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Hon. John D. Graham
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By Email to Dominic Mancini, <Dominic_J._Mancini@omb.eop.gov>

Subject: Peer Review Comments on 2004 Draft Report to Congress

Dear Dr. Graham:

Thank you for the opportunity to comment as a peer reviewer on OMB's *2004 Draft Report to Congress on the Costs and Benefits of Federal Regulation and Unfunded Mandates on State, Local, and Tribal Entities* ("Draft Report"). In future public documents, you may attribute these comments to me by name.

Generally speaking, I believe the Draft Report could benefit from more careful analysis in some parts, especially in the sections dealing with international comparisons. As requested, my comments focus on three areas: the accounting statements of Chapter 1, the Draft Report's discussion of regulation and economic growth, the Draft Report's discussion of regulation and the manufacturing industry.

A. *The Accounting Statements of Chapter 1*

As you know, a growing number of experts seriously question accounting techniques that purport to monetize and compare those regulatory benefits that are inherently non-monetary (lives saved, illnesses prevented, so on). The exercise is fraught with hidden value-judgments and is prone to manipulation. As OMB appears committed to such techniques, I will not replay the criticisms here. But we should all agree that if benefit-cost analysis of this kind is to be done, it must be done according to the highest standards of objectivity and openness. In that spirit, I will discuss the parts of Chapter 1 that I think deserve closer analysis and revision.

1. *Suggested Comparisons among Agencies and Rules*

The Draft Report's benefit-cost tables invite readers to compare efficiencies among regulatory agencies and among individual rules. Estimates for the Department of Health & Human Services, listed on Table 3, for instance, seem intended to be compared with those of the Departments of Labor or Transportation, which appear immediately below. Unfortunately, these comparisons are not valid. In reality, the wide variations among agencies in their methodology, render comparisons across agencies all but meaningless. The drafters recognized the problem: the Draft Report concedes that the data reflect troublesome variations, including, "different monetized values for effects, different baselines in terms of the regulations and controls already in place, [and] different treatments of uncertainty." To choose just one example, the Draft Report notes in Appendix A that some amortizations of aggregate benefits may reflect OMB's preferred 7% discount rate, while others (when performed by the agency itself) may reflect a presumably lower rate. The difference is hardly trivial: the ratio between future benefits thirty years out, calculated using a 3% discount rate and a 7% discount rate is more than 3 to 1.

It is not enough for the Draft Report to warn that aggregate costs and benefits are "not strictly comparable." Without any information about assigned monetary values and discount rates used for each rule, the figures are not comparable at all. Nor is it enough for the Draft Report to say that its tables are intended for "purposes of illustration" only. What relationship are these tables meant to illustrate? The comparisons cannot even show which rules save or cost more money than other rules, let alone by how much.

Recommendation: *If these tables are to be used, the Draft Report's current disclaimers should be expanded to include a statement similar to the following: "Because of wide differences in methodology used by the surveyed agencies, the figures denoting aggregate costs and benefits of one agency's regulations cannot be reliably compared to those of another. This table is not meant to illustrate any comparative relationship among the agencies listed."*

2. *EPA's CAFO Rule*

The Draft Report's analysis of the "National Pollutant Discharge Permits and Standards for Concentrated Animal Feeding Operations" (Table 4) states monetized benefits of \$204-355 million per year and costs of \$355 million per year. The comparison is misleading because the Draft Report (which relies on EPA's accounting) contains one important error and one important omission.

The error is that OMB compares the wrong estimates for costs and benefits. According to EPA's analysis, the benefits range of \$204-355 million per year, which the Draft

Report cites, applies only to “large” concentrated animal feeding operations (CAFOs).¹ But the cost of \$335 million, which the Draft Report cites, applies to *all* CAFOs, small, medium, and large. (At the time of EPA’s accounting, figures on the benefits from regulating small and medium CAFOs were not available.) The figure that should be compared to the \$204-355 range is EPA’s estimate of costs applying only to large CAFOs, which is \$283 million per year.²

The omission is that the monetized benefits do not include *all* of the predicted benefits which could have been monetized, such as “eutrophication and pathogen contamination of coastal and estuarine waters, reduced pathogen contamination of groundwater, reduced human and ecological risks from antibiotics, hormones, metals and salts, improved soil properties, and reduced costs of commercial fertilizers for non-CAFO operations.” The Draft Report minimizes the omissions by saying, “Only the first of these [eutrophication and pathogen contamination of coastal and estuarine waters] would likely significantly affect the benefits estimates if monetized.” But this statement begs more questions. If the benefits of less eutrophication and water contamination are significant and can be monetized, why weren’t they? How would the addition of this significant benefit affect the benefit-cost ratio? What does it mean to say that another unmonetized benefit would not “likely significantly affect” the benefits tally? Is it possible that the rest of the unmonetized benefits could, if monetized, “likely significantly affect” the benefits tally if *added together*? A more detailed explanation is needed.

Recommendation: *In Table 4, the cost figure of \$335 million per year for regulating all CAFOs should be replaced with the cost figure of \$283 million per year for regulating only large CAFOs. In addition, the Draft Report should explain the basis of its statement that eutrophication and pathogen contamination of coastal and estuarine waters “would likely significantly affect the benefits estimates if monetized.” Any supporting evidence that OMB has should be identified and described. The Draft Report should then explain the basis of its statement that the other unmonetized benefits would not likely affect the benefit-cost ratio. Any supporting evidence that OMB has should be identified and described.*

3. Coast Guard Rules

Table 4 contains accounting for three regulations issued by the Coast Guard: Area Maritime Security, Vessel Security, and Facility Security. As all relate to the nation’s new and important efforts in homeland security, I paid special attention to these. The Coast Guard estimates benefits using a unit it calls a “risk point,” by which I assume aggregate quantities of terrorism risk are estimated for comparison before and after a regulation takes effect. Such a subjective measure appears suspect to begin with. But what is truly puzzling to me is the Coast Guard’s use of discounting risk-point reductions

¹ 68 Fed. Reg. 7175.

² *Id.* at 7242.

(at OMB's preferred 7% rate) into the future. "Risk points" are not merely collective indicators of an individual's risk of losing life or limb. They are indicators of national security, that is, sovereignty. The discounting of saved lives or prevented accidents is controversial enough. But the discounting of a nation's security and sovereignty over time pushes the metaphysical envelop even further. This apparently new practice should not go unmentioned and unjustified in the Draft Report.

Recommendation: *The Draft Report should clearly explain how "risk points" were discounted in the Coast Guard's analysis and explain why it is appropriate to discount "risk points" at a 7% rate.*

4. *Savings in Fuel Costs*

Some rules whose costs and benefits are reflected in the Draft Report, reduce fuel costs. For rules in which the agency did not monetize fuel savings, the Draft Report uses gasoline estimates of \$1.10 to \$1.30 per gallon. According to the U.S. Department of Energy, the average retail cost for gasoline as of May 24, 2004, was \$2.06.³ In fact, the last time that gasoline retailed for \$1.30 per gallon, was April 19, 2002 – more than two years ago.⁴ As you know, retail gasoline prices have climbed steeply over the past four months with no sign yet of a plateau.⁵

Recommendation: *The Draft Report should explain whether, given sharp increases in gasoline prices since 2002, its estimates remain valid. If not, the Draft Report's figures should be revised to reflect a more accurate picture of fuel cost savings over time.*

5. *Transfer Rules*

The Draft Report does not report the benefits and costs of what it calls agency "transfer rules," or rules that transfer money from the federal government to private parties. Indeed the Draft Report does not even list such rules if they were issued before October 1, 2002; it lists only such rules issued after that date. (Draft Report, Table 5). For transfer rules issued between October 1, 2002, and September 30, 2002, OMB provides only a brief description of the rules without any estimate of their economic costs or benefits. In its 2002 report to Congress, OMB explained why it had not analyzed the costs and benefits of transfer rules: "Rules that transfer Federal dollars among parties are not included because transfers are not social costs or benefits. If included, they would add equal amounts to benefits and costs."⁶

³ENERGY INFORMATION ADMINISTRATION, U.S. DEPARTMENT OF ENERGY, U.S. RETAIL GASOLINE PRICES, *available at* http://www.eia.doe.gov/oil_gas/petroleum/data_publications/wrgp/mogas_home_page.html

⁴ *Id.*

⁵ *See id.*

⁶ *Id.* at 36 n.30.

The transfer rules listed in the 2004 Draft Report include many very expensive government programs. The money spent on these programs is, by definition, unavailable for other purposes. Such expenditures are opportunity costs in the classic sense. If, for instance, the federal government chose not to spend an estimated \$1.2 billion⁷ to buy out peanut farmers' government quotas, that money could, presumably be used for something else. In OMB's 2003 final report, OMB states that one of its purposes in conducting cost-benefit analysis is to assess the opportunity costs of federal government programs.⁸ In addition, OMB's guidelines for cost-benefit analysis, issued last year, explicitly require agencies to assess the distributional effects of transfer payments.⁹ OMB's failure to consider the opportunity costs and distributional consequences of the transfer rules in Table 5 flouts OMB's own policy statements.

Further, OMB provides no principled definition of a transfer rule. Technically speaking, the transfer rules that lie outside the scope of conventional cost-benefit analysis are those rules that do not attempt to change, or have the effect of changing, the nature or level of economic goods or services provided by private economic actors. They simply transfer money from one entity to another after market actors have chosen the nature and level of goods and services to be provided.

The agency rules that the Draft Report includes within the category of transfer rules do not all meet this definition. For example, the Draft Report includes as transfer rules agricultural subsidy programs that clearly affect the nature and level of agricultural goods provided in the United States. There can be little doubt, for example, that the agency rules associated with the 2003 farm bill's dairy-support program (Table 5) will influence the production of milk and thus affect the primary behavior of market actors. Yet the Draft Report does not explain why these rules are "transfer rules" rather than rules that are properly subject to economic analysis. If the federal government chose to influence milk production through more conventional regulation – say, by tightening environmental standards for dairy farms – the costs associated with such regulation would appear in OMB's cost-benefit tables. To characterize dairy-farm price supports as "transfer rules" simply because they influence market behavior by other means appears arbitrary.

Recommendation: *The Draft Report should: (1) provide a clear definition of the term "transfer rule"; (2) explain why the rules on Table 5 meet this definition; and (3) list the economic costs of the transfer rules it deems not subject to benefit-cost analysis, so readers can judge the relative expenses associated with the unevaluated transfer rules.*

⁷ Environmental Working Group, Farm Subsidy Data Base, available at <<http://www.ewg.org/farm/progdetail.php?fips=00000&progcode=peanuts>>(using figures for 2002).

⁸ OFFICE OF MANAGEMENT AND BUDGET, INFORMING REGULATORY DECISIONS: 2003 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES.

⁹ *Id.*

B. Regulation and Economic Growth

The Draft Report attempts to make an international case for deregulation. First, it asserts that, globally speaking, economic growth is associated with less regulation. In support, OMB offers a preliminary report from the World Bank, a study from Canada's Fraser Institute, and a study co-authored by the Heritage Foundation and the Wall Street Journal.

OMB argues that the correlation between deregulation and economic growth forms, in fact, a causal relationship. Second, OMB suggests that its own regulatory agenda, described in its 2002 Final Report, matches "fairly closely" the pro-growth regulatory reforms praised in the World Bank's preliminary report. Both claims have problems.

1. Reviewing the Literature

OMB relies mainly on the World Bank report to conclude that national wealth, productivity, and employment rates are all positively correlated with less regulation. (It correctly faults the Fraser and Heritage-WSJ studies for failing to isolate the effects of regulation from other influential factors like trade policies.) The World Bank report examines "five of the fundamental regulatory aspects of a firm's life cycle": starting a business, hiring and firing workers, enforcing contracts, getting credit, and closing a business. Describing the World Bank's findings, the Draft Report states:

Australia, Canada, Denmark, the Netherlands, New Zealand, Norway, Singapore, Sweden, the United Kingdom, and the United States, among the richest countries in the world, are the least regulated. The study also finds that common law and Nordic countries regulate less than countries whose legal systems are based on French, German, and socialist origins. (Draft Report at 30)

There are many problems with the use to which OMB would put this report. I will concentrate on four. First, these simple conclusions ignore other means of market interventions which some wealthy countries use in place of direct regulation. Denmark, a country praised in OMB's Draft Report and in which I have lived, imposes heavy taxes on industrial practices disfavored by the government, particularly in pursuit of environmental protection. The same is true in Norway and Sweden. Yet in its use of such examples OMB does not appear to be advocating elaborate taxes to achieve the benefits of direct regulation.

Second, OMB appears to assume, without citing any persuasive evidence, that the rewards of "economic freedom" accrue equally at every stage of deregulation. This is highly doubtful. No one can dispute that Bolivia, whose inhabitants are buried in a jungle of bureaucracy and red tape, would do well to take a machete to its regulatory programs. (See Draft Report at text accompanying note 13.) Bolivia and similar countries could make vast economic improvements by simplifying business regulations. Of course, as the World Bank suggests, regulations should allow for property rights,

contract enforcement, and the like. But what does this say about the United States, a country that has guaranteed such rights since its inception? For wealthy countries already classified as “economically free,” the benefits (or costs) of each felled regulation are highly individualized. The World Bank’s study does not inform regulatory evaluations on the margin.

Third, and related to the point above, the World Bank study does not even concern itself with many of the types of regulations OMB is most concerned about. A careful look at the World Bank study shows that its broad, transnational comparisons rely on some startling assumptions. For instance, in comparing regulations affecting market entry, the World Bank assumes a business that, among other things, (1) “is not using heavily polluting production processes,” (2) is not subject to industry-specific regulations (such as many environmental regulations), and that (3) is operating in the country’s “most populous city.”¹⁰

Whatever the study says about regulation in general, its comparisons say nothing about heavily polluting industries, those subject to special rules, or those operating outside cities like Tokyo and New York. This point is key because wealthy countries are, perhaps, the most likely to have specialized rules, directed toward specific industries or specific pollution threats; and their large industries are less likely to reside in their country’s most populous city, which is likely to be dominated instead by the service sector.

Finally, the Report mistakes wealth for well-being. The two should not be equated.¹¹ Consider two possible measures of well-being, average infant mortality and average life expectancy at birth. While it is true that some “less regulated” nations, such as Sweden and Singapore, rank among the best in international comparisons, other less regulated nations, such as the United States, do not.¹² Indeed the five OECD countries that the

¹⁰ The World Bank Group, *Doing Business: Methodology—Starting a Business*, available at

<<http://rru.worldbank.org:80/DoingBusiness/Methodology/EntryRegulations.aspx>>.

¹¹ See Robert R.M. Verchick, *Feathers or Gold? A Civic Economics for Environmental Law*, 25 HARVARD ENVIRONMENTAL LAW REVIEW 95, 109-15 (2001).

¹² Sweden’s infant mortality rate of 3.42 deaths per 1,000 live births is the world’s second lowest. U.S. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACT BOOK, “Rank Order: Infant Mortality,” (2003), available at

<<http://www.odci.gov/cia/publications/factbook/rankorder/2091rank.html>> [hereinafter, “Infant Mortality”]. Sweden’s average life expectancy at birth, 79.97, places it ninth in the world. U.S. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACT BOOK, “Rank Order: Life Expectancy at Birth,” available at

<<http://www.odci.gov/cia/publications/factbook/rankorder/2102rank.html>> [hereinafter, “Life Expectancy”]. Singapore’s infant mortality rate of 3.57 deaths per 1,000 live births is the world’s fourth lowest. “Infant Mortality,” *supra*. Singapore’s average life expectancy at birth, 80.42, places it fifth in the world. “Life Expectancy,” *supra*. The United States’ infant mortality rate of 6.75 deaths per 1,000 live births is the world’s

Report describes as having the most regulation -- Greece, Italy, Portugal, Ireland, and France -- *all* have lower infant mortality rates than the United States.¹³ All of those countries, with the exception of Portugal, have higher average life expectancy figures too.¹⁴ Among all nations, the country whose figures are among the closest to U.S. figures is Cuba, one of the most repressed and regulated nations on earth.¹⁵

My point is not that life in Sweden is the same as life in Singapore, or that life in America, for that matter is comparable to life in Cuba. Rather my point is that one cannot generalize among countries on any single axis without arriving at conclusions that are intuitively false.

Recommendation: *The Draft Report should avoid sweeping generalizations about comparative levels of regulation and economic growth where such generalizations are not squarely supported by factual findings. Specifically, the Draft Report should acknowledge that differences among nations concerning tax structure, levels of industrialism, size of bureaucracy, and size of economy make comparisons on the basis of regulations and economic growth exceedingly difficult. It should either exclude reference to the World Bank study (because it does not consider business regulations that target heavy pollution, industry-specific activities, or that exist outside a nation's most populous city) or explain why this study, given its narrow focus, should be considered relevant. The Draft Report should also avoid suggesting a causative link between lower regulation and economic growth unless evidence exists that clearly supports such causation.*

2. Linking OMB's agenda to the World Bank Study

The Draft Report suggests that OMB's regulatory agenda matches the World Bank's recommendations "fairly closely." Indeed, it cites OMB's 2002 Final Report, Chapter 1 as evidence of OMB's compatibility with World Bank analysis. To me, this conclusion is too much of a stretch. The World Bank's preliminary conclusions -- which are addressed to countries of all levels of wealth and with myriad forms of government -- is pretty simple: avoid unnecessary interference with competitive markets, enhance property rights, expand technology, reduce court involvement in business matters, and make reform a continuous process.

Most Americans, including me, would agree that centralized management of the economy -- especially when intended to shield business from competition -- is a bad idea.

forty-second lowest. "Infant Mortality, *supra*. The United States' average life expectancy at birth, 77.14, places it forty-eighth in the world. "Life Expectancy," *supra*.

¹³ See "Infant Mortality," *supra* note 12.

¹⁴ See "Life Expectancy," *supra* note 12.

¹⁵ Cuba's infant mortality rate of 7.15 deaths per 1,000 live births is the world's forty-fourth lowest. "Infant Mortality," *supra*. Cuba's average life expectancy at birth, 76.8, places it fifty-first in the world. "Life Expectancy," *supra*. For U.S. figures, see *supra* note 12.

But OMB's regulatory agenda, as expressed in the 2002 Final Report, recommends something very different. OMB's report prominently argues for strongly centralized regulatory oversight, an elaborate system peer review system, and an expanded bureaucratic staff.¹⁶ Whether good or bad, these flagship initiatives have nothing to do with the World Bank Report. Indeed some of the OMB's agenda might be said to be at odds with the World Bank's general injunction against bureaucracy and red-tape.¹⁷

C. Regulation and the Manufacturing Industry

I approached this section of the Draft Report with the assumption that an invitation for public comment on a regulatory reform is a significant undertaking, requiring substantial amounts of OMB's time, staffing, and other resources. Thus I also assume that any topic for such public discussion be carefully chosen as especially deserving of such bureaucratic attention. There are, after all, so many worthy causes, so many opportunities to save lives and money. Every year, for instance, more than 40,000 people die on our nation's highways, costing billions of dollars in property damage and lost worker potential. Foodborne illnesses kill an estimated 7,000 and sicken 76 million. Nearly 6,000 workers die as a result of injury on the job, with an additional 50,000 to 60,000 killed by occupational disease. Asthma – linked to air pollution – is rising dramatically, afflicting 17 million, including six million children.

The Draft Report invites comments on regulatory reforms concerning the manufacturing industry. Specifically, it seeks proposals that might reduce unnecessary costs, increase effectiveness, enhance competitiveness, reduce uncertainty, and increase flexibility. If over-regulation of the manufacturing industry is especially deserving of OMB's attention – as deserving, say, as global warming or even childhood asthma – the Draft Report should make that case, supported by direct and compelling evidence. That case has yet to be made.

1. Defining the Problem

One weakness with this section concerns the Draft Report's definition of "manufacturer." The proposed definition – "establishments engaged in the mechanical, physical, or chemical transformation of materials, substances, or components into new products" – is too vague. Is a pizza parlor a manufacturer? A hospital? Kinko's? Without more explicit limits, the Draft Report opens the door for all kinds of requests for deregulation beyond what was originally intended.

¹⁶ OFFICE OF MANAGEMENT AND BUDGET, *STIMULATING SMARTER REGULATION: 2002 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES*, chap. 1.

¹⁷ For more on OMB's increased, centralized power, see FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* 42, 110-11, 168-69, 195, 207-08 (2003).

2. *Identifying a Regulatory “Burden”*

A more serious weakness concerns the underlying assumption that the manufacturing industry suffers from a regulatory burden that is in need of special OMB attention. As written, the Draft Report does not establish this point.

The discussion opens with the promising assertion that manufacturing regulations have “the potential to lower the viability of U.S. manufacturers and the competitiveness of U.S. manufacturing relative to our international trading partners.” The assertion, however, is made without a supporting citation. Later, in a subpart titled, “Trade and Competitiveness Implications,” the Draft Report briefly reviews the literature in this area and finds the data quite inconclusive. The Report raises the “safe haven” theory, which holds that manufacturers will relocate operations to avoid onerous domestic regulations, but later notes that “[m]ost empirical studies . . . have not concluded that the relative stringency of environmental requirements give rise to international pollution havens.” At another point, the Draft Report opines that increased regulation in the U.S. may lead to competitive disadvantages not yet reflected in current studies. But the Draft Report quickly backs away, suggesting the European Commission’s new Registration, Evaluation, and Authorization of Chemicals (REACH) might just even things out. If burdensome regulation poses a compelling threat to American competitiveness, you would not know it from reading this report.

Ultimately, the Draft Report falls back on a more modest assertion, that regulatory demands on the manufacturing sector are, well, big. Or as the Draft Report puts it, “Whenever the costs of rules are substantial, the search for cost-effective reforms is critical.” Yet I would caution against adopting a standard of “substantial costs” for deciding when to invite public comment on regulatory reform. To begin with, what is “substantial”? The Draft Report makes no attempt to define this standard. Second, one cannot judge the size of costs without simultaneously considering the countervailing benefits. The Draft Report admits that “net benefits” would be a better measure, but dismisses the point because the data on net benefits will not be available until next year. If this is so, the only prudent course is to delay public comment until those data have been evaluated to determine if public comment on this issue is necessary. There is no evidence of exigency here. So far there is no evidence of “an over-burden” of any proportion.

All of this is not to say that the manufacturing sector is in the pink. On the contrary, it is in obvious trouble. Three and a half years ago the manufacturing sector slipped off a cliff; jobs numbers fell for 42 consecutive months.¹⁸ Between March 1998 (a peak) and January 2004, more than three million manufacturing positions have disappeared.¹⁹ Indeed, the loss of manufacturing jobs has become a centerpiece domestic

¹⁸Christian Weller, *Ignore at Your Peril: The Manufacturing Crisis in Perspective*, Feb. 6, 2004, available at

<http://www.americanprogress.org/site/lookup.asp?c=biJRJ8OVF&b=13583>.

¹⁹*Id.*

issue of the 2004 presidential campaign.

Understandably, the current Administration is keen to address the manufacturing problem in any way possible. But it would be wrong to believe, as the Draft Report seems to imply, that health and environmental regulations are a primary cause of today's industry woes. There is simply no evidence directly supporting this claim. Most health and environmental regulations, remember, predate these events by many years. The real culprits are more likely the recent recession, increased worker productivity (a boon for industry, a bust for workers), and, perhaps the relative higher costs of American labor (which includes escalating health costs). It is the job of federal agencies such as OMB to bend toward principle not politics.²⁰ The Draft Report has yet to make the principled case for an inquiry into regulatory reform. Without more compelling evidence, this plan should not move forward.

Recommendation: The final section of the Draft Report inviting public comments on regulatory reforms concerning the manufacturing industry should be omitted until reliable data concerning net benefits (new benefits to society minus new costs to society) are available for evaluation next year.

Again, thank you for this opportunity to comment. I hope you will find these thoughts useful.

Sincerely,

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²⁰ For more complete discussion of agencies' normative goals in general, see Robert R.M. Verchick *Toward Normative Rules for Agency Interpretation: Defining Jurisdiction under the Clean Water Act*, 55 ALABAMA LAW REVIEW 845 (2004).

