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To: John F. Morrall III/OMB/EOP@EOP

cc:

Subject: Comments of Washington Legal Foundation to OMB Report

Please find attached a copy of WLF's comments to the OMB Report. If you cannot open this document, please email me back and I will fax and/or deliver the comment.
Paul Kamenar

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Washington Legal Foundation
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May 28, 2002

John Morrall
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB, Room 10235
725 17th Street, NW
Washington, DC 20503

Re: Comments on Draft Report to Congress on the Costs and Benefits
of Federal Regulations (67 Fed. Reg. 15014 (Mar. 28, 2002))

Dear Mr. Morrall:

The Washington Legal Foundation (WLF) hereby submits these comments in response to the Federal Register notice by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) requesting public comment on the Draft Report to Congress on the Costs and Benefits of Federal Regulations (Draft Report). The OMB prepared the Draft Report pursuant to the Regulatory Right-to-Know Act which requires annual reports from OMB reporting on the costs and benefits of Federal regulations together with recommendations for reform.

The Draft Report is divided into four chapters. Chapter I discusses regulatory policy during 2001 and the reform measures initiated by OMB to ensure openness in the regulatory process and the use of sound scientific analyses in the promulgation of agency rules and regulations. Chapter II provides estimates of the costs and benefits of Federal regulation and paperwork, focusing on the major regulations issued over the last 30 months. Chapter III discusses regulatory initiatives in the international arena and their implication for the United States. Chapter IV seeks recommendations from the regulated community for the reform of particular rules, including rules that are masquerading as agency "guidances" that have not undergone the notice and comment procedure required by the Administrative Procedures Act. In that regard, WLF notes that the Environmental Protection Agency (EPA) seems to be a repeat offender for violating the notice and comment requirements, and was recently rebuked by the court for improperly using

"guidances" instead of issuing formal regulations. See *General Electric Company v. EPA*, 2002 U.S. App. LEXIS 9507 (D.C. Cir., May 17, 2002).

Interests of WLF

WLF is a non-profit public interest law and policy center based in Washington, D.C. with supporters nationwide. WLF devotes substantial resources to promoting free enterprise principles, a limited and accountable government, and a strong national security and defense.

Over the years, WLF participated in numerous court cases challenging agency actions because of their faulty evidentiary or legal basis. See, e.g., *National Mining Ass'n v. U.S. Army Corps of Engineers*, 951 F. Supp. 267 (D.D.C. 1997), *aff'd* 145 F.3d 1399 (D.C. Cir. 1998); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *American Trucking Ass'ns v. Whitman*, 531 U.S. 457 (2001). In addition, WLF supported congressional efforts to obtain cost/benefit information regarding agency regulations. See, e.g., *Washington Legal Foundation v. EPA*, Civ. No. 95-2396 (D.D.C. Jan 31, 1997) (consent judgment) (suit filed by WLF on behalf of U.S. Senators and Representatives against EPA for failing to submit to Congress a report of the cost/benefit impact of the Clean Air Act and related regulations as required by Section 812 of the Clean Air Act).

WLF also participated in many rulemaking proceedings, opposing regulations that were not based on sound science or were not supported by the statute. See *Comments of WLF and WLF's Economic Freedom Law Clinic at George Mason University School of Law Opposing OSHA's Proposed Ergonomics Program Standard* (March 2, 2000). WLF petitioned a number of government agencies, particularly the EPA, to formally revoke agency regulations that have been struck down by the courts. In response to WLF's petition, OMB agreed with WLF and formally notified all Agency General Counsels and Solicitors to "identify and implement any measures it believes are appropriate" for revoking invalid regulations. See *Letter from Jay P. Lefkowitz, OMB General Counsel to Washington Legal Foundation* (Sept. 27, 2001).

In addition, WLF's Legal Studies Division published many studies, reports, and analyses on regulation reform. See, e.g., F. Edwin Froelich, *OSHA's Proposed Indoor Air Quality Standard: An \$8.1 Billion Burden On Economic Growth And Job Creation* (WLF Legal Backgrounder, Aug. 26, 1994); Charles D. Weller and David B. Graham, *An Executive Order Could Bring Better Science To Regulation* (WLF Legal Opinion Letter, Aug. 24, 2001) Ernest Gellhorn, Wendy L. Gramm, & Susan E. Dudley, *President Expands Oversight Of Federal Agency Rulemaking* (WLF Legal Backgrounder, Nov. 16, 2001); Alan Charles Raul, *Deeper Judicial Scrutiny Needed For Agencies' Use Of Science* (WLF Legal Backgrounder, Jan. 25, 2002).

Comments of WLF

WLF applauds OMB for its efforts to engage in meaningful review of agency regulations, particularly those that impact small businesses, and to institute various measures that would help ensure that agency rules are based on sound scientific evidence and are properly assessed for their costs and benefits. WLF supports OMB's so-called "prompt letter" procedure, a new OMB initiative, whereby OMB notifies agencies of current regulations that should be reviewed, and if warranted, revised or revoked because the legal and/or factual basis for the rule is faulty. WLF also commends OMB's efforts to act expeditiously in approving certain regulations that were instituted in response to the attack on America on September 11, 2001, including those proposed by the Department of Justice which WLF supported by filing formal comments.

OMB's notice solicits suggestions from the public for identifying particular regulatory reform improvements as well as examples of problematic agency guidance document improvements. Rather than reiterate many of the same regulations or guidances as those submitted by other organizations, WLF instead endorses those submitted to OMB by the U.S. Chamber of Commerce, the National Association of Home Builders, and the Cement Kiln Recycling Coalition, among others. WLF also supports the recommendation by the Center for Regulatory Effectiveness that OMB should review independent agency rules in addition to executive or cabinet level agencies.

In addition to supporting the reforms submitted by various business organizations, WLF wishes to bring to OMB's attention a regulatory scheme that is not being fully assessed with respect to its true costs. WLF urges OMB and the relevant agencies to focus on the true costs that are incurred by property owners who are denied permits to develop their property because of environmental regulations limiting or preventing the development. Property owners and developers are required to apply for and obtain various permits from government agencies to develop their property that federal agencies claim come within their regulatory and permitting purview. For example, federally regulated wetlands require national, regional, or individual permits from the U.S. Army Corps of Engineers pursuant to Section 404 of the Clean Water Act. 33 C.F.R. 323.3. Similarly, development of property that has been designated critical habitat for endangered or threatened species, or is viewed by the Department of Interior as constituting a "take" of such species, requires a special incidental "take" permit under the Endangered Species Act.

In administering these and related environmental laws and regulations,

property owners are required to leave all or part of their property in its natural state to provide alleged environmental benefits to the public, but are forced to bear all of the costs. Property owners have found it difficult, to say the least, to challenge these "regulatory takings" in court and to seek just compensation under the Fifth Amendment. For the most part, property owners either are forced to capitulate to the restrictions on their property by federal agencies, or reluctantly agree, if they are in a financial position to do so, to pay the government for the right to develop their own property in the form of "mitigation" measures, either in-kind, or by extortionate payments of money into a so-called "mitigation" fund.

In assessing the true costs of these environmental restrictions, the agencies and OMB should, at a minimum, consider and compute the costs of the regulation to the landowner in the form of the reduced value of the property. Whether those costs are compensable under the Fifth Amendment for a full, partial, or temporary taking is a legal issue that may or may not be adjudicated in court. Whatever the merits of such a taking claim may be, there is no denying that the property has suffered a direct economic impact because of the restrictive regulation.

Thus, unlike a typical regulation, such as an OSHA or EPA regulation requiring the expenditure of funds in order to come into compliance, and which can be measured relatively easily, the restrictions on property development present hidden, but nevertheless substantial costs. In other words, there is no significant direct or out-of-pocket costs to a property owner who applies for, but is denied, a permit because of the presence of wetlands. The costs to prepare and file the permit application are relatively nominal. However, the true costs of the regulatory and permitting scheme is quite substantial when the permit is either denied, or loaded with costly conditions and mitigation requirements. Those costs ought to be assessed in each case by the agency, and the OMB should determine in the aggregate what those costs are to property owners. By determining these costs, government agencies will be able to better understand and appreciate the true impact of their regulations, rather than assuming that they are "cost free."

Conclusion

WLF supports OMB's efforts to revitalize its role as the overseer of government agencies' regulatory conduct. The OMB Report to Congress will go a long way to ensuring that agencies' regulatory programs are based upon sound science and take into account the full costs and benefits of their rules and policies. We urge the OMB to continue to take strong measures by denying clearance to needless and costly proposed regulations, and by carefully reviewing existing regulations.

Respectfully submitted,

Daniel J. Popeo
Chairman and General Counsel

Paul D. Kamenar
Senior Executive Counsel

10/10/2020
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