and policy issues necessary to develop a proposed or final regulation.

OAR officials explained that because the changes are new and the process of taking a rule from inception to promulgation still involves many activities, it will be 2 or more years before OAR will be able to judge if these recent changes have had an effect on the clean air rulemaking process.

EPA's Other Regulatory Streamlining Initiatives

In addition to instituting the tiered process, OAR officials told us they are implementing other initiatives to try to expedite the rulemaking process for selected clean air rules. Generally, these initiatives involve reaching out to interested and affected parties early in the rule development process or establishing partnerships with state and local agencies, industry, and environmental groups; such partnerships will allow EPA to benefit from the expertise and resources these organizations can offer. (App. III provides a detailed description of these rulemaking techniques.)

Because their experience with these techniques is limited, OAR officials could not estimate the time savings from their use. For example, one technique—regulatory negotiation[5]—has been used only five times since the passage of the 1990 act, and another technique—partnerships with state and local agencies and industry and environmental groups—is so new that only two pilot projects are ongoing, and none have been completed. Furthermore, some officials cautioned that EPA must be selective in choosing which rules will involve these rulemaking techniques because not all techniques are appropriate for all clean air rules. In their opinion, using these techniques on some rulemakings may cause the initial stages of the process to take longer than they would have under the traditional process. For example, regulatory negotiations that address complex and/or controversial issues may initially take longer because such negotiations are a very resource-intensive process for both EPA and the participating groups. However, these techniques may save time in the long run because they can produce a better quality rule that receives fewer and less severe public comments and is less likely to be challenged in court.

EPA Lacks System for Assessing Effectiveness of Its Streamlining Efforts

To date, EPA has not established a systematic way of assessing the effectiveness of its initiatives to expedite the rulemaking process. As a result, the agency is unable to demonstrate that its past streamlining initiatives have actually reduced the time required to issue clean air rules. As shown in appendix IV, even though EPA missed 91 of 145 (63 percent) of the 1990 act's statutory deadlines, the agency has not collected accurate,

[5]A regulatory negotiation is a formal process, under the Negotiated Rulemaking Act of 1990, for allowing interested and affected parties to negotiate the detailed requirements of a proposed regulation.

reliable information on the time it takes to develop and issue rules. Such data would allow the agency to identify problem areas or bottlenecks in the rulemaking process and to accurately gauge the impact of streamlining efforts.

EPA's lack of data on rulemakings was also noted by the National Performance Review's Regulatory Development Team in its August 1993 report to the EPA Administrator on EPA's regulation development process. The report pointed out that

"Adequate data are not collected to allow the Agency to continuously measure and evaluate the regulation development process and the Agency does not routinely assess the efficiency of its process or the quality of its product."

In July 1994, EPA's Assistant Administrator for Air and Radiation tasked OAR with developing a system that senior managers could use to monitor the progress of individual rules with statutory or court-ordered deadlines, including each rule's deadlines and current stage in the rulemaking process. While the resulting system—a subset of OAR's Management and Accountability Process System (MAPS)—is an improvement in EPA's rulemaking data base, it does not maintain the key dates, length of time in each major phase of the rulemaking process, allotted resources, or other historical information that agency managers can use to assess the rulemaking process. According to the manager of the MAPS data base, limitations in the system's capacity cause some historical data to be eliminated when new deadlines are entered. Thus, the new system still does not allow the agency to identify problem areas in the rulemaking process or measure the impact of streamlining efforts.

OAR officials said that developing a system for tracking the time required to promulgate clean air rules has not been as high a priority as committing their limited resources to issuing rules, although they recognize that such a system could be useful. (App. IV provides the best available data on EPA's record for meeting clean air statutory deadlines through December 20, 1994—about 4 years since the act's passage. Because of EPA's lack of data on rulemakings, the agency was unable to provide us with information on the time required to develop and promulgate clean air rules for this time period.)

OMB's Review of EPA's Rules

OMB has taken several actions to help expedite the rulemaking process since Executive Order 12866 was issued on September 30, 1993. For

example, OMB has begun focusing its in-depth reviews on significant rulemakings, defined in the executive order as those that have one or more of the following effects:

- Have an expected annual effect on the economy of $100 million or more.
- May adversely affect the economy in a material way.
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof.
- Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

Whereas OMB's past practice was to review all nonroutine[6] clean air rules, OMB and EPA have agreed that 52 of 125, or 42 percent, of such ongoing rules will not undergo OMB review because these rules do not meet the above criteria for an in-depth review by OMB. According to EPA officials, the agreement means that these 52 rules may be promulgated from several days to 6 months sooner than they would have been before the issuance of Executive Order 12866. (App. II shows the steps eliminated from the clean air rulemaking process when OMB forgoes its review.)

Executive Order 12866 specifies that nonsignificant rules—those that do not meet the criteria listed above—do not have to be reviewed by OMB. OMB officials said that EPA provides them with a one-page summary of all proposed or final rules and that, on the basis of their review of this summary, OMB concurs or disagrees with EPA's determination of a rule's significance. Subsequently, EPA and OMB representatives may further discuss and resolve their differing views on a rule's significance. Since September 30, 1993, when Executive Order 12866 was issued, OMB has disagreed with EPA's classification of 26 (21 percent) of EPA's 125 clean air rules. In most of these cases, EPA had classified the rule as nonsignificant, but OMB believed these rules were significant. After providing more information to OMB on some rules, EPA obtained OMB's agreement that 3 rulemakings were nonsignificant and redesignated 23 rules as significant. Nonetheless, EPA officials view this process favorably and noted that OMB has agreed with over 75 percent of their classifications (99 of 125 rulemakings).

[6]Under both the prior and current executive orders, OMB does not review routine regulatory actions, such as State Implementation Plans (SIP). According to OMB, SIP actions have risen from about 120 actions in 1991 to nearly 500 actions in 1994.

OMB's Other Streamlining Initiatives

OMB has initiated other actions to help expedite the rulemaking process. For example, EPA and OMB officials said that in keeping with the requirements of Executive Order 12866, OMB has generally completed its reviews of significant clean air rulemakings within 90 days. OMB officials pointed out that they can complete reviews more quickly now, in part because they are reviewing from one-fourth to one-third fewer clean air rules than in past years. Although this process is new, OMB's review of 60 proposed and final clean air rules through September 30, 1994, averaged 34 days each, ranging from 1 to 116 days.[7] Two proposed clean air rules exceeded the 90-day review period allowed under Executive Order 12866, but according to OMB officials, EPA requested the extension in both cases. However, EPA officials pointed out that since OMB reviews both the proposed and final rule, OMB's impact on the length of the rulemaking process is cumulative; thus, when OMB's review of both the proposed and final rule is considered, the average of 34 days would double to an average of 68 days—over 2 months—for a complete rulemaking.

EPA officials said it is difficult to compare the time OMB took to review clean air rules before and after the issuance of Executive Order 12866. Before the new order, they said that in some instances OMB would suspend its review and thus "stop the clock." OMB officials said that they suspended a rule's review when EPA needed additional time to collect more data, complete new analyses, or make changes to the rule and that they restarted the "clock" and continued the review when EPA resubmitted the rule to OMB. Thus, in the past, although months or years might have passed before a rule cleared OMB's review, OMB's data would show a much shorter time period. Executive Order 12866 does not provide for "suspending" the review of rules, and OMB officials said that OMB is no longer engaging in this practice. Currently, to ensure timely reviews, OMB's Office of Information and Regulatory Affairs (OIRA)[8] staff meet weekly with the Administrator of OIRA to discuss and resolve any outstanding issues on rules that have been at OMB for 60 or more days or rules approaching statutory or judicial deadlines. According to OMB staff, this process is working well, as evidenced by the sparse number of rulemakings that have exceeded 90 days.

[7]This analysis excludes eight clean air rules submitted before OMB's 90-day review criteria were imposed on October 1, 1993, but which OMB subsequently approved. Review time for these eight rules averaged 79 days, ranging from 17 to 158 days. Of the 60 rules, only 1 rule had received both proposed and final reviews by OMB since October 1, 1993.

[8]OIRA is responsible for reviewing clean air and other federal agency rules.

Additionally, OMB has instituted several measures to improve cooperation and communication with EPA staff. For example, in a series of meetings with EPA staff over the last year, OMB and EPA clarified the criteria for determining whether an EPA rule should be classified as significant or nonsignificant. EPA staff are optimistic that this guidance will assist them in correctly classifying proposed and ongoing rulemakings and will reduce the number of initial disagreements with OMB about a rule's significance. Additionally, another initiative calls for the use of regulatory policy officers as focal points for resolving conflicts with EPA and other regulatory agencies. This mechanism gives the OIRA Administrator a quick contact in each agency for elevating and resolving rulemaking issues in a timely manner. Finally, OIRA officials also pointed out that they have improved communications with regulatory agencies' staffs by providing informal training in how OMB conducts its regulatory reviews; the officials believe that the training will help EPA staff understand and address OMB's concerns and, in turn, issue rules faster.

EPA officials generally agreed with OIRA's May 1994 report, which noted that a vastly improved relationship has developed between OIRA and federal agencies since Executive Order 12866 was issued on September 30, 1993. However, because only one clean air rule has been completed under the new process (with both proposed and final reviews by OMB), it is too early to assess the full impact of these changes on EPA's ability to expedite clean air rulemakings. OIRA officials said it will probably be 2 years or more before they can assess the overall impact of these changes on the rulemaking process.

Conclusions

Officials from both EPA and OMB believed that the cumulative impact of their collective efforts to reform the rulemaking process could save from 4 to 13 months in a process that averaged nearly 37 months at the time of the act's passage in 1990. Staffs of both agencies said that communication and coordination have improved, which should be helpful in resolving impasses that, in the past, resulted in rules that took years to be issued.

However, the act clearly places the responsibility for meeting milestones on EPA, and while the agency believes that these changes will reduce the time to issue rules, it does not have a systematic way of measuring the impact of its efforts. In our opinion, a rulemaking tracking system would provide EPA with the information needed to assess the impact of current and future changes to its rulemaking process.

Recommendation

To better ensure that EPA managers efficiently and appropriately monitor the agency's efforts to meet statutory deadlines, we recommend that the Administrator, EPA, implement a rulemaking tracking system that maintains key dates for major phases in the rulemaking process, provides for analysis of the length of time that rules spend in major phases of the rulemaking process, and tracks the resources allotted to rules and other historical information that managers need to identify problem areas and measure the impact of changes made.

We discussed the information contained in this report with officials from both OMB and EPA. At OMB, we talked to representatives of the Administrator of the Office of Information and Regulatory Affairs. At EPA, we discussed this information with representatives of the Assistant Administrator for Air and Radiation, the Director of the Office of Air Quality Planning and Standards, the Director of the Office of Mobile Sources, and the Director of the Office of Policy, Planning, and Evaluation. Officials from both agencies generally agreed with the facts contained in this report and noted that the report fairly characterized their efforts to expedite the development and issuance of clean air rules, as well as the improved working relationship between the staffs of the two agencies. Furthermore, while EPA officials agreed that a rulemaking tracking system could be useful, they indicated that issuing more rules was a higher priority than developing and maintaining such a system. In our opinion, however, the value of a tracking system—including identifying problem areas and bringing about rulemaking efficiencies—warrants such a management tool. EPA and OMB officials' comments are included where appropriate. However, at your request we did not obtain written agency comments on a draft of this report. We conducted our review from March through December 1994 in accordance with generally accepted government auditing standards.

Unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days after the date of this letter. At that time, we will send copies to the Director of OMB and the Administrator of

EPA and make copies available to others upon request. If you have any questions, please call me at (202) 512-6111. Major contributors to this report are listed in appendix V.

Peter F. Guerrero
Director, Environmental
Protection Issues

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Figure

Abbreviations

EPA	Environmental Protection Agency
GAO	General Accounting Office
GPO	Government Printing Office
MACT	maximum achievable control technology
MAPS	Management and Accountability Process System
OAR	Office of Air and Radiation
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
SAN	Start Action Notice
SIP	State Implementation Plan

Objectives, Scope, and Methodology

Concerned about the Environmental Protection Agency's (EPA) lengthy rulemaking process and the fact that the agency missed statutory deadlines for clean air rules, the Ranking Minority Member of the Senate Committee on Environment and Public Works and Senator Joseph I. Lieberman asked us to describe EPA's progress in streamlining the clean air rulemaking process and identify improvements that might enhance EPA's efforts. They also asked us to describe the corresponding efforts of the Office of Management and Budget (OMB) to reduce the time associated with its review of such rules.

Our work focused on EPA's and OMB's completed, ongoing, and planned efforts to reduce the time required to issue clean air rules since the passage of the Clean Air Act Amendments in November 1990. In carrying out our work, we also considered both agencies' initiatives to streamline their rulemaking procedures as part of their efforts to implement Executive Order 12866 and the recommendations of the National Performance Review. To address the efforts made at EPA to streamline the agency's clean air rulemaking procedures, we interviewed officials and obtained documents from the following EPA offices:

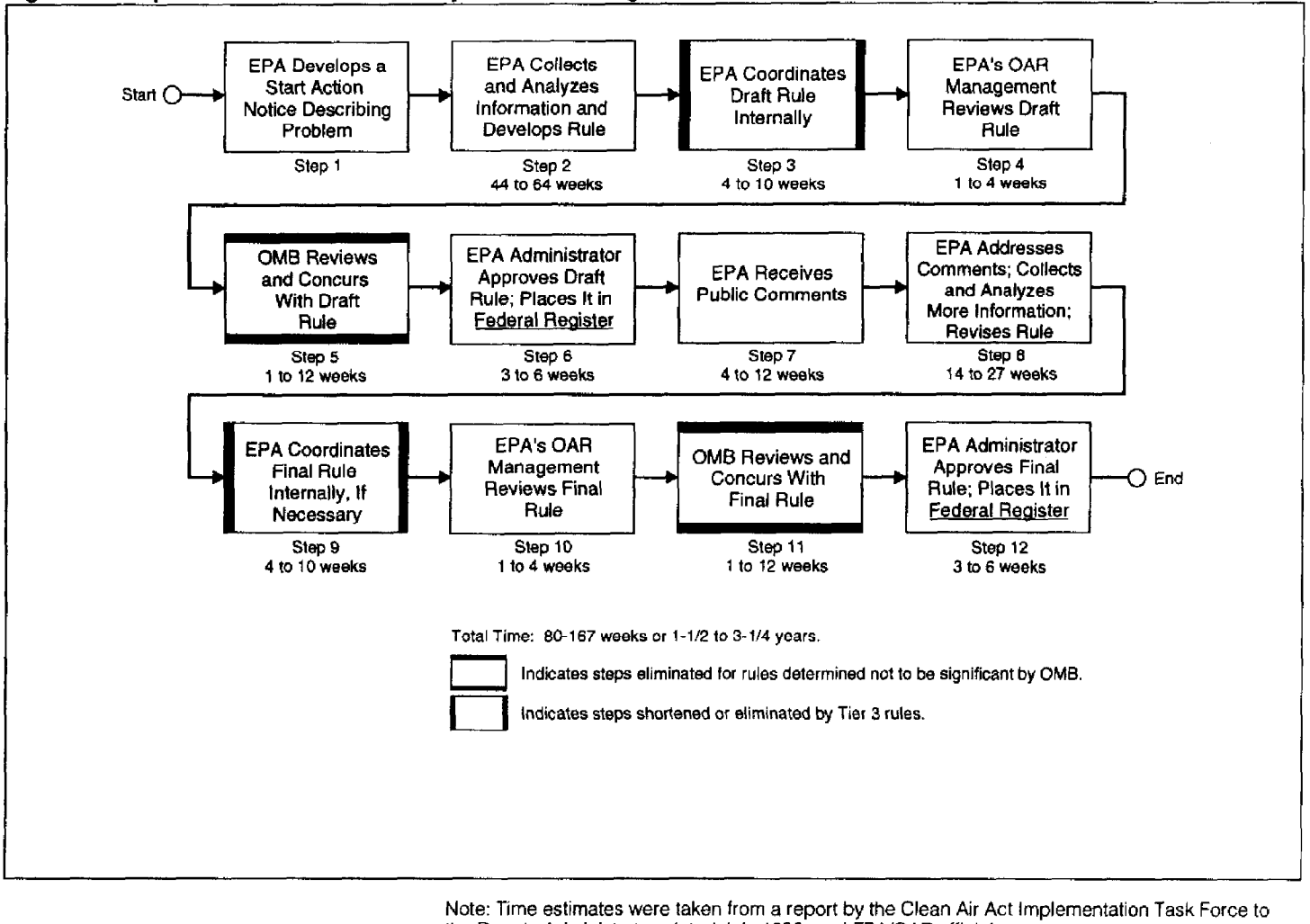
- Office of Air and Radiation, Washington, D.C.;
- Office of General Counsel, Washington, D.C.;
- Office of Policy, Planning and Evaluation, Washington, D.C.;
- Office of Enforcement and Compliance Assurance, Washington, D.C.;
- Office of Mobile Sources, Washington, D.C.; and
- Office of Air Quality Planning and Standards, Durham, N.C.

To address efforts made by OMB to streamline the agency's review of clean air rules, we interviewed officials and obtained documents from OMB's Office of Information and Regulatory Affairs.

Overview of the Traditional Process for Clean Air Rulemaking

We developed the following flow chart (fig. II.1) in an effort to simplify and categorize the multitude of activities involved in developing and promulgating clean air rules. While this flow chart is not a formal agency model, it was prepared with the assistance of EPA senior air program officials who agreed that these steps present a fair framework for depicting the traditional rulemaking process and illustrating the steps where EPA's and OMB's initiatives may expedite rulemakings. A general description of each step follows the chart.

Figure II.1: Steps Shortened or Eliminated by New Rulemaking Process



Note: Time estimates were taken from a report by the Clean Air Act Implementation Task Force to the Deputy Administrator, dated July 1990, and EPA/OAR officials.

In step 1, EPA develops a one page description of the environmental problem(s) to be addressed by the rule and assigns the rule a Start Action Notice (SAN) number. In concept, this is the rule's beginning.

For air rules, in step 2, EPA establishes a workgroup, led by a representative of the Office of Air and Radiation, to identify, assess and, if possible, resolve key technical and policy issues; assess any data needs and limitations; devise a work plan; collect the necessary scientific and technical information to support and defend the rulemaking action; and evaluate regulatory options, including assessing the health and environmental risks and the costs-benefits of available regulatory options. Once sufficient information has been collected and analyzed, a draft regulatory package is prepared that includes the intent, purpose, scope, and authority for the regulation. At this point, the workgroup assesses the quality of the proposed regulation and reaches agreement on as many open issues as possible before forwarding the regulatory package to OAR senior management for review, resolution of any significant unresolved issues, and approval.

After OAR management approves the regulatory package, it moves to step 3 for coordination with other EPA media offices (such as the Office of Water). This is called cross-agency coordination. All tier 1 or tier 2 rules receive this coordination. Tier 3 rules that do not affect other EPA offices skip this step. Other tier 3 rules may have this step shortened because they would be coordinated only with the media office they may affect. In this step, senior managers from all other interested or affected media offices within EPA review the draft regulation and supporting materials to assess the rule's impact on their programs, resolve any remaining issues, and assess the quality of the proposed regulation.

Draft air rules then move to step 4 for review and approval by OAR.

Once EPA management is satisfied internally with the proposed rule, a significant rule moves to step 5. This step is eliminated for nonsignificant rules. A rule that undergoes this step is submitted to OMB/OIRA for an independent assessment of the rule's costs and benefits and impact on the economy, among other things. After OIRA approves it, the proposed rule is returned to EPA.

In step 6, the EPA Administrator reviews and approves draft rules, after which they are published in the Federal Register.

In step 7, interested and affected parties have an opportunity to comment on the proposal. These comments are placed in a docket[1] that is open for public review.

In step 8, depending on the severity of the comments and whether new information has been introduced, EPA may have minimal or substantive issues to be addressed before the agency can proceed to final rulemaking. Comments may cause EPA to have to reconvene the agency workgroup, collect and analyze more data in support of a rule, more thoroughly evaluate other regulatory options previously excluded or given low priority, or significantly alter selected aspects of the proposed rule. Except for public comment, final rules generally follow the same review and approval process that proposed rules follow. Under the Clean Air Act, for most rules, EPA must respond to all substantive comments in the docket, as well as provide a written explanation of any substantive changes between the proposed and final rules, at the time the final rule is issued. According to agency officials, in practice EPA takes these actions for all clean air rules.

In step 9, final draft tier 1 and tier 2 rules receive cross-agency coordination, as in step 3. Also, tier 3 rules may have this step shortened or eliminated, as described in step 3.

In step 10, final rules are reviewed and approved by OAR management, as in step 4, before being sent to OMB.

In step 11, all significant final rules receive OMB's review and concurrence, as in step 5. However, nonsignificant rules eliminate this review step, as they did in step 5.

In step 12, the EPA Administrator reviews and approves all final rules and publishes them in the Federal Register.

[1]The docket is the collection of documents that form the record for any judicial review of EPA's rulemaking actions. It generally consists of scientific and technical reports and data, transcripts of public hearings, drafts of proposed and final rules, and the correspondence, memorandums, and comments that EPA used or considered to make a rule.

Additional Information on EPA's Initiatives to Streamline the Clean Air Rulemaking Process

Since the passage of the Clean Air Act Amendments of 1990 but before EPA instituted the tier process in June 1994, the agency initiated five other completed or ongoing efforts to reduce the time required to promulgate clean air rules. This appendix provides additional details on each of the five initiatives, including their benefits, limitations, and extent of use through September 30, 1994.

Elimination of Red Border Review

Before the passage of the Clean Air Act Amendments in November 1990, EPA's Clean Air Act Implementation Task Force recognized that EPA needed to change its internal rulemaking process if the agency was to meet its expanded rulemaking responsibilities envisioned under the impending act. In its July 1990 report, the task force recommended, among other things, that EPA use "workgroup closure"[1] as the agency's final approval of a rulemaking, in lieu of the traditional consecutive review processes that EPA had been using. In January 1991, OAR eliminated one step in the agency's traditional rulemaking process—red border review—saving an estimated 16 weeks, or about 4 months, according to an OAR senior official.

Consultation and Consensus-Building

Under the consultation and consensus-building technique, EPA recognizes that the most effective rules are not only technically sound and legally defensible, but also readily implementable—that is, rules for which the concerns of major interest groups have been thoroughly considered and fairly addressed. EPA believes that early, informal consultation with interested groups and affected parties can save time by allowing direct input into the drafting of the regulation, seeking a more pragmatic solution among competing interests, reducing the number and severity of adverse comments during the public comment period, and minimizing the likelihood of litigation after promulgation. OAR officials said that they have not tracked the number of clean air rules for which this technique has been used, but they estimate that some form of this technique—such as convening a multidisciplinary roundtable early in rule development—has been employed on more than 100 rulemakings since 1990.

Regulatory Negotiation

Under the regulatory negotiation technique, interested and affected parties negotiate the detailed requirements of a proposed clean air rule. Negotiation is done by a federally chartered advisory committee consisting of one or more representatives of the regulated public, public interest

[1]Workgroups are EPA-wide, staff-level groups formed to ensure that the agency's data collection and analysis methodology is sound and to identify, assess, and, if possible, resolve key technical and policy issues necessary to develop a proposed or final regulation.

groups, and state and local governments who join with an EPA representative to negotiate the text of a proposed rule before it is published in the Federal Register. Regulatory negotiations are carried out in accordance with the Negotiated Rulemaking Act of 1990, the Federal Advisory Committee Act, and EPA's internal policies. EPA officials said regulatory negotiations can save time by allowing interested and affected parties more direct input into the drafting of the regulation, seeking a more pragmatic solution among competing interests, reducing the number and severity of adverse comments during the public comment period, and minimizing the likelihood of litigation after promulgation. Regulatory negotiations still have to undergo the traditional public comment period.

Furthermore, EPA officials said this technique will not work for all rulemakings because it is initially very resource-intensive for EPA and the participating groups, a factor that has caused EPA to be highly selective in choosing this approach. They also said this technique may take longer in some cases than the traditional rulemaking approach because more planning and negotiations take place to develop a better rule. As of September 30, 1994, the agency had used regulatory negotiations for only five clean air rulemakings. The five clean air rules negotiated under this approach were

- Small Non-Road Engines Emissions Controls,
- Reformulated Fuels,
- National Emissions Standards for Coke Oven Batteries,
- Wood Furniture Manufacturing Industry VOC (volatile organic compounds) Emission Controls, and
- Architectural and Industrial Maintenance Coatings.

Electronic Federal Registering

Under the electronic federal registering technique, EPA officials said the agency saves money by eliminating the need to pay the Government Printing Office (GPO) for proofing and typesetting thousands of pages for the Federal Register. Instead, EPA staff ensure the accuracy of notices and deliver a data disk to GPO ready for printing. While EPA officials said that this technique does not save time, it saves money that can be used elsewhere to develop data to support rules and thereby possibly save time in the rulemaking process. EPA officials estimate this technique is saving about $500,000 yearly.

Developing Air Pollutant Standards With Partners

Under the 1990 act, EPA must establish maximum achievable control technology (MACT) standards for 189 of the nation's most hazardous and

pervasive toxic air pollutants. For a limited group of rules for toxic air pollutants, EPA plans to establish informal partnerships with state and local governments, industry, and environmental groups that allow the agency to benefit from the expertise and resources these organizations can offer. These partnerships are established early in the MACT rulemaking process for the purpose of identifying the data available, resolving critical issues early, and reaching agreement on which non-EPA organization will either take the lead in developing the rule or work closely with EPA in developing the rule. By taking this approach, EPA officials believe that the time and resources required to set each MACT standard will be reduced if EPA, during the process, can obtain consensus from those groups who have stakes in regulating toxic air pollutants.

EPA is currently exploring two types of partnering techniques. The first, "share-a-MACT," is an approach whereby EPA shares MACT development responsibilities with one or more groups having a strong interest in the rule. EPA officials said that in such cases, a non-EPA group willing to commit resources to developing supporting data and, in some instances, the initial draft of the proposed rule, agrees to operate under EPA's general direction. Such nontraditional rulemakings are expected to save EPA time and resources, but they may be limited by the need for the affected industries to be relatively homogenous and have a strong national association with authority to act in their collective best interests. EPA currently has two pilot projects under way to evaluate this technique.

A second technique is "adopt-a-MACT," an approach whereby EPA allows either a state or local air pollution agency with expertise in the particular toxic air pollutant in question to take the lead in developing the supporting data and initial draft of the proposed rule. Such rulemakings are expected to save EPA time and resources, but they are limited to situations in which the industry to be regulated is located in one or a few states. According to EPA officials, as of September 30, 1994, this approach had not been used, although EPA officials said that some states have expressed a willingness to undertake projects under this approach. For example, they said the states of Arizona and New Mexico are interested in jointly undertaking the development of MACT for primary copper smelters. Their interest is important because these two states have the expertise in regulating this industry, since all of the copper smelters in the United States are located in those states.

Statutory Deadlines Met and Missed for EPA's Clean Air Rulemakings

Table IV.1: Number of Statutory Deadlines Met and Missed, Annually, Through November 15, 1994.

Status	11/15/91[a]	11/15/92[b]	11/15/93[c]	11-15-94[d]
Number due	23	53	27	42
Number met	11	13	10	20
Number missed	12[e]	40[f]	17[g]	22[h]

Note: The information presented includes some statutorily mandated studies, reports, or other activities; however, according to agency officials, the majority of the actions required were clean air rulemakings due on or before the date indicated.

[a]Includes statutorily mandated actions from 11/16/90 to 11/15/91.

[b]Includes statutorily mandated actions from 11/16/91 to 11/15/92.

[c]Includes statutorily mandated actions from 11/16/92 to 11/15/93.

[d]Includes statutorily mandated actions from 11/16/93 to 11/15/94.

[e]EPA has since issued 11 of 12 rules that did not meet the 11/15/91 deadline.

[f]EPA has since issued 36 of 40 rules that did not meet the 11/15/92 deadline.

[g]EPA has since issued 8 of 17 rules that did not meet the 11/15/93 deadline.

[h]EPA has since issued 4 of 22 rules that did not meet the 11/15/94 deadline.

SUMMARY: Of 145 statutorily mandated actions from 11/15/90 to 11/15/94, EPA met 54 deadlines and missed 91. As of 12/15/94, EPA had issued 59 of the 91 rulemaking actions that missed the statutory deadlines; work was under way on the remaining rules missed as well as new rulemakings required in coming years. EPA officials pointed out that while the agency's record on meeting statutory milestones could be better, EPA has not missed any court-ordered deadlines for clean air rules.

Source: EPA's Management and Accountability Process System; data as of November 15, 1994.

Table IV.2: Unmet Clean Air Act Statutory Deadlines as of December 20, 1994

Name of rule	Statutory deadline
States submit selected State Implementation Plan (SIP) provisions for moderate and above ozone nonattainment areas	11/15/93
Report to Congress on the California low-emissions vehicle	06/30/94
EPA action on final phase I sulfur dioxide and nitrogen oxide permits	08/15/93
Submit consumer/commercial products emissions report to Congress	11/15/93
Submit Section 811 report (international competitiveness) to Congress	08/15/92
Publish results of ozone design value study	11/15/93
Publish wood furniture emissions control techniques guidelines	11/15/93
Finalize sulfur dioxide allowance opt-in-regulation - combustion sources	05/15/92
Publish final acid deposition standards study	11/15/93
Final guidance for modification of major sources of hazardous air pollutants	05/15/92

(continued)

Name of rule	Statutory deadline
Final maximum achievable control technology (MACT) standards for secondary lead smelters	11/15/94
Finalize MACT standards for petroleum refineries	11/15/94
Final MACT standards for aerospace industry	11/15/94
Promulgate standards for large municipal waste combustors	11/15/91
Promulgate standards for small municipal waste combustors	11/15/92
Finalize rules for risk management plans and prevention of accidental releases of hazardous air pollutants	11/15/93
Study of emissions from electric utilities generating units	11/15/93
Nitrogen oxides New Source Performance Standards for new fossil fuel fired utilities	01/01/94
Publish surface coal mining emissions study	11/15/93
Promulgate nitrogen oxides emissions reduction rule	05/15/92
Initiate operation of allowance tracking system	05/15/92
Report to Congress: production/consumption of ozone depleting chemicals	11/15/93
Report on Acid Rain program in Canada	01/01/94
Promulgate rules for enhanced monitoring of major stationary sources	11/15/92
Promulgate chlorofluorocarbon labeling regulations	05/15/92
MACT standards for polymers and resins I	11/15/94
MACT standards for polymers and resins II	11/15/94
Medical waste incinerator rule	11/15/92
Promulgate MACT standards for printing and publishing	11/15/94
Promulgate MACT standards for asbestos	11/15/94
Promulgate MACT standards for wood furniture	11/15/94
Promulgate MACT standards for off site waste	11/15/94
Promulgate MACT standards for shipbuilding	11/15/94
Promulgate tank vessel emissions rule	11/15/92

Source: Planning Staff, Office of the Director, Office of Air Quality Planning and Standards, EPA's Office of Air and Radiation.

Major Contributors to This Report

Resources, Community, and Economic Development Division, Washington, D.C.	Allen Li, Associate Director William F. McGee, Assistant Director
Norfolk Regional Office	James R. Beusse, Evaluator-in-Charge Hamilton C. Greene, Jr., Evaluator Philip L. Bartholomew, Evaluator

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