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Reinventing the Regulatory Agenda: Conclusions from an Empirical Study of EPA's Clean Air Act Rulemaking Progress Projections

Steven J. Groseclose

Study

REINVENTING THE REGULATORY AGENDA: CONCLUSIONS FROM AN EMPIRICAL STUDY OF EPA'S CLEAN AIR ACT RULEMAKING PROGRESS PROJECTIONS

STEVEN J. GROSECLOSE*

INTRODUCTION

As part of its rulemaking process, the United States Environmental Protecting Agency (EPA) is required by executive order and statute to publish rulemaking progress projections twice yearly in the Regulatory Agenda (Agenda).[1] Federal Regulations describe this Agenda as a "summary of current and projected rulemakings, reviews of existing regulations, and Agency actions completed since the previous publication of the [A]genda."[2] The Agenda lists the major actions that have been planned, are underway, or have been completed under each statute that EPA administers.[3] Most significantly, the Agenda provides EPA's projected Federal Register publication dates of Notice of Proposed Rulemakings (NPRMs) and Final Rules. Currently, these timetables are of limited value to the public or other parties interested in participating in the rulemaking process because EPA consistently misses these dates. This Study presents the findings of, and draws conclusions from, an empirical study of the publication estimates that EPA has published in the Agenda for its Clean Air Act (CAA) rulemakings. The Study documents the extent to which EPA met these deadlines, identifies various possible causes for the documented regulatory delay, and suggests a method for transforming the Agenda into an effective quality management tool for improving and expediting the rulemaking process.

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* B.A., B.S.M.E., 1990, Rice University. J.D., 1994, University of Maryland School of Law. M.S.E., 1994, Johns Hopkins University, Department of Geography and Environmental Engineering.

1. The Agenda reporting requirements apply to all agencies of the federal government, 5 U.S.C. § 602 (1988), but this analysis focuses solely on EPA.

2. 57 Fed. Reg. 52,024 (1992).

3. 5 U.S.C. § 602 (1988).

The results of this Study can be applied in two ways. First, they serve as a rough "user's guide" to the Agenda—specifically to its Clean Air Act section. Currently, the Agenda provides the only readily accessible source of rulemaking scheduling information. For members of the general public not "plugged in" to regulatory circles, probing the bureaucracy for the status of even a single rulemaking can be a resource-intensive endeavor beyond the patience and means of many.[4] This Study attempts to place the Agenda's information in perspective in order to improve its utility.

Second, this Study's results reveal the pervasive acceptance of unrealistic rulemaking targets by EPA, the President, and Congress. Chronic regulatory delay and unrealistic Agenda information are symptoms of complex problems in the regulatory bureaucracy. By publishing consistently inaccurate dates in the guise of reliable estimates, EPA has imposed a veil of deception over the rulemaking process that not only impairs public and private participation, but creates needless public mistrust of the regulatory system.

An improved Agenda would serve as a useful information disclosure document and measurement tool. It could help to explain and improve the administrative rulemaking process and mitigate delays. Currently, no EPA document compiles information sufficient to hold any of the players accountable for the delays routinely experienced. As accountability is obscured, so are solutions to persistent problems that perpetuate administrative ineffectiveness. As the executive branch proceeds with its heralded campaign to "Reinvent Government,"[5] demands for greater accountability through information disclosure should become an attainable goal. The Agenda could be modified into a powerful quality management[6] tool, providing a reliable means of performance measurement to guide improvement of the administrative process.

The publication of this Study's empirical data generates questions not adequately answerable through the summary information provided in EPA's Agenda. To account for the many conceivable causes of missed target dates and deadlines, EPA must more realisti-

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4. Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY 113, 122 (1992) (analyzing rulemaking delay through the study of data attained through Freedom of Information Act requests).

5. "Reinventing Government" is the unofficial term for Vice President Gore's National Performance Review initiative, a government reform initiative aimed at reducing government waste and delay. *See generally* NATIONAL PERFORMANCE REVIEW: FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS (1993) [hereinafter NATIONAL PERFORMANCE REVIEW].

6. *See infra* notes 153-162 and accompanying text.

cally assess its rulemaking process. The Study does not purport to reach conclusions about EPA's internal procedures or the greater environmental political arena. Instead, it seeks to demonstrate the need for accurate information with regard to EPA rulemaking. It focuses on the Agenda's potential for use as a public information disclosure document. Part I traces the historical evolution and purposes behind the Regulatory Agenda; Part II describes the study and summarizes its particularly pertinent findings; Part III identifies the systemic causes of regulatory delay; and finally, Part IV describes the Agenda's role in sustaining bureaucratic delay and discusses the possibility of its reform. A summary of the complete results of the Study is included in an appendix. This Study exposes the limited utility of the information currently provided in the Agenda, but concludes that the Agenda could be transformed from a semi-annual bureaucratic ritual into a beneficial measurement tool.

I. EVOLUTION AND PURPOSE OF THE REGULATORY AGENDA

The Regulatory Agenda has been published in its present form since 1980. It was shaped by a Carter Administration Executive Order,[7] a federal statute which partially codified the Order,[8] and a Reagan Administration Executive Order that modified the requirements of the statute.[9] These reforms reflected a growing perception that the federal bureaucracy was becoming unwieldy. The Carter Administration's primary concern was for efficiency and equity in the administration of the burgeoning federal regulatory system vis-à-vis the public.[10] Congress and the Reagan Administration shifted the emphasis towards efficiency and equity with regard to small businesses and organizations.[11] The Agenda was to provide interested parties with the advance notice necessary for public oversight of regulatory activities.[12] Contemporaneously, executive, congressional, and judicial oversight were competing to influence the rulemaking process.[13]

President Carter initiated the publication of a "Semiannual Agenda of Regulations" with Executive Order 12,044 in 1978.[14] In

7. Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (1978).
8. *See* 5 U.S.C. §§ 601-612 (1988).
9. Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 (1988).
10. *See* Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (1978).
11. See 5 U.S.C. § 601 (1988).
12. *See id.* § 602.
13. *See id.* §§ 601-612.
14. Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (1978).

general, the Order emphasized the adoption of "procedures to improve existing and future regulations."[15] The economy, individuals, public and private organizations, and state and local governments were to be spared unnecessary burdens.[16] Section 1(c) stated that the efficient regulatory process must ensure the opportunity for "early participation and comment" by agencies, governments, businesses, organizations, as well as individual citizens.[17]

The first of five procedural reforms contained in the Order was the requirement that a Semiannual Agenda of Regulations be published "[t]o give the public adequate notice . . . of significant regulations under development or review."[18] Rulemaking schedules per se were not required; information describing and noting the status of an agency action was sufficient.[19] The publication requirement was limited to "significant regulations," which were to be identified through criteria established by each agency based on the burdens and effects of the regulations on individuals, state and local governments, and businesses and organizations.[20]

While Executive Order 12,044 was still in effect, Congress passed the Regulatory Flexibility Act (RFA) in September of 1980.[21] The RFA identified October and April as the months in which agencies

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15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* The other four specific reforms contained in the Order included: (1) agency head oversight of significant regulations; (2) opportunity for public participation through a variety of means including publication of advanced notice of proposed rulemaking, open conferences and public hearings, media publication, and direct notification; (3) approval of significant regulations by agency heads before comment is solicited; and (4) specific criteria for determining whether a regulation is significant. *Id.* Section 3 also required the preparation of a Regulatory Flexibility Analysis for significant new regulations. *Id.*

19. *See id.*

> At a minimum, each published agenda shall describe the regulations being considered by the agency, the need for and legal basis for the action being taken, and the status of regulations previously listed on the agenda. Each item on the agenda shall also include the name and telephone number of a knowledgeable agency official and, if possible, state whether or not a regulatory analysis will be required.

Id.

20. *Id.* According to § 2(e) of Executive Order 12,044, the criteria for determining significant regulations included: "(1) the type and number of individuals, businesses, organizations, State and local governments affected; (2) the compliance and reporting requirements likely to be involved; (3) direct and indirect effects of the regulation including the effect on competition; and (4) the relationship of the regulations to those of other programs and agencies." *Id.*

21. 5 U.S.C. §§ 601-612 (1980).

were to publish Agendas each year.[22] It also made the Agenda publication requirement applicable only to rules "likely to have a significant economic impact on a substantial number *of small entities*," rather than on the range of entities included in the Carter Order.[23] For applicable rulemakings, the information requirements were similar to, although more specific than, those in Executive Order 12,044. A significant additional requirement was the mandate to include an "approximate schedule" for completing the action.[24]

The RFA focused on the impacts of regulation on small businesses and organizations.[25] It required that a copy of each Agenda be transmitted to the Chief Counsel of the Small Business Administration for comment.[26] In addition, the RFA required each agency to issue both notice of the Agenda and a solicitation of comments to the community of "small entities."[27]

Although the language of the RFA is aimed at small *business* entities, its legislative history reflects a continued interest on the part of Congress in achieving Executive Order 12,044's goal of broad participation in the regulatory process:

> The purpose of the "Regulatory Flexibility Act" is to encourage federal agencies to utilize innovative administrative procedures in dealing with individuals, small businesses, small organizations, and small governmental bodies that would otherwise be unnecessarily adversely affected by federal regulations . . . . This is a goal President Carter has also called for in his Executive Order on Improving Government Regulations (Executive Order 12,044).[28]

In fact, the legislative history indicates that the public participation provisions of Executive Order 12,044 were actually narrower than those of the RFA:[29]

> [T]he committee believes that S. 299 [the Senate bill which was ultimately ratified] would not conflict with the Executive

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22. *Id.* § 602(a).

23. *Id.* § 601(a)(1) (emphasis added).

24. *Id.* § 602(c)(2). Specifically, the RFA required the Agenda to contain a description of the rule's subject area, a summary of the nature of the rulemaking, its objectives and legal basis, an agency contact name and phone number, and an "approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking." *Id.* § 602(a).

25. *See id.* §§ 601-612.

26. *Id.* § 602(b).

27. *Id.* § 602(c).

28. S. REP. NO. 96-878, 96th Cong., 2d Sess. (1980).

29. *Id.*

> Order and does not represent a duplication of objectives. S. 299 would supplement and strengthen the Order in several ways, notably by *improving public participation* and providing for the assessment of alternative regulatory strategies in light of their impact on small concerns.[30]

On its face, the RFA's notice requirement is merely a courtesy to small businesses. Since no independent purpose was given for the publication requirement, it may be inferred that publication was designed to facilitate the achievement of the broader goals of the RFA. Under the Act, the listing of an item in the Agenda neither restricts nor mandates agency action.[31] This lack of obligation, combined with subsection (a)(2)'s soft requirement to provide an "*approximate* schedule," provides no inherent credibility to the dates listed.[32] For any rulemaking which does not have a significant impact on "small entities," the publication of even an approximate schedule is completely voluntary.

Although President Reagan's Executive Order 12,291 specifically revoked Executive Order 12,044,[33] the Regulatory Flexibility Act and its incorporation of the goals of Executive Order 12,044 remain in effect. Moreover, Executive Order 12,291 expanded the types of rulemakings covered under the limited RFA agenda requirement to include "proposed regulations that the agency has issued or expects to issue."[34] The Order provides that adhering to the general RFA agenda requirements would satisfy its mandate,[35] but requires that a broader range of agency activities, including existing agency regulations, be listed.[36] The schedules remain approximations,[37] and the Order expressly precludes the creation of legally enforceable rights in its contents.[38]

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30. *Id.* (emphasis added).

31. 5 U.S.C. § 602(a) (1988). "Nothing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda, or requires an agency to consider or act on any matter listed in such agenda." *Id.*

32. *Id.* § 602(a)(2) (1988) (emphasis added).

33. Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601.

34. *Id.* The most significant aspect of Executive Order 12,291 is its requirement that a Regulatory Impact Analysis (RIA) be prepared for each proposed "major rule." An RIA is essentially a cost-benefit analysis that emphasizes the burden of the economic costs of regulation. A "major rule" is defined with respect to economic impacts as any rule likely to have "an annual effect on the economy of $100 million or more." *Id.* § 1 (b)(1).

35. *Id.* § 5(a).

36. *Id.* § 5.

37. *Id.* § 5(a)(1).

38. *Id.* § 9 ("This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or

The existence of other legally enforceable rights associated with the information in the Agenda is uncertain. To date, there are no reported judicial decisions concerning government liability for information in the Agenda. The President can make compliance with the mandates of an Executive Order expressly unenforceable by the public, as can Congress by statute. A private party, however, could potentially seek a judicial remedy for an action taken in reliance on the official Agenda estimates published in the Federal Register. It is conceivable, for example, that a business or public interest group whose interests have been compromised could make a colorable argument.[39] But the potential value of the Agenda is not related to justifying questionable litigation. Instead, it is related to participation in administrative rulemaking and efficient management of the rulemaking process.

Because the Agenda publication requirement is the product of an executive order in which no express legal rights are conferred on the public, the practical value of the Agenda's information is best reflected in agency interpretation and practice since its inception. The Regulatory Agenda Notice section of the November 1992 Agenda states EPA's interpretation of the Agenda's purpose:

> By providing the public with current and advance information about pending regulatory activities, the Agency hopes to encourage more effective public participation in the regulatory process . . . . The Agency has attempted to list all regulations and regulatory reviews except those considered as minor, routine, or repetitive actions. There is no legal significance to the inadvertent omission of an item from the listing. The Agenda reflects dates for actions on each item; these dates are honest estimates but should not be construed as an Agency commitment to act on or by the date shown.[40]

According to both executive order and statute, the information in the Agenda is intended to provide useful information for the

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procedural, enforceable at law by a party against the United States, its agencies, its officers or any person.").

39. A simplified example might involve a small business that decides to forego installation of emissions recovery equipment with a three year return on investment in reasonable reliance upon Agenda projections that a new rule affecting such projects, mandating an as yet undetermined standard will be promulgated within three years. If the rule is published several years late, the business might be able to claim lost profits incurred from foregoing the modification in reliance on EPA's estimates. A court could find that EPA should have reasonably expected affected parties to take such action in reliance on the official Federal Register publication.

40. 57 Fed. Reg. 52,024 (1992).

regulated community as well as for the general public. While "honest estimates" regarding deadlines are all that can be realistically expected from EPA, the empirical data in this Study suggest honesty has become a forgotten standard.

II. SUMMARY OF THE EMPIRICAL STUDY

A. Description of the Database

The Study is based on data on informal rulemakings[41] taken from the Clean Air Act (CAA) section of the seven Agendas published for the three-year period from October 1989 through October 1992. The CAA section was chosen because the Office of Air and Radiation, which implements the CAA, has been one of the most prolific EPA rulemaking offices. Three years of Agenda information provided a sufficiently large, yet manageable amount of data for a preliminary study. These three years of implementation of the CAA are an especially significant period in the evolution of the administration of environmental law. During that time, EPA grappled with the tremendous requirements of the Clean Air Act Amendments (CAAA), enacted November 15, 1990.[42] The data reflects one year of relative calm before the enactment of the CAAA and two years of preparation and implementation of its requirements.

B. Empirical Results

The following summary of empirical results demonstrates the predictable inaccuracy of information in the Agenda as well as the existence of more pervasive problems in the rulemaking process. More detailed results of the Study, including analyses of additional parameters, appear in the appendix.

The Agenda gives estimated publication dates for NPRMs[43] and final rules.[44] This Study reveals that these publication dates are unlikely to be honored. With regard to NPRMs, EPA revised over eighty percent of all estimates for NPRM publication.[45] The revised publication dates were on average almost six months later than the

41. Informal rulemakings are agency actions subject to the normal notice and comment rulemaking procedures of the Administrative Procedure Act. 5 U.S.C. § 553 (1988).

42. Pub. L. No. 101-549, 104 Stat. 2399 (1990).

43. 57 Fed. Reg. 52,024 (1992).

44. *Id.*

45. App. Part I.A.1.

previous publication dates.[46] Moreover, EPA failed to meet eighty-six percent of all estimated NPRM publication dates.[47] On average, EPA missed the dates by almost five months.[48]

EPA's estimated dates for publishing final rules were just as unreliable as those for NPRMs, even though rules at this stage are more mature and their futures presumably more predictable. EPA revised over eighty percent of all estimates for final rule publication.[49] The revised publication dates were on average almost six months later than the previous publication dates.[50] On average, EPA missed the dates by nearly four months.[51]

The findings also demonstrate that congressional reliance on statutory deadlines as a means of controlling rulemaking priority is ineffective. Forty-four percent of the rulemakings were subject to such deadlines, but their publication dates were postponed and missed about as frequently as the publication dates for rulemakings without deadlines.

EPA must acknowledge that the dates listed for the vast majority of rulemakings in any given Agenda are not realistic estimates. Given that listing unrealistic target dates has been ineffective in stimulating expedited rulemaking, EPA must undertake to produce more reliable Agendas that might at least function as useful information disclosure documents and measurement tools.

III. SYSTEMIC CAUSES OF REGULATORY DELAY

This Study quantifies what those involved with rulemaking have recognized for years: "the rulemaking process has become increasingly less effective and more time-consuming."[52] Institutionalized delay

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46. *Id.*
47. *Id.*
48. *Id.*
49. App. Part I.A.2.
50. *Id.*
51. *Id.*
52. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES COMMITTEE ON RULEMAKING, IMPROVING THE ENVIRONMENT FOR AGENCY RULEMAKING 1 (1993) [hereinafter ADMINISTRATIVE CONFERENCE]. In another study, Professor Jerry L. Mashaw viewed this common perception as one of the assumptions underlying administrative failure. He "indulge[d] the view that rulemaking is currently so difficult and time-consuming that agencies fail to accomplish missions (either of a regulatory or deregulatory sort) that are worth doing." JERRY L. MASHAW, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, IMPROVING THE ENVIRONMENT OF AGENCY RULEMAKING: AN ESSAY ON MANAGEMENT, GAMES, AND LEGAL AND POLITICAL ACCOUNTABILITY 3 (1993). *See also* Kerwin & Furlong, *supra* note 4, at 115 (describing regulatory delay as "staggering" and "a fundamental impediment to the functioning of regulatory agencies").

can be attributed both to internal factors in EPA's structure and management and to external factors such as executive, congressional, and judicial oversight.[53] Although the Administrative Procedure Act (APA) outlines a clear scheme for expeditious informal rulemaking,[54] its simplicity has become obscured by the continual and often competing influences of all three branches of the federal government.[55] This additional complexity has led many commentators to question the purported superiority of the APA rulemaking process as it is now practiced over the case-by-case adjudication that it supplanted in most agencies.[56] The literature thoroughly explores potential causes of the pervasive delay. Professor Jerry L. Mashaw, for example, described a recent issue of *Law and Contemporary Problems*, critiquing EPA's performance after twenty years, as "a 374-page orgy of hand-wringing concerning EPA's rulemaking performance."[57] This Part of the Study discusses the principal sources of regulatory delay, focusing on the effect that executive, congressional, and judicial branch oversight has on internal agency practices. The following discussion is intended to place the problem in perspective. The available data on regulatory delay is insufficient to merit further theorizing beyond the current literature; rather it highlights the need for a unified approach.

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53. MASHAW, *supra* note 52, at 2. In his study, Professor Mashaw stated that "the rulemaking process in all administrative agencies is shaped by the interaction of the agency's internal and external environment." *Id.* For his analysis, Mashaw assumed that the external environment dominates this relationship. *Id.* He qualified this assumption by noting that it is controversial. *Id.*

54. 5 U.S.C. § 553 (1988). The APA requirements include public notice of proposed rulemakings and an opportunity to submit comments that the agency must consider.

> (2)(b) General notice of proposed rule making shall be published in the Federal Register . . . .
>
> (2)(c) After notice . . . , the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

Id.

55. Thomas O. McGarity, *Some Thoughts on 'Deossifying' the Rulemaking Process*, 41 DUKE L.J. 1385, 1396-98 (1992). Professor McGarity attributes the complexity of the rulemaking process to four factors: (1) the notice and comment procedure has worked so well that factions are able to mobilize; (2) informal rulemaking has developed during a period of intense competition between Congress and the President for control of policy; (3) the modern complexity of rulemaking has grown beyond the resources of agencies to apply their expertise; and (4) the informal rulemaking process has developed during a period of intense public distrust. *Id.* at 1397-98.

56. *See id.* at 1398.

57. MASHAW, *supra* note 52, at 8.

A. Executive Branch Review

Although executive review in some form is essential for coordinating the vast federal environmental rulemaking structure, the current process of review has been criticized for its secrecy and potential to displace agency authority.[58] Currently, the Office of Management and Budget (OMB) functions as the primary executive oversight apparatus in the rulemaking process.[59] OMB derives its rulemaking authority from two principal executive orders: Executive Order 12,291 requires EPA to submit proposed rules to OMB for approval;[60] Executive Order 12,498 requires EPA to submit the annual regulatory program to OMB for its supervision.[61] These orders were intended

> to ensure consistency and coordination of the regulatory process, to increase the authority of agency heads over their staffs by bringing matters to political attention at an early stage, to ensure that the regulatory program is both subject to public scrutiny and conducted consistently with the political objectives of the administration, and to promote political accountability over the regulatory process by increasing the power of those close to the President.[62]

In practice, these Executive Orders function as an awesome source of power for OMB to modify or supplant EPA's regulatory priorities and force changes in the regulations.[63] University of Chicago Law Professor Cass Sunstein believes that although OMB review is capable of addressing some systemic problems in the regulatory structure, it may increase the "power of private groups with disproportionate access to OMB officials."[64] As one congressional staffer explained: "[R]egulatory review has 'provided industry with an opportunity to review, comment on, delay, and change EPA actions behind closed doors. The public has not been afforded this opportunity and consequently faces industry-influenced and weakened

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58. *See generally* Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS. 127 (Autumn 1991).

59. Exec. Order No. 12,291, 3 C.F.R. 127 § 6 (1981), *reprinted in* 5 U.S.C. § 601.

60. *Id.*

61. Exec. Order No. 12,498, 50 Fed. Reg. 1036 (1985).

62. Cass Sunstein, *Factions, Self-interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 294 (1986).

63. *Clean Air Act Implementation (Part 2): Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 328 (1991) [hereinafter *Hearings (Part 2)*] (testimony of Professor Robert V. Percival).

64. Sunstein, *supra* note 62, at 294.

guidelines, regulations, and standards difficult to modify.'"[65] This lack of public accountability "may also increase rather than diminish the dangers of self-interested representation and factional tyranny."[66]

Even benign OMB review adds time to the rulemaking process.[67] According to Professor Mashaw, the effect of executive/OMB oversight amounts simply to "delays and displacements."[68] Moreover, OMB priorities may conflict with those of EPA, resulting in slow review of the rulemakings that EPA considers high priority. Case histories of OMB-derived delay in the rulemaking process are well documented.[69] EPA estimated the OMB component of rulemaking delay to be 50 to 100 days per regulation in 1984 and 1985.[70] OMB's power to kill rulemakings through delay has led critics to label the review process a "black hole."[71]

Another problem with executive oversight is its timing. Identifying problems late in the rulemaking process necessarily causes greater delays than if problems were discovered at an early stage. The Administrative Conference of the United States has recommended that agencies involve executive oversight bodies early in the rulemaking process to more effectively coordinate the comment process and expedite final executive review.[72] Professor Sunstein has recommended that a deadline be included in the review process to confront the history of delay.[73]

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65. Percival, *supra* note 58, at 170 (quoting *Office of Management and Budget Plays Critical Part in Environmental Policymaking, Faces Little External Review*, 7 Env't Rep. (BNA) 693, 695 (1976)). The current criticism of regulatory review has become even more polar and rhetorical. Congressman Waxman made the following comment in an oversight hearing regarding former Vice President Quayle's Council on Competitiveness: "In many ways, the council, which apparently thinks itself beyond public accountability and beyond the law of the land, is a domestic version of the Iran-Contra operations of the National Security Council during the Reagan era." *Hearings (Part 2), supra* note 63, at 1 (testimony of the Hon. Henry A. Waxman, Chairman, Subcomm. on Health and the Environment). Congressman Sikorski referred to the council as a "special secret court for special interests." *Id.* at 11 (testimony of Mr. Sikorski).

66. Sunstein, *supra* note 62, at 294.

67. ENVIRONMENTAL AND ENERGY STUDY INSTITUTE AND THE ENVIRONMENTAL LAW INSTITUTE, STATUTORY DEADLINES IN ENVIRONMENTAL LEGISLATION: NECESSARY BUT NEED IMPROVEMENT 32 (1985) [hereinafter ENVIRONMENTAL STUDY].

68. MASHAW, *supra* note 52, at 20.

69. *See* Percival, *supra* note 58, at 157. Professor Percival has noted that the "'clearest impact of the regulatory management process has apparently been in slowing down rulemaking activity.'" *Id.* (quoting NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, PRESIDENTIAL MANAGEMENT OF RULEMAKING IN REGULATORY AGENCIES 7 (1987)).

70. *Id.* at 158.

71. McGarity, *supra* note 55, at 1431.

72. ADMINISTRATIVE CONFERENCE, *supra* note 52, at 8.

73. *Hearings (Part 2), supra* note 63, at 293 (testimony of Prof. Cass R. Sunstein).

The substance of executive oversight extends well beyond the cost-benefit analysis required by Executive Order 12291. Rulemakers must assess a proposed regulation's impacts on trade, federalism, and family values.[74] In addition, a separate analysis must consider whether the proposed regulatory burdens potentially violate the Takings Clause of the Fifth Amendment.[75] These reporting requirements often displace EPA resources from other priorities. They create a drain on budget and manpower resources that has translated into delay and less effective regulations.[76] In fact, the resultant deceleration of the rulemaking process prompted the Administrative Conference formally to recommend to the President that "[w]hile the Unified Agenda of Regulations is a useful tool and should be preserved, the number of extra-APA analytical requirements should be kept to a minimum."[77]

B. Legislative Overburdening

The legislative branch has exerted tremendous pressure on the rulemaking process that distorts priorities and prevents realistic agenda setting and deadline compliance.[78] Criticism of direct and

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74. McGarity, *supra* note 55, at 1407. Professor McGarity lists the executive branch requirements beyond the Executive Order 12,291 cost-benefit analysis:

> Executive Order 12,291 requires them to analyze the 'trade' impact of regulations; Executive Order 12,612 requires them to analyze the impact of individual regulations on 'federalism;' and Executive Order 12,606 requires them to consider 'family' policy making criteria in promulgating regulations. . . . However, these requirements have not proven especially burdensome because they have not been vigorously enforced. Agency officials tend to regard them as 'paperwork' requirements that, although having little or no relevance to the decisionmaking outcome, bog down the process with additional documents and intra-agency sign-offs. Although the prospect of preparing . . . federalism analyses has probably never caused an agency to abandon a rulemaking initiative, such analyses are nevertheless additional extra-statutory hurdles that burden the process and inspire rulemaking avoidance techniques.

Id.

75. *Id.*; Executive Order 12,630.

76. *Id.* at 1406. Average costs during the 1980s were approximately $100,000 and as high as $2 million. *Id.*

77. ADMINISTRATIVE CONFERENCE, *supra* note 52, at 3.

78. Professor Percival has capsulized the long standing congressional inertia:

> The action-forcing structure of the environmental laws has constrained EPA's flexibility from the start. Beginning with the Clean Air Act in 1970, statutory deadlines, technology-forcing regulatory mandates, and citizen suit provisions in the laws have restricted the agency's ability to decide what to regulate and how to regulate it. Despite the acknowledged inefficiencies of this approach, its proponents argued that it was justified on the ground that a national assault on long-neglected environmental problems had to be jump-started to achieve success.

indirect legislative disruption of the rulemaking process includes complaints of too many requirements in enacted legislation, numerous and unrealistic statutory deadlines attached to those directives, inadequate funding to meet excessive burdens, and costly and overintrusive oversight of implementation.[79] "While overpromising, underfunding and contributing to analytic overkill in its legislation, the Congress' oversight activities seem directed primarily at chastising agencies for the slow pace of their regulatory efforts."[80]

The complexity of factors and lack of raw data shrouds the true congressional contribution to delay.[81] One identifiable factor, however, stems from the substantive legislative requirements that are not matched with the budgetary funding necessary for EPA to attend to its ever-increasing agenda. The statutory deadline is one type of legislative requirement that stands out from other mandates because of its seductive simplicity and drastic effect.[82] While the deadline is universally recognized as an effective management tool, improper use and overuse by Congress has nearly destroyed the efficacy of this legislative tool.[83] Although the overuse of deadlines has been identified as a major obstacle to efficient EPA rulemaking, their use, as demonstrated by the CAAA,[84] has not diminished.[85] In fact, the Administrative Conference of the United States found in 1985 that "strict legislative time limits on rulemaking, while understandable, . . . have often proven to be unrealistic and have resulted in either hasty rules or missed deadlines that undermine respect for the rulemaking process."[86]

Percival, *supra* note 58, at 174. *See generally* Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves)?*, 54 LAW & CONTEMP. PROBS. 205 (Autumn 1991).

79. *See generally* MASHAW, *supra* note 52; McGarity, *supra* note 55.

80. MASHAW, *supra* note 52, at 22. But Professor McGarity has warned that "[t]he potency of *ad hoc* review by interested committees through agency oversight and appropriations hearings . . . should not be understated." McGarity, *supra* note 55, at 1427.

81. MASHAW, *supra* note 52, at 51 ("Congress' power to hassle administrators and to claim credit with constituents for intervening with the bureaucracy is legendary, but there is virtually no hard data on the degree to which this external political force is a major impediment to effective rulemaking activity.").

82. The Administrative Conference also has chided Congress for imposing extra-APA requirements on rulemakers such as the RFA's required analysis of rules' effects on small businesses. ADMINISTRATIVE CONFERENCE, *supra* note 52, at 4.

83. *See generally* ENVIRONMENTAL STUDY, *supra* note 67.

84. App. Part I.B.1.

85. Between 1970 and 1980, for example, 328 statutory deadlines appeared in the enacted federal environmental laws. *Id.* at 11.

86. ADMINISTRATIVE CONFERENCE, *supra* note 52, at 3-4.

Despite such cautions from respected government entities, Congress has either failed to grasp the importance of rationing its use of deadlines and other mandates or has intentionally continued to demand more than is possible from an agency whose resources are already spent.[87] The CAAA oversight hearings provide a vivid example of the problem. The CAAA required fifty-five rulemakings and thirty guidance documents to be promulgated within two years—an increase by a factor of five over previous air program activities.[88] During that period, however, funding for the air program increased only sixty-six percent.[89] Congressman Lent indicated during a CAAA oversight hearing that congressional willingness to over-burden EPA stemmed from a lack of trust in the agency's ability to move forward without the threat of deadlines.[90] He described Congress' motto as "'keep EPA's feet to the fire.'"[91] Congressman Bliley, to the contrary, confessed a more basic lack of congressional understanding:

> [W]hile Congress [was] patting itself on the back for a job well done and enjoying the holidays, our friends at EPA were left with the almost thankless task of sorting out the thousands of directives and deadlines issued to them by this body . . . . I must confess that, during the many hours of debate and negotiation in Congress, the question, 'How can we write the bill so that EPA can implement the measures properly,' was never asked.[92]

Congressman Bliley's confession was followed by six days of intense oversight hearings in which Congress consistently attacked EPA and the executive branch, nit-picking over the accounting of missed deadlines, but rarely pointing a finger at Congress itself.[93]

This single set of hearings represents just one example of many similar hearings to which EPA managers must respond each year.[94]

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87. Professor McGarity, on the other hand, believes that deadlines necessarily force the process forward. According to his view, "[t]he net result of all the . . . procedural, analytical, and substantive requirements is a rulemaking process that creeps along, even when under the pressure of statutory deadlines. In the absence of deadlines, the process barely moves at all." McGarity, *supra* note 55, at 1436.

88. *Hearings (Part 2)*, *supra* note 63, at 13 (testimony of Hon. William K. Reilly, Administrator of the Environmental Protection Agency).

89. *Id.* at 72.

90. *Id.* at 518 (testimony of Mr. Lent).

91. *Id.*

92. *Id.* at 3-4 (testimony of Mr. Bliley).

93. *See id.*

94. Professor Lazarus identified the most remarkable statistic: "From 1971 to 1988, EPA officials appeared before each Congress between ninety-two and 214 times, testifying

The fact that eleven House and nine Senate committees with up to 100 combined subcommittees have jurisdiction over EPA demonstrates the potential for overkill. The tremendous number of oversight hearings that EPA must prepare for is a severe drain on the Agency's staff and budget, diverts resources away from the rulemaking process, and causes further delay.

C. Judicial Review

The judiciary has had significant effects on the rate of development of regulations—both directly through the imposition of judicial deadlines and indirectly by affecting the climate of agency rulemaking through its interpretations of environmental legislation and the APA. The ability of the courts to destroy years of rulemaking effort through a single decision has made EPA extremely sensitive to the judicial process.[95] This Study's empirical results indicate greater agency responsiveness to judicial deadlines than statutory deadlines.[96] Although this resulting disproportionate attention achieves the immediate goal of expediting the few rulemakings subject to judicial deadlines, disproportionate costs may result as resources are shifted away from other agency priorities.[97] Thus, judicial action represents a third often hostile force confronting EPA in its rulemaking activities.[98]

The expectation of stringent scrutiny after promulgation of a rule causes agencies to take a defensive position from the beginning of the rulemaking process.[99] Extra personnel hours and resources are expended developing ultra-defensible records, and decisionmakers scrutinize each progressive step of the tortuous process.[100] Rulemaking decisions are not based simply on EPA's fundamental technical expertise, but also on EPA's perception of the courts' likely

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on 142 occasions in the first session of the 101st Congress alone." Lazarus, *supra* note 78, at 212.

95. One commentator has concluded simply that "the impact of court decisions on EPA is problematic. Compliance with court orders has become the agency's top priority, at times overtaking congressional mandates and threatening representative democracy." MASHAW, *supra* note 52, at 18 (quoting Rosemary O'Leary, *The Impact of Federal Court Decisions on the Policies and Administration of the U.S. Environmental Protection Agency*, 41 ADMIN. L. REV. 549 (1989)).

96. App. Part I.B.2.

97. MASHAW, *supra* note 52, at 18.

98. "The evolving scope of judicial review of agency rules, along with the timing of most judicial review of rules at the preenforcement stage, has resulted sometimes in overly intrusive review." ADMINISTRATIVE CONFERENCE, *supra* note 52, at 4.

99. *Id.*

100. MASHAW, *supra* note 52, at 19. *See also* McGarity, *supra* note 55, at 1387.

reactions. A history of erratic judicial review of technical issues has created significant uncertainty within EPA. Because of the complex and technical nature of many judicial challenges, agencies perceive the courts as unprepared to issue consistent rulings reflecting the agencies' technical expertise.[101]

Perhaps the most alarming effect of judicial activity on the rulemaking process is its pervasive influence on the government, from legislation through implementation. Shep Melnick's study of judicial review of Clean Air Act rulemakings concluded that courts have a detrimental effect on the rulemaking process:

> Taken as a whole, the consequences of court action under the Clean Air Act are neither random nor beneficial . . . . Court action has encouraged legislators and administrators to establish goals without considering how they can be achieved, exacerbating the tendency of these institutions to promise far more than they can deliver. The policymaking system of which the federal courts are now an integral part has produced serious inefficiency and inequities, has made rational debate and conscious political choice difficult, and has added to frustration and cynicism among participants of all stripes.[102]

Moreover, the judiciary can play only a limited role in solving pervasive problems of the administrative process.[103] As Professor Sunstein has noted, the drafters of the APA may have believed that problems in the administrative process "were isolated anomalies subject to judicial remedy, [but] the most important problems are structural or systemic in character."[104] The inability of the courts to police the administrative process forces reliance on other means of supervision. Public scrutiny is one available means of supervision, but it is only as strong as the amount and quality of the available information.

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101. McGarity, *supra* note 55, at 1417 (noting that "the fact that nearly all of EPA's first round [Clean Water Act] . . . technology based standards resulted in remands on one or more technical issues, [which] had a profound impact on the agency").

102. MASHAW, *supra* note 52, at 18 (citing R. MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 345 (1983)).

103. *See* Sunstein, *supra* note 62, at 292.

104. *Id.* (footnote omitted). "This phenomenon of 'government failure' parallels the 'market failure' that often gives rise to a regulatory scheme in the first instance." *Id.*

D. EPA's Rulemaking Environment

EPA's rulemaking environment is a product of external pressures from the three branches of the federal government as well as numerous manifestations of the public interest. Internal reaction to these varied influences is a principal focus of the literature on regulatory delay.[105] EPA's independence and authority have eroded as resources have been used to achieve the goals of entities other than the agency itself. As a result of pervasive statutory requirements and increased judicial control, more than eighty percent of EPA's major decisions are made by courts or in formal negotiated settlements.[106] In addition, EPA officials, who spend ninety percent of their time in courts and congressional hearings defending their actions, have little time to contribute to making thoughtful, deliberative decisions.[107] Instead, they are forced to spend the remainder of their time disproportionately on a few issues to satisfy the various supervising bodies.[108]

The rulemaking goals of EPA managers have been reshaped in reaction to this environment. Survival of review has become the overarching management goal: "The job of EPA's managers is to shepherd the rulemaking process along in an efficient way to produce rules that will survive judicial and political review."[109] Moreover, the prospects of surviving review and promulgating regulations in such an atmosphere instill a pervasive hesitance in the process.

Each rulemaking is attended to by personnel from various offices throughout EPA, and the goals of the individuals within a workgroup are often divergent.[110] Professor McGarity's survey of EPA employees' priorities revealed the wide variety of objectives among EPA

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105. The Administrative Conference has recommended "Internal Agency Management Initiatives" to expedite the rulemaking process: "Senior agency staff should develop management strategies to set priorities and track agency rulemaking initiatives, to achieve more rapid internal clearances of proposed and final rules, to develop reasoned analysis and response to significant issues raised in public comments, to manage the rulemaking file (and associated requests for access to it), and to use appropriate advisory or negotiated rulemaking committees." ADMINISTRATIVE CONFERENCE, *supra* note 52, at 8 (footnote omitted).

106. Lazarus, *supra* note 78, at 355 (footnotes omitted).

107. *Id.*

108. *Id.*

109. Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROBS. 57, 62 (Autumn 1991).

110. *Id.* at 76-86.

officers.[111] It demonstrated, for example, that timely promulgation was significantly more important to the Program Office than to other offices.[112] More importantly, Professor McGarity identified a strategic use of the differing attitudes toward timeliness: because not all offices must account internally for delays, some workgroup members can use delay tactics to force concessions from other members.[113]

Furthermore, the general lack of direction that EPA has experienced has detrimentally affected the confidence of agency employees.[114] The constant pressure of deadlines and the inevitable failure to meet them is demoralizing, and increased delay is often the result.[115] The personnel who grind through the rulemaking process are generally dedicated to the agency's mission, but may at the same time have conflicting personal objectives.[116] In addition, they frequently decide to conduct "further study" resulting in further delay because they know that any decision that EPA makes is likely to be attacked by some interest group or government body.[117]

IV. THE AGENDA'S ROLE IN AN EVOLVING BUREAUCRACY

The gross inaccuracy of Agenda progress estimates is significant on two levels. First, it signals the existence of an unknown number of problems and causes of delay in the administrative process. Second, the absence of credibility undermines the fundamental purpose of the Agenda—to facilitate public participation in the rulemaking process.

Improving the system would demand a detailed understanding of the problems and their causes. The complexity of contributing factors and the current lack of primary data make these determinations impossible. Some empirical analyses have attempted to correlate delay with specific causes, but the results have been inconclusive.[118]

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111. *Id.* The survey requested that employees "rank on a scale from one-to-ten the vigor with which each office represented on the workgroup pursued each of the goals." *Id.* at 77. Ten agency goals were included in the survey: (1) timeliness; (2) administrative efficiency; (3) scientific and technical credibility; (4) allocative efficiency; (5) fidelity to statute; (6) judicial review; (7) political review; (8) enforceability; (9) fairness; and (10) multimedia considerations. *Id.*

112. *See id.* at 78.

113. *Id.* at 79.

114. *See* Lazarus, *supra* note 78, at 350.

115. ENVIRONMENTAL STUDY, *supra* note 67, at 47.

116. *See* MASHAW, *supra* note 52, at 3 ("[A]ll the participants in the regulatory or rulemaking process are boundedly rational and limitedly altruistic.").

117. *See* Percival, *supra* note 58, at 194.

118. *See* Kerwin & Furlong, *supra* note 4, at 130-33 (finding that an examination of EPA rulemakings from 1986 through 1989 produced one statistical model that "confirmed"

There is currently no adequate system in place to track regulations through the tortuous rulemaking process. Certainly those who work closely with the regulations can identify various factors affecting the progress of each one, but such information has not been compiled. Until these barriers are removed, the evolution of administrative rulemaking cannot proceed.

A significant barrier to effective public participation in the administrative process is the publication of unrealistic Agenda information; "[t]imetables are useless if they are not realistic."[119] While EPA could readily produce more realistic estimates, publishing them would mean acknowledging in advance that some congressional and judicial deadlines could not be met and that powerful interest groups' favorite regulations would not get the attention sought. Yet, the Agenda is currently the most comprehensive tracking system available to the public. Its coverage of the entire range of regulatory agencies gives it great potential to effect government-wide administrative reform. But to reach its full potential, it will have to be transformed into a credible source of information and accountability and enhanced to provide the necessary details about the underlying causes of delay.

A. The APA and Resistance to Administrative Disclosure

The original APA, together with the Freedom of Information Act (FOIA),[120] represents the cornerstone efforts to force greater government accountability. Resistance to the FOIA's disclosure requirements is strong, however, and case-by-case court struggles continue to develop over individual rulemakings. Because adequate disclosure of information on the causes of rulemaking delay is unlikely under current law, congressional amendment of the FOIA or the Regulatory Flexibility Act, or modification of the Agenda's rulemaking reporting system by executive order is necessary.

Drafters of the APA were primarily concerned with "the usurpation of government by powerful private groups [and] the danger of self-interested representation [leading to] the pursuit by political actors of interests that diverge from those of the citizenry."[121]

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suspicions of OMB causation of delay in rulemaking, but two models that showed no significant effect).

119. Neil R. Eisner, *Agency Delay in Informal Rulemaking*, 3 ADMIN. L.J. AM. U. 7, 46 (1989).

120. 5 U.S.C. § 552 (1988).

121. Sunstein, *supra* note 62, at 271.

Reducing these risks is still the main goal of administrative law.[122] Information disclosure and public accountability are the most effective methods to achieve that goal.

The FOIA was incorporated into the APA in 1967 to ensure public access to government information.[123] Based on progressive ideas regarding achieving government change through disclosure and accountability,[124] it represented a broad leap in disclosure law. The FOIA includes nine exemptions,[125] which have been the focus of years of litigation regarding the extent to which disclosure is mandated.[126] Resistance to disclosure has permeated the executive branch and independent agencies.[127] The polarization of the environmental debate further impedes information disclosure;[128] parties including Congress, regulatees, environmentalists, and EPA often take extreme positions, and the common strategy of making excessive demands followed by public attacks for compromise serves to discourage disclosure.[129]

Executive implementation and judicial review of the FOIA reveal the entrenched forces of resistance. *Wolfe v. Department of Health and Human Services*,[130] for example, demonstrates the ongoing hand wringing encountered in the FOIA jurisprudence. In *Wolfe*, the

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122. *Id.* at 295.

123. BERNARD SCHWARTZ, ADMINISTRATIVE LAW 215 (3d ed. 1988).

124. *See id.* at 215-17.

> For the first time the individual was given a legally enforceable right of access to government files and documents and one not limited to those needed for litigation in an actual case. In this respect FOIA has made for a profound alteration in the position of the citizen vis-à-vis government. No longer is the individual seeking information from an agency in the position of a mere suppliant.

Id. Schwartz summarizes the policies behind the FOIA as follows:

> —that disclosure be the general rule, not the exception;
> —that all individuals have equal rights of access;
> —that the burden be on the Government to justify the withholding of a document, not on the person who requests it;
> —that individuals improperly denied access to documents have a right to seek injunctive relief in the courts; [and]
> —that there be a change in Government policy and attitude.

Id. (citing RAMSEY CLARK, U.S. DEPT. OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT, *reprinted in* PIKE & FISCHER ADMIN. L.2D STAT. 203-04 (1967)).

125. 5 U.S.C. § 552(b)(1)-(9) (1988).

126. *See generally* SCHWARTZ, *supra* note 123, at 217-23 (discussing cases stemming from FOIA disclosure disputes).

127. *See id.*

128. Lazarus, *supra* note 78, at 354.

129. *Id.*

130. 839 F.2d 768 (D.C. Cir. 1988) (en banc).

plaintiffs sought information regarding the progress of FDA actions through executive branch review by the Department of Health and Human Services (HHS) and OMB.[131] The information had been requested under the FOIA so the plaintiff could identify and challenge the causes of delay. The district court granted summary judgment in favor of disclosure[132] and a divided appellate panel affirmed.[133] A rehearing en banc resulted in a reversal allowing OMB to withhold the information,[134] but the court remained divided. Writing for the majority, Judge Bork stated that "th[e] case reflect[ed] dissatisfaction with the results of the development of formal presidential oversight of executive branch rulemaking."[135] The split of opinions and enthusiastic dissent written by the judges reflect a more general split of opinion as to the need for further disclosure. Legislation mandating further disclosure in the Agenda would not be a radical departure from the current expectations of many involved in the rulemaking process.

The rift between the majority and dissent stemmed from their divergent beliefs regarding the degree to which government operations should be conducted in a "fishbowl" exposed to public scrutiny.[136] The disagreement regarded the interpretation of Exemption 5 of the FOIA, the executive or deliberative process privilege, which prevents disclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[137] The legislative history of Exemption 5 reveals that it was enacted to ensure honest debate in agency decisionmaking by insulating the process from public scrutiny.[138] The court determined that the appropriateness of

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131. *Id.* at 769.

132. Wolfe v. Department of Health & Human Servs., 630 F. Supp. 546 (D.D.C. 1985).

133. Wolfe v. Department of Health & Human Servs., 815 F.2d 1527 (D.C. Cir. 1987).

134. Wolfe v. Department of Health & Human Servs., 839 F.2d 768 (D.C. Cir. 1988) (en banc).

135. *Id.* at 770. The plaintiffs wanted disclosure of which executive bodies were reviewing the regulations and the length of time the regulations spent in each stage. *Id.* at 771. HHS disclosed only that it maintains a log containing the information sought. *Id.*

136. *Id.* at 773. After the public relations disaster associated with the resignation of Administrator Burford, EPA Administrator Ruckelshaus embraced the term "goldfish bowl" to describe the way in which his agency would operate in order to regain public support. Percival, *supra* note 58, at 168. Ruckelshaus also declared during his first term that broad public participation would benefit the agency's efforts to win public support. *Id.*

137. 5 U.S.C. § 552(b)(5) (1988).

138. *See* S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965). The majority in *Wolfe* stated that "Congress adopted Exemption 5 because it recognized that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl." *Wolfe*, 839 F.2d at 773 (citing Mead Data Cent. Inc. v. U.S. Dep't of Air Force,

disclosure thereby turns on whether the information sought reveals "significant aspects of the deliberative process."[139]

The decision in *Wolfe* shielded from public disclosure logs indicating the length of time proposals spent at each stage of the rulemaking process.[140] The majority maintained that such information would not only identify where delay occurred, but provide clues regarding how particular agencies or departments viewed rulemaking proposals.[141] The dissenters maintained that information regarding rulemaking timing does not necessarily reveal the political positions contemplated because only a working title of the rule, not its exact content, is known before publication.[142] The dissenters maintained that the FOIA's legislative history demands a narrow construction of Exemption 5 and reasoned that, "[s]trictly construed, Exemption 5 would seem not to apply at all to a log that merely indicates receipt or transmittal of proposals. It exempts only 'memoranda or letters,' undoubtedly for the express purpose of limiting its privilege to documents which divulge agency reasoning and conclusions."[143] The dissenters additionally asserted that "[p]remature disclosure of the agencies' tentative rationales and preliminary conclusions (and factual materials to the extent that they inevitably reflect these predecisional views) is the only ground for invoking Exemption 5."[144]

The majority's fundamental resistance to public accountability was evident in its conclusion in dicta that "disclosure would force officials to punch a public time clock."[145] As noted in Judge

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566 F.2d 242, 256 (D.C. Cir. 1977).

139. *Wolfe*, 839 F.2d at 771 n.3.

140. *Id.* at 771.

141. *See id.* at 775. The majority reasoned that because a working summary of the regulation was provided in the Agenda, *id.* at 771, any indication that an action was delayed in a particular department's review process would suggest whether or not that department supported the proposed action. *Id.* at 775. But the dissent pointed out that the rulemaking process is not so clear cut: "The majority assumes a rigidified, and therefore predictable deliberation process that the record and the realities of government decisionmaking do not support." *Id.* at 777 (Wald, C.J., dissenting).

142. *See id.* at 777-78 (Wald, C.J., dissenting).

143. *Id.* at 778 n.3 (Wald, C.J., dissenting). The majority used the legislative history to support its position by noting that "[i]n accordance with the general disclosure policy of FOIA, Exemption 5 is to be construed 'as narrowly as consistent with efficient Government operation.'" *Id.* at 773-74 (quoting S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965)). In her dissenting opinion, however, Judge Ginsberg insisted that Congress intended Exemption 5 to be narrowly construed and that the court's decision strayed from that intent. *Id.* at 780 (Ginsberg, J., dissenting).

144. *Id.* at 779 (Wald, C.J., dissenting) (footnote omitted).

145. *Id.* at 776.

Ginsberg's dissent, however, similar information regarding the current status of the Internal Revenue Service's regulatory projects is published.[146] No reason exists to assume that agencies would be imperiled by disclosing similar information.

As in *Wolfe*, OMB's disclosure practices have often been the target in struggles regarding interpretation of the FOIA. In 1986, OMB enacted a disclosure policy[147] that promised disclosure, after publication of the proposed final rule, of agency head correspondence, dates of commencement and completion of review, and the drafts of regulations sent to OMB for review.[148] Information is available under the policy only upon written request.[149] The timing of its release, its relative inaccessibility to the general public, and the fact that OMB will not disclose information on rules that have not survived review reduces the utility of the policy for the public. In effect, it has amounted to little more than a weak step toward disclosure which only momentarily pacified congressional critics.

Numerous recommendations for greater disclosure have been written over the years. The debate over the disclosure of ex parte contacts, which peaked in response to the actions of the Bush Administration's Council on Competitiveness, has led to calls for information disclosure amendments to the APA.[150] In addition, the Administrative Conference has recently recommended amendments to "[e]nsure appropriate expedition, openness and transparency in the review process."[151] To effect meaningful change, however, the government must comprehensively address the entire rulemaking process, not just executive review. Specifically, it must develop a concrete method to measure and evaluate rulemaking performance from start to finish.

B. Reinventing Government

The reform of rulemaking disclosure could be handled more effectively by executive order than through congressional legislation.

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146. *Id.* at 780 n.* (Ginsberg, J., dissenting). This information includes the names of decisionmakers and reasons for the transmittal of each item. *Id.*

147. Percival, *supra* note 58, at 171 n.259 (citing Memorandum from Wendy L. Gramm (then OIRA administrator), Additional Procedures Concerning OIRA Reviews under Executive Orders Nos. 12291 and 12498 (June 13, 1986)).

148. McGarity, *supra* note 55, at 1449.

149. *Id.*

150. *See Hearings (Part 2), supra* note 63, at 293 (testimony of Prof. Cass R. Sunstein). It is arguable that such disclosure must be made as the Act now reads. *See id.* at 292-93. *See also id.* at 328 (testimony of Prof. Robert V. Percival).

151. ADMINISTRATIVE CONFERENCE, *supra* note 52, at 9.

Moreover, Vice President Gore's "Reinventing Government" initiative,[152] the National Performance Review, could propel the transformation of the Agenda into a powerful administration-wide regulatory management tool. The National Performance Review could also improve the credibility of the Agenda, as a more open rulemaking environment—allowing for publication of more realistic dates—evolves over time.

Improving the rulemaking process, however, will depend on the development and use of effective measurement tools. These tools are necessary for the federal government implementation of Total Quality Management (TQM) theory, a quality improvement theory that incorporates the systematic measurement of process to achieve greater understanding of problems and develop effective solutions.[153] The National Performance Review has already incorporated many TQM concepts into its vision of entrepreneurial government.

The concepts of TQM are not new to the government. In the midst of the American industrial quality movement in 1988, the United States Office of Personnel Management established the Federal Quality Institute (FQI) to lead the government in adopting the concepts of TQM.[154] TQM promotes systematic continuous improvement through innovative, worker-driven and customer-oriented approaches. These approaches ultimately reweave the priorities of an organization into a focused mission. FQI has acknowledged that implementing TQM in the federal government is a monumental task:

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152. *See supra* note 5.

153. Total Quality Management is an approach to government that encourages innovative management strategies by local, state and federal governments to produce greater effectiveness. *See* DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR xix (1993). Numerous state and several federal agencies have established statistical quality control programs as part of their TQM process with dramatic success. *See id.* at 160. The federal government has endorsed these theories at the highest levels; an endorsement by President Clinton graces the cover of Osborne and Gaebler's book, and coauthor Osborne is special consultant to Vice President Gore's "Reinventing Government" task force.

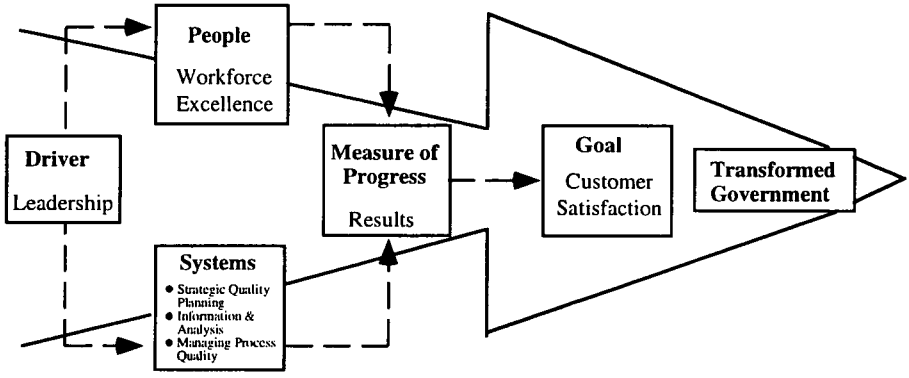
The wide-spread emulation of the Japanese quality revolution by "progressive" American industries in the 1980's has created a boom in the field of TQM consulting. Variations of TQM theory are associated with the names of Deming, Juran, and Ishikawa, among others, who have been proclaimed "gurus" in the field. *See e.g.*, JERRY BOWLES & JOSHUA HAMMOND, BEYOND QUALITY: HOW 50 WINNING COMPANIES USE CONTINUOUS IMPROVEMENT (1991); W. EDWARDS DEMING, OUT OF THE CRISIS (1986).

154. FEDERAL QUALITY INSTITUTE, FEDERAL TOTAL QUALITY MANAGEMENT HANDBOOK: INTRODUCTION TO TOTAL QUALITY MANAGEMENT IN THE FEDERAL GOVERNMENT 34 (1991).

> In short, the government is a huge conglomerate of activities and functions generally operating under inflexible and outdated management practices and principles. The objectives of the government-wide TQM effort are to break down the rigidity and excess structure of the government and to devise ways to enlist the energies and talents of the workforce to meet the challenges of the Nation.[155]

FQI recognizes three fundamental principles of TQM: (1) focusing on achieving customer satisfaction; (2) seeking continuous improvement; and (3) assuring full involvement of the entire workforce in improving quality.[156] Measurement and analysis are essential to the pursuit of continuous improvement.[157] Exhibit 1 illustrates FQI's approach to reinventing government.

EXHIBIT 1
REINVENTING GOVERNMENT THROUGH QUALITY MANAGEMENT



Source: U.S. Office of Personnel Management, Federal Quality Institute.

155. *Id.*
156. *Id.* at 3.
157. *Id.* at 8.

> In order to assure that processes are continuously improved, data should be collected and analyzed on a continuing basis, with particular attention to variation in processes. The causes of variation are examined to determine whether they result from special circumstances or from recurring or "common" causes. Different strategies should be adopted to correct each occurrence. The immediate objectives of the analysis and measurement effort are to reduce rework, waste, and cycle-time and to improve cost-effectiveness and accuracy. The ultimate objectives, of course, are to ensure that the organization understands the extent to which customer satisfaction is being realized, where there are deficiencies, and why, and to isolate causes that can be attacked systematically.

Id.

The "Reinventing Government" initiative similarly recognizes the value of measuring the process itself,[158] but emphasizes the importance of measuring the results of the process.[159] Phrases that have become dogma for TQM consultants are also employed in connection with the "Reinventing Government" approach: "What gets measured gets done,"[160] and "If you don't measure results, you can't tell success from failure."[161] The idea is based on the belief that the information organizations receive through measurement of their work can be used to transform them into more successful organizations.[162]

The first report issued by the National Performance Review laid the foundation for reshaping the federal government and identified numerous strategies for innovative reform and specific cost cutting measures.[163] It suggested changes to streamline regulatory review[164] and identified as a goal the establishment of a "more useful and realistic" review process.[165] The National Performance Review, however, relies too heavily on workload reduction and interagency coordination to achieve its goals.[166] A method of information disclosure and accountability must be integrated into the reform plan to measure agency processes and outcomes. There is currently too little information about the rulemaking process to effect ambitious reform without measurement tools to lead the way.

The fresh momentum and broad vision of the "Reinventing Government" initiative is capable of driving to new levels the evolution of administrative disclosure and accountability. When the Agenda was shaped in the Regulatory Flexibility Act in 1980, Congress intended to improve the effectiveness of federal regulation.[167] It sought to increase the accountability of regulatory agencies to their

158. The accuracy of the Agenda's estimated completion dates for rulemakings is an example of a measurement of the rulemaking process.

159. The number of regulations generated by a given agency is an example of a measurement of the outcome of the rulemaking process.

160. OSBORNE & GAEBLER, *supra* note 153, at 146.

161. *Id.* at 147.

162. *See id.* at 146.

163. NATIONAL PERFORMANCE REVIEW, *supra* note 5.

164. *Id.* at 32-34.

165. *Id.* at 33.

166. *See id.* at 33-34.

167. The legislative history states that "[t]he purpose of the Regulatory Flexibility Act is to encourage Federal agencies to utilize *innovative administrative procedures* in dealing with individuals, small businesses, small organizations, and small governmental bodies that would otherwise be unnecessarily adversely affected by Federal regulations." S. REP. NO. 878, 96th Cong., 2d Sess. 2788 (1980) (emphasis added).

customers. The Agenda has failed to achieve this goal, and it awaits transformation into a modern entrepreneurial government tool—a measurement tool to chart the course of improvement. The creation of a work environment allowing frank disclosure of the problems underlying the administrative processes is essential. Whether or not the ultimate goals of the National Performance Review are achieved, the enhanced Agenda will help translate the numerous theories of administrative inefficiency into workable solutions.

CONCLUSIONS

The empirical results of this Study demonstrate the shortcomings of the Agenda and highlight the existence of chronic problems in the rulemaking process. In its present form, the Agenda has become little more than a semi-annual catalog of regulatory identification numbers. It does not achieve its goal of serving as a notification tool to enhance public participation in the rulemaking process. Such a goal will inevitably remain unfulfilled so long as the document, designed to be taken at face value, must be interpreted to reveal any useful information.[168]

Although regulatory delay has been the subject of numerous theoretical and empirical studies, its causes remain unknown. The reasons for delay are measurable, but government opposition to disclosure has prevented raw data from being collected, forcing critics of administrative practices to fill the data gaps with speculation. The results of this Study merely identify the problems—rulemaking progress estimates that are consistently and predictably inaccurate and statutory deadlines that are routinely missed. This is only the first step in creating workable solutions. The system is currently too complex for piecemeal data collection through independent research

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168. Professor Mashaw recognized the limited utility of the data in the Agenda for his particular research:

> Nor is it possible for the untutored eye to discern from the reporting in the Unified Agenda of Federal Regulations whether activity levels are primarily in a regulatory or deregulatory direction. The brief synopsis of the rule might well be enough for a sophisticated observer, who fully understands the regulatory status quo in a particular field to classify the rules with some degree of accuracy. When I looked at three agencies with whose regulatory activities I am not particularly familiar I found myself, in two of the three cases examined, unable to classify the majority of the rules as either regulatory or deregulatory . . . . [I]t obviously takes a specialist to interpret even the somewhat better data on rulemaking that is included in the Regulatory Agenda than in the Federal Register tallies.

MASHAW, *supra* note 52, at 15.

to provide effective long-term solutions. Solutions will require changes in disclosure law through legislation or executive order.

Despite its shortcomings, the Agenda is a reporting system that can be efficiently redesigned into an effective quality management tool. The rulemaking process must also be modified to require accountability for various causes of delay as well as to require realistic timetable estimates in each Agenda. A follow-through mechanism is needed to address the causes of delay and design improvements to the rulemaking system.

Among Professor Percival's recommendations for the reform of executive oversight of EPA rulemaking are: (1) the reform of the regulatory review process into a management tool to monitor EPA's rulemaking progress and to ensure sufficient resources to meet its agenda; and (2) the restructuring of regulatory review to provide greater political accountability.[169] Modification of the Agenda reporting requirements as a first step can efficiently create a management tool that is effective at all stages of the regulatory lifecycle, while also imposing accountability and increasing public oversight in the spirit of the Regulatory Flexibility Act. Reforms can create an effective management tool only if they create a system that fosters honest and accurate information. While accountability is essential to obtaining meaningful data and understanding the system, the information in the Agenda must be generated in an environment with realistic expectations and without fear of reprisal when expectations are not met.

By embracing the progressive "Reinventing Government" initiative, the Clinton Administration has created high expectations of progress. Concrete actions must be taken to begin fulfilling the Administration's wide-ranging promises so as to reassure a wary electorate. The administrative rulemaking system is well suited for reform through adoption of quality management techniques and entrepreneurial government. The recommended modifications to the Regulatory Agenda can be made through Executive Order and can provide an efficient, effective first step in the accomplishment of these objectives. Alternatively, Congress, where rhetoric concerning greater "public accountability" from administrative agencies is frequently voiced, should amend the Freedom of Information Act and the Regulatory Flexibility Act to unveil the rulemaking process so the public can see what it really looks like.

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169. *See* Percival, *supra* note 58, at 201-02.

APPENDIX

INTRODUCTION

EPA's Regulatory Agenda is divided into sections that correspond to the statutes Congress has authorized EPA to implement. The actions listed under each statute section are divided into four subsections according to the progress of the rulemaking procedure. The Prerule-Stage subsection includes all activities that EPA is conducting to decide whether to initiate the APA rulemaking process, such as advance notice of proposed rulemaking, advance studies, and solicitation of public comment on the need for regulation. The Proposed-Rule-Stage subsection includes the rulemakings that EPA has decided to pursue and that have not yet resulted in publication of a Notice of Proposed Rulemaking (NPRM).[1] The Final-Rule-Stage subsection includes the rulemakings for which NPRMs have been published and are progressing towards completion. The Completed-Actions subsection includes rulemakings that are being removed from the Agenda because they have been completed, withdrawn from consideration, or combined with another rulemaking.

Exhibit 1 is taken from the April 27, 1992 Regulatory Agenda Clean Air Act Proposed-Rule-Stage subsection. The action's previous and subsequent Agenda entries can be located by reference to the Regulatory Identification Number (RIN), the last item in the entry. The RIN will remain with the action until it is withdrawn, completed, merged with another rulemaking, or a notice of a change of RIN is given in the Completed Actions subsection of a subsequent Agenda. The RIN is the most effective way to identify a regulation because the rulemaking's working title may change slightly or significantly over the course of several Regulatory Agendas.

Several of the entries are responses to the requirements of Congress or the Reagan Administration, which imposed greater reporting requirements on certain regulations in the early 1980s.[2]

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1. EPA states in its preface to the November 1992 Agenda, "EPA generally lists regulations in this category of the agenda once they are within a year of proposal." 57 Fed. Reg. 52025 (1992).

2. *See* Steven J. Groseclose, *Reinventing the Regulatory Agenda: Conclusions from an Empirical Study of EPA's Clean Air Act Rulemaking Progress Projections*, 53 MD. L. REV. 521 (1994).

"Significance" indicates whether the rulemaking is subject to the requirement of Executive Order 12498 to include the agency's priority actions in a yearly Regulatory Program. "Small Entities Affected" and "Government Levels Affected" entries identify some of the interests that EPA anticipates will be affected by the rulemaking. Designated small entities are limited to businesses, organizations, and governmental jurisdictions. Government levels refers to state, local, and federal. The "Analysis" entry indicates whether the rule requires a regulatory flexibility analysis pursuant to Executive Order 12498 or a regulatory impact analysis pursuant to Executive Order 12291.

The remaining information describes the legislative, administrative, and judicial history of the action. The "Legal Authority" entry cites the statutory provisions under which EPA has authority to promulgate the rule. A "Legal Deadline" entry is provided for

EXHIBIT 1
SAMPLE AGENDA ENTRY

3273. CONTROL OF AIR TOXICS FROM MOTOR VEHICLES

Significance: Regulatory Program

Legal Authority: 42 USC 7545/CAA 211; 42 USC 7521/CAA 202

CFR Citation: 40 CFR 80; 40 CFR 86

Legal Deadline: Final, Statutory, May 15, 1995.

Abstract: The Clean Air Act Amendments of 1990, require EPA to study the need for and feasibility of controlling toxic air pollutants associated with motor vehicles and fuels. Based on this study, EPA must promulgate standards containing reasonable requirements to control such toxic emissions, applying at a minimum to benzene and formaldehyde.

Timetable:

Action	Date	FR Cite
NPRM	**05/00/94**	
Final Action	**05/00/95**	

Small Entities Affected: None

Government Levels Affected: None

Analysis: Regulatory Impact Analysis

Additional Information: SAN No. 2769.

FTS:8-374-8321.

Agency Contact: Joseph Somers, Environmental Protection Agency, Air and Radiation, 2565 Plymouth Road, Ann Arbor, MI 48105, **313 668-4321**

RIN: 2060-AC75

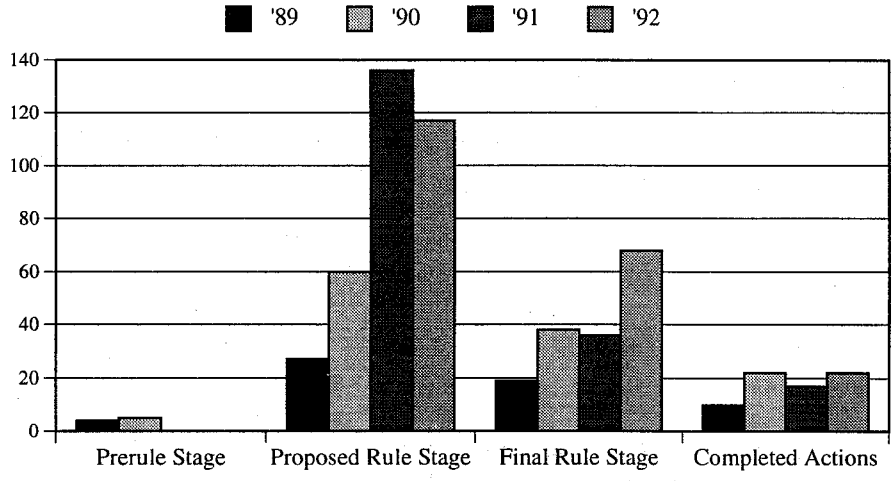
-57 Fed. Reg. 17439 (1992)

rulemakings that are subject to congressionally imposed statutory deadlines, judicially imposed deadlines, or both. The "Timetable" lists the EPA's "honest estimates"[3] of when the NPRM will be published and when the Final Action (promulgation of the final rule) will be completed. When an action has been completed, a Federal Register citation is given.

I. EMPIRICAL RESULTS

The empirical study involved an examination of 164 rulemakings that appeared in EPA's Regulatory Agenda, Clean Air Act section, from October 1989 through November 1992.[4] Most of these rulemakings were either initiated prior to the study period and concluded during the study period, or initiated during the study period and remained in progress after the study period. Exhibit 2 provides a relative indication of the number of rulemakings in the various subsections during each year.

EXHIBIT 2
RULEMAKINGS PER STAGE



'89 includes only actions listed in the October agenda.
'92 includes actions through the November agenda.

Note: The "Completed Actions" section lists all actions withdrawn, merged, and completed since the preceeding Agenda.

3. 57 Fed. Reg. 57024 (1992).

4. The term "Rulemaking" in this study refers to informal APA rulemaking procedures, including *revisions* of existing regulations. The term does not refer to the development of guidelines, policy statements, and *reviews* of existing regulations.

Twenty-four of the rulemakings were listed as new rulemakings and progressed to completion during the study period. These rules are the only complete data set of the
Regulatory Agenda lifecycle and provide an important perspective for assessing the results for incomplete data subsets. But since it is impossible to determine from an isolated Agenda which rulemakings will be completed over a given period of time, this study looked principally at the entire, undifferentiated population of rulemakings. The goal was first to determine the reliability of the dates in the Agenda timetables and, second, to identify which information in an entry provided clues regarding the rulemaking's future progress.

A. Validity of Timetable Projections

This study was designed to help readers of the Agenda gauge the credibility of the dates listed in the Agenda. Two main parameters were chosen to measure the accuracy of EPA's performance projections and their reliability for planning purposes. "Slip" is a measure of the length of time a revised projection has shifted, or slipped, into the future relative to the date given in the previous Agenda. Each estimate after the first one given for each rulemaking during the study period was considered an opportunity for a slip. "Miss" applies only to rulemakings for which a Notice of Proposed Rulemaking (NPRM) and/or a final rule was published. "Miss" refers to the difference between an Agenda timetable estimate and the actual date of publication (of either the NPRM or final rule). Subsequent references to "NPRM" in this section refer to the date listed in the timetable for publication of the NPRM. "FINAL" refers to the date listed in the Agenda timetable for final action. There is frequently more than one NPRM or FINAL for each rulemaking because EPA may change the estimated NPRM or final rule publication dates in every subsequent Agenda.

1. Proposed-Rule Stage.—The Proposed-Rule-Stage subsection of the Agenda provides potentially important information for effective participation in the regulatory process from the critical early stages.[5] As Exhibit 2 displays, the vast majority of rulemakings under consideration by EPA during the years examined in this study were in

5. The period before an NPRM appears in the Federal Register is a critical time period. At this stage, the proposal is malleable. Accurate EPA progress projections are important to persons intending either to contribute to the proposal or submit written comments during the comment period following NPRM publication.

the Proposed-Rule Stage, the period prior to publication of an NPRM.

The following information describes the accuracy of the dates provided in the Agenda timetable for entries in the Agenda's Proposed-Rule-Stage subsection:

NPRM SLIP

- 81% (150 of 186) of all estimated NPRM publication dates (NPRMs) slipped.
- 19% (36 of 186) did not slip.
- The estimated NPRMs slipped an average of 173 days (5.7 months).[6]

NPRM MISS

- EPA failed to meet 86% of the NPRMs (72 of 84 NPRMs, 36 of 41 rulemakings had missed dates).
- EPA met 14% (12 of 84) of the NPRMs.
- EPA missed its estimated NPRMs by an average of 144 days (4.8 months).[7]

FINAL SLIP

- 64% (92 of 143) of estimated final rule publication dates (FINALs) listed in the Proposed-Rule-Stage subsection slipped.
- 35% of the FINALs did not change.
- EPA moved up 1% of FINALs (but these dates subsequently slipped further).
- The FINALs listed in the Proposed-Rule-Stage subsection of the Agenda slipped an average of 217 days (7.2 months).[8]

FINAL MISS

- EPA failed to meet 82% (9 of 11) of the FINALs.

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6. Standard deviation: 142 days; maximum: 1553 days; minimum: 32 days; median: 152 days.

7. Standard deviation: 130 days; maximum: 628 days; minimum: 29 days; median: 116 days.

8. Standard deviation: 157 days; maximum: 1249 days; minimum: 30 days; median: 183 days.

- EPA met 18% (2 of 11) of the FINALs.
- EPA missed its FINALs listed in the Proposed-Rule-Stage subsection of the Agenda by an average of 200 days (6.7 months).[9]

2. *Final-Rule Stage.*—The Final-Rule-Stage subsection is of paramount importance for tracking the actual approval of environmental regulations. The following information describes the accuracy of the dates provided in the timetable for entries in the Agenda's Final-Rule-Stage subsection:

FINAL SLIP

- 83% (52 of 63) of all FINALs slipped.
- 11% (7 of 63) of the FINALs did not slip.
- EPA moved up 6% (4 of 63) of the estimated dates.
- The FINALs listed in the Final-Rule-Stage subsection of the Agenda slipped an average of 172 days (5.8 months).[10]

FINAL MISS

- EPA failed to meet 81% (38 of 47) of all FINALs in the Final-Rule-Stage subsection of the Agenda. (One or more missed FINAL was published for 22 of the 26 completed rulemakings.)
- EPA met 19% (9 of 47) of the FINALs.
- EPA missed its FINALs listed in the Final-Rule-Stage subsection of the Agenda by an average of 114 days (3.8 months).[11]

Exhibit 3 summarizes the above information.

9. Standard deviation: 109 days; maximum: 321 days; minimum: 17 days; median: 109 days.

10. Standard deviation: 112 days; maximum: 517 days; minimum: 31 days; median: 153 days.

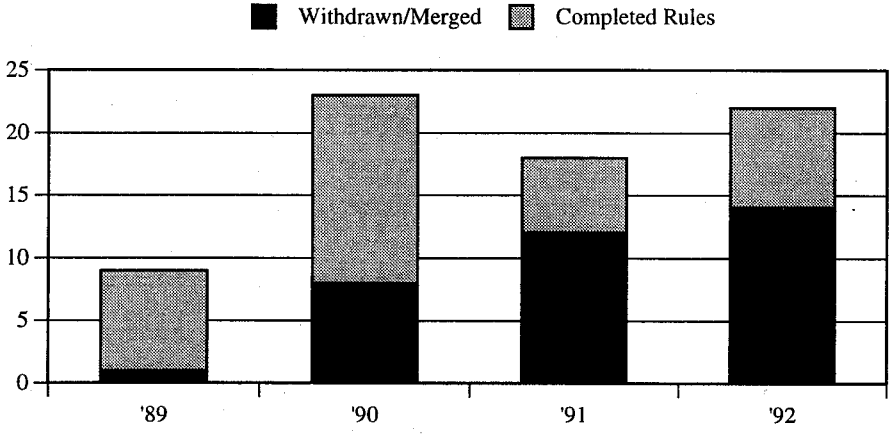
11. Standard deviation: 112 days; maximum: 517 days; minimum: 5 days; median: 65 days.

EXHIBIT 3
SUMMARY OF STUDY RESULTS FOR ALL RULEMAKINGS

Stage	NPRM		FINAL RULE	
	Slipped	Missed	Slipped	Missed
Proposed Rule Stage	81% (173 Day Average)	86% (144 Day Average)	64% (217 Day Average)	82% (200 Day Average)
Final Rule Stage			83% (172 Day Average)	81% (114 Day Average)
Both Stages Combined			70% (201 Day Average)	81% (130 Day Average)

3. Withdrawn and Completed Actions.—The likelihood that a rulemaking will be withdrawn is another significant consideration in evaluating the reliability of information in the Agenda. Exhibit 4 demonstrates that in recent years, withdrawal and merger of rules have significantly outpaced the completion of rulemakings.

EXHIBIT 4
RULEMAKINGS COMPLETED AND WITHDRAWN PER YEAR



'89 includes only actions listed in the October agenda.

'92 includes actions through the November agenda.

Thirty-five rulemakings, 21% of all rulemakings in the study, were deleted from the Agenda without completion during the study. These included rules that were labeled as "withdrawn" as well as rulemakings that were "merged" into other rulemakings.

Withdrawn: 26 out of 35 actions, 16% of total rulemakings studied.
Merged: 9 out of 35 actions, 5% of total rulemakings studied.
Total Deleted: 35 actions, 21% of total rulemakings studied.

Of the withdrawn rules with projected completion dates in the timetable, three were overdue and two were withdrawn before becoming overdue. Eight of the merged rules were merged before the estimated completion date and only one was merged after. Four were merged shortly before expiration of a CAAA statutory deadline imposed by the Clean Air Act Amendments (CAAA).

These results may reflect strategic behavior on the part of EPA as rules are merged or withdrawn to obscure the passing of statutory deadlines. The re-evaluation of the necessity of a separate rulemaking may come into sharper focus as the pressure of an impending deadline increases. OMB review is a source of at least some of the momentum for withdrawal of rulemakings. In 1989, 5% of all of the regulations submitted to OMB review were subsequently withdrawn by EPA.[12] Often regulations are neither promulgated nor formally withdrawn, but languish for years in "regulatory purgatory."[13]

Exhibit 5 reflects a logical result; rules are most vulnerable to being deleted from the Agenda in the Proposed-Rule- Stage subsection, before an NPRM has been published. Still, despite the time and resources necessary to publish NPRMs, a significant 23% of the deleted rulemakings (5% of the total actions studied) were deleted in the Final-Rule Stage. The slow pace of the rulemaking process may contribute to this seemingly wasteful practice—rules may simply become obsolete during the rulemaking process.

12. Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS. 127, 163 (Autumn 1991).

13. *See* Thomas O. McGarity, *Some Thoughts on 'Deossifying' the Rulemaking Process*, 41 DUKE L.J. 1385, 1388 (1992).

EXHIBIT 5
NUMBER OF RULES DELETED BY STAGE

Stage	Number Deleted	% of Deleted	% of Total
Prerule	3	8.57%	1.83%
Proposed Rule	21	60%	12.8%
Final Rule	8	22.86%	4.88%
Entered in Agenda as Withdrawn*	3	8.57%	1.83%
All Stages	35	100%	21.34%
Total Rulemakings	164		100%

* These are rulemakings that EPA considered, but decided against pursuing during the six-month period between two printings of the Agenda.

4. Meaning of "00/00/00."—The designation "00/00/00" frequently appears in the Agenda timetable as the projected date of NPRM and FINAL publication. In fact, it was listed as an NPRM or FINAL estimate at least once for 32% of the study population (52 of 164 rulemakings).[14] The symbol is sometimes used in other contexts to flag actions demanding immediate attention. However, EPA apparently uses the symbol to indicate a strong likelihood that an action will be delayed and/or withdrawn, or when a reasonable estimate cannot be given.[15] Readers unfamiliar with the Agenda must be aware of this distinction.

Twenty-one rulemakings in the study had at least one "00/00/00" entry in the NPRM column of the timetable.[16] Forty-three percent of those rulemakings (9 of 21) were subsequently withdrawn. Nine of the remaining rulemakings stayed in the Proposed-Rule Stage with no progress (i.e., publication of an NPRM) during the study period. Two progressed from Prerule to Proposed-Rule Stage, and one progressed from Proposed-Rule to Final-Rule Stage. In addition, "00/00/00" entries appeared in an average of three consecutive Agendas before a projected date was finally listed in the timetable. For the nine

14. Rulemakings for which no FINAL estimate was provided are included in the description "00/00/00". There were 17 such rules.

15. No definition of the term is given in the Agenda.

16. These rulemakings were given no FINAL estimate or listed "00/00/00" as the FINAL estimate.

withdrawn rulemakings and the one which resulted in a published NPRM, an average of 532 days (median of 510) passed between the initial listing of "00/00/00" and any action on the rulemaking. The publication of the NPRM occurred 723 days (twenty-four months) after the publication of the first "00/00/00" entry.

Thirty-two rulemakings in the study showed a listing of "00/00/00" only as a FINAL timetable entry. Thirty-four percent of the total (11 of 32) were eventually withdrawn. However, 47% (7 of 15) of those that were already in the Final-Rule Stage were withdrawn, compared to 43% for NPRMs and 21% for the entire study population. A "00/00/00" entry in the Final-Rule Stage is thus probably a sign of serious problems with the rulemaking.

Only five of the rulemakings did not progress during the study. EPA published nine final rules and seven NPRMs. EPA averaged three Agendas before producing FINAL estimates for all "00/00/00" rulemakings. For the actions deleted from the Agenda, an average of 671 days (median of 510) passed between the publication of the first FINAL "00/00/00" listing and any action. A screening of the rulemakings, excluding those withdrawn, indicated that an average of 808 days (median of 776, maximum of 2402) passed between the first appearance of "00/00/00" and the publication of a final rule.

These results demonstrate a pervasive problem in the rulemaking process—defensive behavior by EPA leads to insufficient disclosure of information. The data may be interpreted in two ways. EPA may be using the "00/00/00" symbol as a euphemism for troubled rulemakings, but a more critical reading of the data indicates that EPA is intentionally using "00/00/00" entries to obscure the true status of certain rulemakings. By not estimating an honest date, EPA is forcing interested parties to work for the truth.

B. Compliance with Legal Deadlines

A legal deadline designation in the Regulatory Agenda gives timetable estimates an undeserved air of authenticity. Statutory deadlines were extremely popular with Congress when it enacted the Clean Air Act Amendments, and the trend indicates that Congress will continue to rely on them heavily in the future. But as this analysis demonstrates, it is necessary to pause and assess the true value of these deadlines if they are to be effectively used in future legislation. Although this study is not a substantive analysis of the deadlines in the study population, the empirical results indicate that deadlines have not improved the reliability of Agenda timetable estimates.

1. Statutory Deadlines.—A "Statutory Deadline" designation in an Agenda entry connotes legal accountability for meeting the given dates and further suggests that they are *capable* of being met. But the sheer number of deadlines in the current Agenda creates doubts as to that possibility. The results of this study reinforce those doubts.

A total of 72 rulemakings (44% of the study population) was subject to statutory deadlines, and the CAAA imposed 85% (61 out of 72) of them.[17] The estimates in the Agenda timetable were only slightly more reliable for statutory deadline rulemakings than for the population as a whole for dates listed in the Proposed-Rule-Stage subsection:

NPRM SLIP

- 70% (71 of 101) of the estimated NPRM publication dates (NPRMs) for rulemakings subject to statutory deadlines slipped, compared to 81% of the population as a whole.
- The NPRMs for rulemakings with statutory deadlines slipped an average 174 days, compared to 173 days for the population as a whole.[18]

NPRM MISS

- EPA failed to meet 85% (41 of 48) of the NPRMs for rulemakings subject to statutory deadlines, compared to 86% for the population as a whole.
- EPA missed its NPRMs for rulemakings with statutory deadlines by an average of 150 days, compared to 144 days for the population as a whole.[19]

The study indicated, however, that FINALs for statutory deadline rulemakings slipped less often than for the population as a whole:[20]

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17. Eight of the CAAA deadlines were imposed on existing rulemakings.

18. Standard deviation: 180 days; maximum: 1553 days; minimum: 31 days; median: 152 days.

19. Standard deviation: 130 days; maximum: 599 days; minimum: 10 days; median: 116 days.

20. These figures represent all FINALs, whether listed in the Proposed Rule Stage or the Final Rule Stage.

FINAL SLIP

- 52% (82 of 157) of estimated final rule publication dates (FINALs) for rulemakings subject to statutory deadlines slipped, compared to 70% for the population as a whole.
- The FINALs for rulemakings subject to statutory deadlines slipped an average of 233 days, compared to 201 days for the population as a whole.[21]

FINAL MISS

- EPA failed to meet 95% (21 of 22) of the FINALs for the rulemakings subject to statutory deadlines, compared to 81% for the population as a whole.
- EPA missed its FINALs for rulemakings subject to statutory deadlines by an average of 165 days, compared to 130 days for the population as a whole.[22]

Exhibit 6 summarizes the data collected on rulemakings subject to statutory deadlines.

EXHIBIT 6
SUMMARY OF STUDY RESULTS FOR RULEMAKINGS SUBJECT TO STATUTORY DEADLINES

Stage	NPRM		FINAL RULE	
	Slipped	Missed	Slipped	Missed
Proposed Rule Stage	70% (174 Day Average)	85% (150 Day Average)		
Proposed & Final Combined			52% (233 Day Average)	95% (165 Day Average)

21. Standard deviation: 171 days; maximum: 1249 days; minimum: 30 days; median: 189 days.

22. Standard deviation: 102 days; maximum: 321 days; minimum: 17 days; median: 194 days.

Although FINAL projections for rulemakings with statutory deadlines slipped slightly less often than the population as a whole, they slipped further when they did, possibly indicating a reluctance on the part of EPA to project realistic completion dates for rulemakings with statutory deadlines. In short, EPA seems to want to avoid admitting in advance that statutory deadlines may be missed. The larger percentage of missed FINALs and the length of missed FINALs further supports this inference. Apparently, EPA routinely retains dates approximating the statutory deadlines longer than warranted. As a result, the ultimate publication dates are further away from the artificially optimistic projections.

A statutory deadline, however, apparently provides a relatively strong assurance that the proceeding will not be abandoned. Only nine of the 72 rulemakings subject to statutory deadlines were deleted from the Agenda before completion. Of those nine, only two were withdrawn outright.[23] Four merged with other rulemakings shortly before their statutory deadlines were set to expire, presumably prompted by the approaching deadline. In one case, EPA decided to issue a guidance rather than promulgate a rule. In the two other cases, EPA decided to abandon promulgating New Source Performance Standards in favor of establishing National Emissions Standards for Hazardous Air Pollutants for organic solvent degreasing and perchloroethylene dry cleaning. Regardless of the particular course of action chosen by EPA, its timing appears to have been influenced by the approaching deadline.

2. *Judicial Deadlines.*—Nine rulemakings, 5.5% of the study population, were subject to judicial deadlines. Only three progressed from Proposed-Rule to Final-Rule Stage. The results for the Proposed-Rule Stage of this statistically small subgroup were surprisingly similar to the Slip and Miss measures for the population as a whole:

NPRM SLIP

- 80% (4 of 5) of the estimated NPRM publication dates (NPRMs) for rulemakings subject to judicial deadlines slipped, compared to 81% for the population as a whole.

23. These two exceptions were not CAAA rulemakings.

- The NPRMs for rulemakings with judicial deadlines slipped an average of 182 days, compared to 173 days for the population as a whole.[24]

NPRM MISS

- EPA failed to meet 83% (5 of 6) of the NPRMs for rulemakings subject to judicial deadlines, compared to 86% for the population as a whole.
- EPA missed its NPRMs for rulemakings subject to judicial deadlines by an average of 20 days, compared to 144 days for the population as a whole.[25]

The smaller average miss for judicial deadlines as opposed to statutory deadlines suggests that EPA gives rulemakings with judicial deadlines special attention, but deadlines are not guarantees that a date will be met.

The FINAL results indicate that more of this attention is given as the judicially imposed final deadline approaches (six rules went from Final-Rule Stage to completion):

FINAL SLIP

- 10% (1 of 10) of the estimated final-rule publication dates (FINALs) for rulemakings subject to judicial deadlines slipped, compared to 70% for the population as a whole.
- The FINALs for rulemakings subject to judicial deadlines slipped an average of 214 days, compared to 201 days for the population as a whole.

FINAL MISS

- EPA failed to meet 50% (5 of 10) of the FINALS for rulemakings subject to judicial deadlines, compared to 81% for the population as a whole.

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24. Standard deviation: 117 days; maximum: 330 days; minimum: 61 days; median: 168 days.

25. Standard deviation: 134 days; maximum: 284 days; minimum: 9 days; median: 20 days.

- EPA missed its FINALS for rulemakings with judicial deadlines by an average of 85 days, compared to 130 days for the population as a whole.[26]

Exhibit 7 summarizes the data collected on rulemakings subject to judicial deadlines.

EXHIBIT 7
SUMMARY OF STUDY RESULTS FOR RULEMAKINGS SUBJECT TO JUDICIAL DEADLINES

Stage	NPRM		FINAL RULE	
	Slipped	Missed	Slipped	Missed
Proposed Rule Stage	80% (182 Day Average)	83% (20 Day Average)		
Final Rule Stage			10% (214 Day Average)	50% (85 Day Average)

Although this small sample size does not allow for accurate comparisons, the implications are rational. The FINAL projection, under more intense EPA management scrutiny, is apparently not *permitted* to slip as the judicial deadline approaches, even when it is inevitable that the deadline will be missed. Frequency and length of Miss for judicial deadlines are much lower than for either the statutory deadline subgroup or the population as a whole. These results correspond with the Environmental and Energy Study Institute (EESI) finding that "[c]ourt ordered deadlines are more effective than statutory deadlines in speeding EPA action and setting priorities."[27] Perhaps the significantly higher median/lower average Miss combination means that only more serious factors will force a missed judicial deadline.

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26. Standard deviation: 94 days; maximum: 252 days; minimum: 42 days; median: 227 days.

27. ENVIRONMENTAL AND ENERGY STUDY, INSTITUTE AND THE ENVIRONMENTAL LAW INSTITUTE, STATUTORY DEADLINES IN ENVIRONMENTAL LEGISLATION: NECESSARY BUT NEED IMPROVEMENT 24 (1985).

C. *Rulemakings Begun & Completed During the Study*

Twenty-four rulemakings began and were cleared off the Agenda during the study's time frame: EPA published 11 of the 24 as final rules and deleted 13. Exhibit 8 summarizes the disposition of the 24 rules cleared off of the Agenda during the study period.

EXHIBIT 8
DISPOSITION OF RULEMAKINGS CLEARED OFF THE AGENDA FROM OCTOBER 1989 THROUGH NOVEMBER 1992

Disposition	# of Rulemakings	% of 24
Total Rules Deleted	13	54.17%
Withdrawn	*5*	20.83%
Merged	*8*	33.33%
Total Final Rules Published	11	45.83%

Exhibit 9 compares the number of days that EPA estimated in the rule's first Agenda entry it would take to publish an NPRM to the number of days that it actually took. The exhibit shows the average, maximum, and minimum number of days for both the actual and estimated publication dates.

EXHIBIT 9
TIME FROM NPRM PUBLICATION TO FINAL RULE PUBLICATION

Published Final Rules	First Agenda Estimate	Actual	% Over
Average	198 days	305 days	54%
Maximum	321 days	438 days	
Minimum	85 days	174 days	
Standard Deviation	66 days	90 days	

Exhibit 10 shows the length of time from the date of the first Agenda to list a rule to the date the final rule was actually published.

This is compared to the amount of time EPA first estimated it would take from the first entry in the Agenda to final publication.

EXHIBIT 10
TIME FROM DATE OF FIRST AGENDA TO FINAL RULE PUBLICATION

Published Final Rules	EPA's First Estimate	Actual	% Over
Average	215 days	322 days	50%
Maximum	495 days	800 days	
Minimum	39 days	44 days	
Standard Deviation	110 days	222 days	

Exhibit 11 documents the average, maximum, and minimum number of days between EPA's first estimated final rule publication dates and the actual final rule publication dates.

EXHIBIT 11
NUMBER OF DAYS BETWEEN THE FIRST ESTIMATED FINAL RULE PUBLICATION DATE AND THE ACTUAL PUBLICATION DATE

Published Final Rules	Days
Average	104
Maximum	305
Minimum	–25*
Standard Deviation	116
Median	49.5

* EPA published this rule ahead of schedule.

Exhibit 12 compares EPA's first estimate of the number of days it would take to publish an NPRM to the number of days that it actually took.

EXHIBIT 12
TIME FROM DATE OF FIRST AGENDA ENTRY TO NPRM PUBLICATION

Published NPRMs	EPA's First Estimate	Actual	% Over
Average	47 days	113 days	140%
Maximum	221 days	496 days	
Minimum*	2 days	-34 days	
Standard Deviation	73 days	164 days	

* NPRM was actually published ahead of schedule and before the Agenda was published.

Exhibit 13 documents the average, maximum, and minimum number of days between EPA's first estimated NPRM publication date and the actual NPRM publication date.

EXHIBIT 13
NUMBER OF DAYS BETWEEN THE FIRST ESTIMATED NPRM PUBLICATION DATE AND THE ACTUAL NPRM PUBLICATION DATE

Published NPRM	Days
Average	67
Maximum	275
Minimum	-36*
Standard Deviation	95

* EPA published this rule ahead of schedule.

D. Performance Statistics for Additional Subgroups

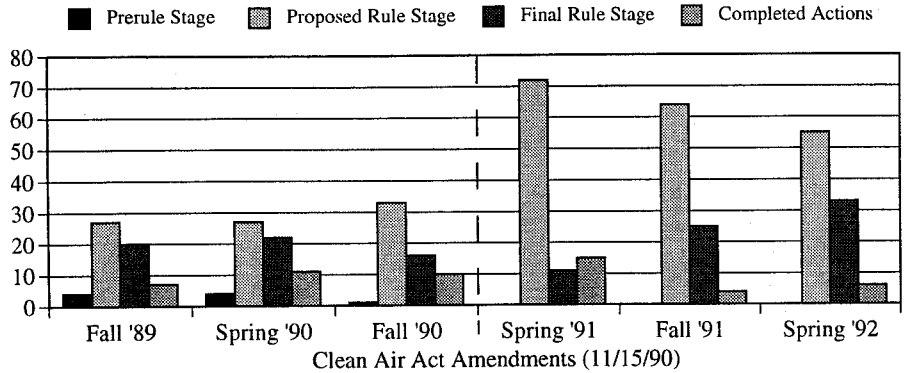
1. Clean Air Act Amendments.—The results of the analysis of rulemakings subject to deadlines were not unpredictable. In 1985, an exhaustive study by the Environmental and Energy Study Institute recognized the swelling tide of congressional use of statutory deadlines in environmental legislation.[28] The study demonstrated

28. *See generally id.*

the need for better use of deadlines as a legislative tool.[29] It suggested that Congress set more realistic deadlines[30] and impose them only on the most important tasks.[31] The fact that 85% (61 out of 72) of the statutory deadlines in this study's population were imposed by the CAAA, and 68% (61 out of 90) of all rulemakings citing the CAAA as authority had deadlines attached, suggests a continued wholesale use of statutory deadlines as a legislative tool. Moreover, the unreliability of Agenda timetable dates suggests that greater accountability and expedited rulemaking will not soon be achieved.[32]

The CAAA requirements created a sudden and dramatic shift in EPA rulemaking priorities. Exhibit 14 illustrates the increase in workload.

EXHIBIT 14
INFLUENCE OF THE 1990 AMENDMENTS ON THE REGULATORY AGENDA WORKLOAD



Note: The "Completed Actions" section lists all actions withdrawn, merged, and completed since the preceeding Agenda.

Exhibit 15 suggests the shifting focus as EPA completed fewer rules and withdrew or merged more rulemakings.

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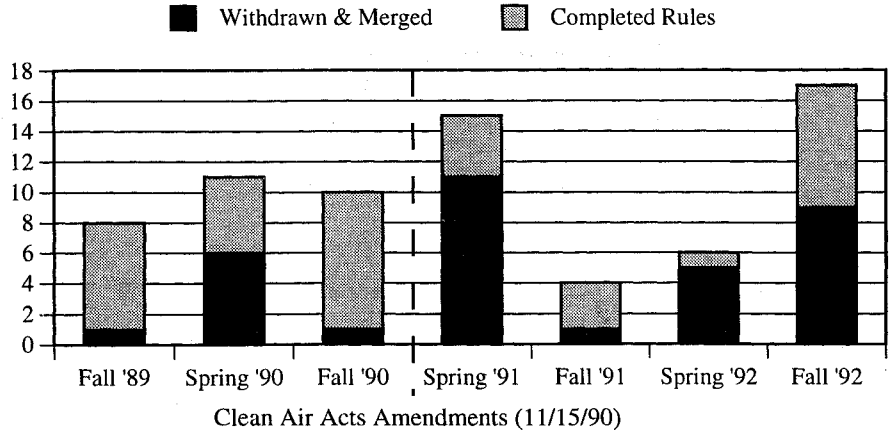
29. *Id.*
30. *Id.* at 58.
31. *Id.* at 57.
32. Congressional displeasure with the implementation of the CAAA has been voiced emphatically in congressional subcommittees and the federal courts. *See, e.g., Clean Air Act Implementation: Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. (1991); Waxman v. Reilly, No. 92-1320 HHG, slip op. (D.D.C. 1992) (consent decree issued in a suit brought by Representative Henry Waxman for failure to meet CAAA deadlines).

EXHIBIT 15
INFLUENCE OF 1990 AMENDMENTS ON THE NUMBER OF RULEMAKINGS COMPLETED AND WITHDRAWN



The 90 rulemakings citing the CAAA in this study were analyzed using the same parameters as the total study population. Because eighteen of those rulemakings were already on EPA's Agenda before the November 1990 amendments, only dates that appeared in the April '91 Agenda through the November '92 Agenda were included in the study. The estimates in the timetable were no more reliable for the CAAA rulemakings than for the population as a whole, with the exception of NPRM misses, which were shorter.

NPRM SLIP

- 79% (92 of 116) of the estimated NPRM publication dates (NPRMs) for CAAA-required rulemakings slipped, compared to 81% for the population as a whole.
- The NPRMs for CAAA-required rulemakings slipped an average of 179 days, compared to 173 days for the population as a whole.[33]

NPRM MISS

- EPA failed to meet 85% (35 of 41) of the NPRMs for CAAA-required rulemakings that progressed from Proposed-Rule to

33. Standard deviation: 166 days; maximum: 1553 days; minimum: 31 days; median: 153 days.

Final-Rule Stage, compared to 86% for the population as a whole.

- EPA missed its NPRMs for CAAA-required rulemakings by an average of 109 days, compared to 144 days for the population as a whole.[34]

FINAL performance was slightly less reliable for CAAA rulemakings than for the entire population:

FINAL SLIP

- 58% (99 of 171) of the estimated final rule publication dates (FINALs) for CAAA-required rulemakings slipped, compared to 70% for the population as a whole.
- The FINALs for CAAA-required rulemakings slipped an average of 212 days, compared to 201 days for the population as a whole.

FINAL MISS

- EPA failed to meet 95% of the FINALs for the CAAA-required rulemakings, compared to 81% for the population as a whole.
- EPA missed its FINALs for CAAA-required rulemakings by an average of 135 days, compared to 130 days for the population as a whole.[35]

Exhibit 16 summarizes the data collected on CAAA rulemakings.

34. Standard deviation: 86 days; maximum: 425 days; minimum: 9 days; median: 95 days.

35. Standard deviation: 96 days; maximum: 275 days; minimum: 5 days; median: 137 days.

EXHIBIT 16
SUMMARY OF STUDY RESULTS FOR CAAA-REQUIRED RULEMAKINGS

Stage	NPRM		FINAL RULE	
	Slipped	Missed	Slipped	Missed
Proposed Rule Stage	79% (179 Day Average)	85% (109 Day Average)		
Proposed & Final Combined			58% (212 Day Average)	95% (135 Day Average)

2. Executive Order/Regulatory Flexibility Act Requirements.—

a. Small Entities Affected.—The Regulatory Flexibility Act requires that EPA provide notice to small entities when a proposed regulation might significantly impact them.[36] Rulemakings designated as possibly affecting small entities accounted for 57% of the study population. This is not surprising, since the Agenda was created out of concern for protecting the interests of small businesses.[37] Except for differences in the publication of final rules, the small entities designation did not appear to affect the reliability of the estimates in the timetable. Exhibit 17 contains a breakdown of the rulemakings that affect small entities according to the type of small entity affected.

36. 5 U.S.C. § 602(c).
37. *See* Groseclose, *supra* note 2, at 525.

EXHIBIT 17
NUMBER OF RULEMAKINGS THAT AFFECT SMALL ENTITIES

Type of Small Entity Affected	# of Rulemakings	% of Study
Businesses (B)	30	18.29%
Governmental Jurisdiction (GJ)	7	4.27%
Organizations (O), GJ, B	4	2.44%
B, GJ	3	1.83%
B, O	1	0.61%
Total # of Rulemakings Affecting Small Entities	**45**	**27.44%**
? (Undecided whether the rulemakings affect small entities)	49	29.88%
None (Rulemakings not affecting small entities)	70	42.68%
Total Rulemakings	**164**	**100%**

The following summary of data compares rulemakings in the Agenda designated as affecting specific small entities, rulemakings designated as not affecting small entities (nones), and the population of rulemakings as a whole.

For dates listed in the Proposed-Rule-Stage subsection:

NPRM SLIP

- 79% (98 of 124) of the estimated NPRM publication dates (NPRMs) for rulemakings affecting small entities slipped, compared to 83% of the rulemakings not affecting small entities, and 81% of the population as a whole.
- The NPRMs for rulemakings affecting small entities slipped an average of 179 days, compared to an average of 162 days for

rulemakings not affecting small entities, and 173 days for the population as a whole.[38]

NPRM MISS

- EPA failed to meet 88% (44 of 50) of the NPRMs for rulemakings affecting small entities by their estimated publication dates, compared to 82% for the rulemakings not affecting small entities, and 86% for the population as a whole.
- EPA missed its NPRMs for rulemakings affecting small entities by an average of 149 days, compared to 168 days for rulemakings not affecting small entities, and 144 days for the population as a whole.[39]

FINAL performance for both Stages combined:

FINAL SLIP

- 59% (103 of 176) of the estimated final rule publication dates (FINALs) for rulemakings affecting small entities slipped, compared to 62% (44 of 71) for rulemakings not affecting small entities, and 70% for the population as a whole.
- The FINALs for rulemakings affecting small entities slipped an average of 212 days, compared to average slips of 192 days for rules not affecting small entities, and 201 days for the population as a whole.[40]

FINAL MISS

- EPA failed to meet 88% (23 of 26) of the FINALs for rulemakings affecting small entities, compared to 78% (21 of 27) for rulemakings not affecting small entities, and 81% for the population as a whole.
- EPA missed its FINALs for rulemakings affecting small entities by an average of 160 days, compared to 105 days for rules not

38. Standard deviation: 163 days; maximum: 1553 days; minimum: 31 days; median: 153 days.

39. Standard deviation: 133 days; maximum: 599 days; minimum: 1 day; median: 117 days.

40. Standard deviation: 156 days; maximum: 1249 days; minimum: 30 days; median: 183 days.

affecting small entities, and 130 days for the population as a whole.[41]

Exhibit 18 summarizes the data collected on rulemakings affecting small entities.

EXHIBIT 18
SUMMARY OF STUDY RESULTS FOR RULEMAKINGS AFFECTING SMALL ENTITIES

Stage	NPRM		FINAL RULE	
	Slipped	Missed	Slipped	Missed
Proposed Rule Stage	79% (179 Day Average)	88% (149 Day Average)		
Proposed & Final Combined			59% (212 Day Average)	88% (160 Day Average)

The FINAL projections for rulemakings not affecting small entities (43% of the population) were met 10% more often than small entity rulemakings and were closer to the actual completion dates. The additional delay accompanying small entity rulemakings might result from the extra administrative requirements for such rulemakings or awareness of the expected effects on small entities.

b. Analysis Requirements.—It was anticipated prior to this study that the requirement to perform a Regulatory Impact Analysis (RIA) or a Regulatory Flexibility Analysis (RFA) would affect the reliability of the time estimates, but no effect was observed.

For dates listed in the Proposed-Rule-Stage subsection:

41. Standard deviation: 138 days; maximum: 517 days; minimum: 5 days; median: 152 days.

NPRM SLIP

- 70% (33 of 47) of the estimated NPRM publication dates (NPRMs) for rulemakings subject to analysis requirements slipped, compared with 81% for the population as a whole.
- The NPRMs for rulemakings subject to analysis requirements slipped an average of 165 days, compared with 173 for the population as a whole.[42]

NPRM MISS

- EPA failed to meet 81% (25 of 31) of the NPRMs for rulemakings subject to analysis requirements that progressed from Proposed-Rule to Final-Rule Stage, compared with 86% for the population as a whole.
- EPA missed its NPRMs for rulemakings subject to analysis requirements by an average of 125 days (94 median), compared with 144 for the population as a whole.[43]
- Eighteen proposed rules were ultimately published.

FINAL performance for both Stages combined:

FINAL SLIP

- 48% (34 of 71) of the estimated final rule publication dates (FINALs) for rulemakings subject to analysis requirements slipped, compared with 70% for the population as a whole.
- The FINALs for rulemakings subject to analysis requirements slipped an average of 242 days, compared with 201 for the population as a whole.

FINAL MISS

- EPA failed to meet 83% (15 of 18) of the FINALs for rulemakings subject to analysis requirements, compared with 81% for the population as a whole.

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42. Standard deviation: 197 days; maximum: 1187 days; minimum: 60 days; median: 121 days.

43. Standard deviation: 88 days; maximum: 298 days; minimum: 10 days; median: 94 days.

- EPA missed its FINALs for rulemakings subject to analysis requirements by an average of 163 days, compared with 130 for the population as a whole.[44]
- Seven final rules were ultimately published.

Exhibit 19 summarizes the data collected on rulemakings requiring RIAs or RFAs.

EXHIBIT 19
SUMMARY OF STUDY RESULTS FOR RULEMAKINGS SUBJECT TO ANALYSIS REQUIREMENTS

Stage	NPRM		FINAL RULE	
	Slipped	Missed	Slipped	Missed
Proposed Rule Stage	70% (165 Day Average)	81% (125 Day Average)		
Proposed & Final Combined			48% (242 Day Average)	83% (163 Day Average)

44. Standard deviation: 106 days; maximum: 321 days; minimum: 17 days; median: 152 days.