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Environmental Protection in the Trump Era

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What the “Two-for-One” Executive Order on Regulation Means for Environmental Law

On January 30, 2017, the President issued [Executive Order 13771](#), which directs executive branch agencies and departments to repeal two regulations for every new regulation adopted. The Order also directs that in fiscal year 2017, costs imposed by new regulations must be offset by eliminating existing regulations. In future years, incremental costs of new regulations must be offset using a regulatory “budget” to be prescribed for each agency by the Office of Management and Budget (OMB). This Order:

- creates great uncertainty in selecting regulations to adopt and repeal,
- discourages new regulations even if they offer large benefits in excess of their costs, and
- vests huge discretion in the OMB Director.

Process.

Executive Order 13771 defines “regulations” to include agency statements designed to implement, interpret, or prescribe law or policy, including procedures. The Order exempts regulations related to military, national security, or foreign affairs functions; regulations related to agency organization, management, or personnel; and any category of regulations exempted by the OMB Director. The requirements of the Order do not apply to independent agencies and commissions.

Executive Order 13771 imposes two distinct, interrelated requirements:

Two-for-One Requirement. Whenever a federal agency proposes a regulation for public notice and comment, or otherwise promulgates it, the agency must “identify at least two existing regulations to be repealed.”

Cost Offset Requirement. In fiscal year 2017, the “total incremental cost” of all new regulations to be finalized by each agency, “including repealed regulations,” shall be “no greater than zero.” Moreover, all “new incremental costs associated with new regulations” must be completely offset by the “elimination of existing costs associated with at least two prior regulations.”

For each future fiscal year, the OMB Director will identify for each agency “a total amount of incremental costs” that will be allowed for issuing and repealing its regulations. The head of each agency must include in the agency’s annual “regulatory

Areas to Watch

All environmental, health and safety, and natural resources rules issued by executive agencies will be assessed by OMB under this Order. Scrutinizing the published annual regulatory agendas of EPA, Department of the Interior, US Department of Agriculture, NOAA, and many other agencies will help determine which rules are no longer being developed (or are being withdrawn), as well as planned repeals. Members of the public should also consider disclosure, monitoring, and recordkeeping provisions that are important to their communities, as these are likely targets for deregulatory actions to provide offsets.

plan” submitted to OMB the incremental costs of all new regulations and total costs or savings associated with regulations targeted for repeal. No regulations that exceed the agency’s approved total incremental cost allowance will be allowed “unless required by law or approved in writing by the Director.”

OMB Guidance. By two memoranda, dated February 2 and April 5, 2017, the Acting Administrator of OMB’s Office of Information and Regulatory Affairs (OIRA) issued [guidance](#) to agencies on how Executive Order 13771 will be implemented. The regulatory actions subject to the Order will include all “significant regulations,” as defined in [Executive Order 12866](#). (That 1993 executive order, as amended, requires that agencies provide cost-benefit analysis of regulations as well as submit an annual regulatory agenda to OIRA.) Thus, Executive Order 13771 will apply to the 300 to 400 federal regulatory actions each year currently subject to OIRA review:

- ones that have an annual effect on the economy of \$100 million or more;
- that may adversely affect in a material way the economy, any sector thereof, productivity, competition, jobs, the environment, health or safety, or other units of government;
- that create serious inconsistency with other agency actions; or
- that raise novel legal or policy issues.

The OIRA guidance includes as regulatory actions subject to the Trump Order “significant guidance” documents issued by federal agencies. The OIRA guidance exempts rules affecting transfer payments or imposing fees for services, except where such regulatory actions impose more than *de minimis* costs and “may distort markets, causing inefficiencies.”

Deregulatory actions recognized by OIRA for calculating Executive Order 13771 offsets include formal and informal rulemakings, revocation of agency guidance documents, “some actions related to international regulatory cooperation,” and “information collection requests that repeal or streamline recordkeeping, reporting, or disclosure requirements.” Agencies must identify intended deregulatory actions in their annual unified regulatory agendas submitted to OIRA.

Agencies may count savings from regulations revoked by Congress under the Congressional Review Act ([see Chapter 3](#)). On a case-by-case basis, agencies may be allowed by OIRA to use offsets savings from Obama Administration regulations (but not Trump Administration regulations) vacated by a court, provided appeals have been concluded. To calculate dollar offsets from repeals, agencies may not use the Regulatory Impact Analysis that supported the regulation’s adoption, but must conduct a new analysis of ongoing and prospective costs.

Agencies may not consider sunk costs of compliance with existing regulations, but only prospective savings from repeal. Agencies may “bank” deregulatory actions (for the 2-for-1 repeal requirement) as well as bank cost savings from repeals to use in offsetting costs from new regulatory actions.

Benefits are not to be considered in any determinations, only costs.

Executive Order 13771 deregulatory actions and cost savings may be transferred within individual federal agencies, allowing offsets in one program to be applied to regulatory actions undertaken by another program; for example, deregulatory actions by EPA’s Air Office can be used to offset actions by the agency’s Office of Water.

Constraints. The Order has six similar provisos:

- “unless prohibited by law,”
- “unless otherwise required by law,”
- “to the extent permitted by law,”
- “unless required by law,”
- “implemented consistent with applicable law and . . . the availability of appropriations,” and
- not “construed to impair or otherwise affect the authority granted by law to an executive department or agency or the head thereof.”

However, the guidance takes a narrow view of what is exempt, and says OIRA must in each case determine whether to grant a waiver based on critical issues, and/or the need to comply with an imminent statutory or judicial deadline. Offsetting repeals will still need to be identified. Also, even if a statute prohibits consideration of costs when adopting a regulation, the OIRA guidance says that the agency must still identify two deregulatory actions to use as offsets, and must still offset the costs of the new regulation.

Discussion.

Discussions between agencies and OIRA about which new rules to forego for lack of offsets, about determining the size of an agency’s annual “total incremental cost allowance,” and about decisions on whether a rule is “required by law” or otherwise exempt, may occur outside of public view.

The effect on federal agency operations will be significant. Repeals will require rulemaking in accordance with statutory and regulatory procedures:

- notice and comment,
- cost-benefit analysis,
- paperwork reduction,
- federalism analysis, and justifications for changes in agency position, and
- in many cases compliance with the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and other requirements.

An agency cannot simply say “we’ve decided training of pesticide applicators is no longer needed,” or “exploration permits are no longer required on federal lands,” without justifying its change in position and the repeal’s consistency with the statutes ([see Chapter 8](#)). Rules whose adoption was

expressly required by law, including pursuant to court orders, would need to be replaced by rules that meet the same statutory and judicial standards. OIRA has also stated that even deregulatory actions must meet the Executive Order 12866 requirement that benefits must exceed costs, **so it may be challenging for agencies to repeal environmental and health and safety regulations that are generating benefits to society.**

Finding regulations for repeal will be difficult given existing statutory mandates and the scarcity of sufficiently “costly” repeals to meet the offset provisions of Executive Order 13771. Existing regulations’ costs have often already been internalized into standard operating processes and new equipment, **so there may be little, if any, cost saving available from repeal of regulations.** Agencies may decide to target recordkeeping, disclosure, monitoring, and transparency rules and document requirements, for which the ongoing costs are determinable, while the benefits are more diffuse or programmatic.

Regulations for repeal may be identified by federal agencies through processes under [Executive Order 13777](#). This Order, issued by President Trump on February 24, directed each federal agency to convene a regulatory reform task force to identify regulations suitable for repeal, replacement, or modification.

Under the OIRA guidance, agencies will not publish in the *Federal Register* notice of which deregulatory actions they are using to offset any specific regulatory action. However, such deregulatory actions may themselves be published separately, as may be required by the Administrative Procedure Act and other laws. OIRA states that agencies should not cite Executive Order 13771 as the basis for any deregulatory action.

Opportunities for Public Engagement.

Executive Order 13771 does not *create* any right enforceable against the U.S. However, litigation challenging its application to specific delays in new regulations (or repeals of regulations or guidance documents) may be brought under the Administrative Procedure Act (APA) and substantive laws, and the Order would provide no defense against these statutory claims.

Public Citizen, the Natural Resources Defense Council (NRDC), and the Communications Workers of America filed a lawsuit in February 2017 challenging the Order on its face, alleging that it adds requirements for agencies that are not allowed by underlying statutes, and identifying numerous rules that have been delayed, potentially because of the Order. Other groups can be expected to bring targeted litigation to compel agencies to proceed with specific regulations, even if not offset.

Citizen action groups and other beneficiaries of health, safety, and environmental regulations will likely press agencies to identify and justify some of their regulations as “required by law,” as well as to identify repeal targets and cost estimates long in advance of discussions with OMB, so that any tradeoffs are in public view. They may also highlight rules that get lost in the limbo of agency compliance with the Order, and push for disclosure of, and an opportunity to comment on, periodic agency negotiations with OMB.