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340

THE WHITE HOUSE  
WASHINGTON 9-3

TO: KEN CRIBB

FROM: John G. Roberts, Jr.  
Associate Counsel  
to the President *JGR*

- FYI
- COMMENT
- ACTION

THIS DOJ POSITION WILL  
UNDERMINE OUR EFFORTS WITH  
RESPECT TO THE NIXON PAPERS  
REGS, WHICH ARE BEFORE OMB  
UNDER E.O. 12291. LET ME  
KNOW WHEN WE CAN DISCUSS  
THOSE REGS.

# Justice Dept. Seeks to Bar Review Suit

*OMB Regulatory Oversight  
Described as Nonbinding*

By Cass Peterson  
Washington Post Staff Writer

Less than a month after taking office in 1981, President Reagan issued what was to be the centerpiece of his administration's deregulatory drive—a directive ordering agencies to submit rulemaking proposals to the Office of Management and Budget for approval.

It was called Executive Order 12291, and it quickly became the subject of raucous debate. Critics contended that the order gave OMB officials virtual control over the rulemaking process, and that scores of regulations were being scrapped, delayed or watered down as a result.

Now the Justice Department, seeking to fend off a legal challenge to the regulatory review process, has argued in court papers not only that OMB holds no sway over the substance of rules but that agency heads are "legally free to ignore" the president's order.

The assertion comes in a legal brief filed last month in U.S. District Court here in an effort to block a lawsuit that drives at the heart of the OMB review. The question is whether the courts may review and enforce an executive order as a legal matter, or whether, as the administration maintains, the order is nothing more than "an internal policy tool."

The suit, filed by the Environmental Defense Fund (EDF), alleges that a rule to control underground storage of toxic waste was delayed for months by OMB officials, even though the Environmental Protection Agency was facing a statutory deadline to issue it.

EDF contends that the OMB thus violated Executive Order 12291, which states that OMB's review may not conflict with statutory or court-imposed deadlines. The Justice Department concedes that the deadline was missed, and it has taken the unusual step of asking the court to rule against the agency it represents and impose a new deadline for the EPA to meet.

The delayed rule was one of 44 regulations facing deadlines under last year's amendments to the nation's hazardous-waste disposal law. EDF contends that future regulations will face similar

delays if the OMB has any role in the process, and it wants the court to order OMB to stay out.

"So long as OMB has any authority to have an influence, it will take additional time," said EDF attorney Robert V. Percival. "We stumbled onto a situation where we caught OMB with its hand in the cookie jar. They not only delayed the rule, but they forced EPA to accept a rulemaking procedure that it had considered and rejected. That will cause continuing delays . . ."

The government argues that missing the deadline had nothing to do with OMB's review. It also denies EDF's contention that the rule was significantly altered at OMB's insistence, contending that the budget office "has no authority under the order to require an agency to conform to its views."

"The president has directed agencies only to respond to OMB's views, not to conform to them," Justice's brief states. The government agrees that the executive order has an effect on the rulemaking process, but only because the OMB review affords an agency "the opportunity to decide to alter its course."

The environmental group based its case largely on weekly reports from the EPA's solid waste office, which was responsible for writing the underground storage rule. According to court documents, those reports show that the rule was forwarded to OMB on March 1, two weeks ahead of the statutory deadline.

On May 17, more than two months after the deadline, the weekly report noted that the rule was "being revised" and "is still awaiting OMB clearance." The rule was proposed June 20,

more than three months after the deadline and about two weeks after EDF's lawsuit was filed.

Justice argues that OMB played no role in EPA's failure to meet the deadline because "an agency head is legally free to ignore the executive order's directive and exercise his discretion to promulgate a regulation without subjecting it to OMB review." If the executive order has no legal force, in other words, OMB officials could not have violated it.

But agency officials acknowledge that, legal niceties aside, it is not considered prudent for regulators to skip the OMB review. Justice's argument "comes as a surprise to those who have watched [the system] operate as a practical matter," an EPA attorney said.

Another official said that agency heads, as presidential appointees, "aren't likely to get the chance to bypass OMB more than once."

Some administration officials also are skeptical of Justice's argument, but they fear that a decision finding OMB in violation of an executive order in this case could set a precedent for judicial review of other presidential orders as well.

The case is scheduled for oral arguments in October, although the court may decide before then whether to give the environmental group access to additional documents that it believes will buttress its case.

16