UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, INC., NATURAL RESOURCES DEFENSE COUNCIL, INC., and COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

v.

DONALD TRUMP, President of the United States, UNITED STATES OF AMERICA, MICK MULVANEY, Director of the Office of Management and Budget, RICK PERRY, Secretary of Energy, U.S. Department of Energy, ELAINE L. CHAO, Secretary of Transportation, U.S. Department of Transportation, HEIDI KING, Deputy Administrator of the National Highway Traffic Safety Administration, LOREN SWEATT, Acting Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, R. ALEXANDER ACOSTA, Secretary of Labor, U.S. Department of Labor, RYAN ZINKE, Secretary of the Interior, U.S. Department of the Interior, RAYMOND MARTINEZ, Administrator, Federal Motor Carrier Safety Administration, JIM KURTH, Deputy Director and Acting Director, U.S. Fish and Wildlife Service, SCOTT PRUITT, Administrator, U.S. Environmental Protection Agency, HOWARD "SKIP" ELLIOTT, Administrator, Pipeline and Hazardous Materials Safety Administration, CHRIS OLIVER, Assistant Administrator for Fisheries, National Marine Fisheries Service, DAVID ZATEZALO, Assistant Secretary for Mine Safety and Health Administration, U.S. Department of Labor, and RONALD BATORY, Administrator, Federal Railroad Administration.[1]

Civil Action No. 17-253 (RDM)

**SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

[1] Pursuant to Federal Rule of Civil Procedure 25, current public officers have been substituted for some of the public officers originally named as defendants.

## INTRODUCTION

1. This action seeks declaratory and injunctive relief with respect to Executive Order 13771 on "Reducing Regulation and Controlling Regulatory Costs" issued by President Donald Trump on January 30, 2017, Interim Guidance issued by the Office of Management and Budget (OMB) on February 2, 2017, and Guidance issued by OMB on April 5, 2017, regarding implementation of the Executive Order. The Executive Order exceeds President Trump's constitutional authority, violates his duty under the Take Care Clause of the Constitution, and directs federal agencies to engage in unlawful actions that harm countless Americans, including plaintiffs' members.

2. Executive Order 13771 states that an agency may issue a new regulation only if it rescinds at least two existing regulations in order to offset the costs of the new regulation. It directs agencies (1) to identify at least two existing regulations to repeal for every new regulation proposed or issued, (2) to offset the costs of a new regulation by eliminating costs associated with at least two existing regulations, and (3) to promulgate regulations during fiscal year 2017 that, together with repealed regulations, have combined incremental costs of $0 or less, regardless of the benefits. The Executive Order states that the total incremental cost limit for future fiscal years will be identified later by the Director of OMB. Following OMB's instruction that each agency's total incremental cost for fiscal year 2018 should be a net reduction from fiscal year 2017, each agency set a cost cap of $0 or less.

3. The Executive Order is blocking, delaying, or forcing the repeal of regulations needed to protect health, safety, and the environment, across a broad range of topics—from automobile safety, to occupational health, to air pollution.

4. The Executive Order's mandate that a new regulation may be issued only if its costs are offset by costs eliminated through the repeal of at least two regulations ignores the benefits of these rules—including rules that cannot be promulgated consistent with the mandate and rules that must be repealed to meet the mandate. Indeed, the Executive Order directs agencies to disregard the benefits of new and existing rules in complying with this mandate—including benefits to consumers, to workers, to people exposed to pollution, and to the economy—even when the benefits far exceed costs. The Executive Order's direction to federal agencies to zero out costs to regulated industries, divorced from consideration of the public benefits for which Congress enacted these statutes, forces agencies to take regulatory actions that harm the people of this nation.

5. Executive Order 13771 and OMB's Interim Guidance and Guidance direct regulatory agencies to engage in decisionmaking that is arbitrary, capricious, an abuse of discretion, and not in accordance with law. No governing statute authorizes any agency to withhold, delay, or revise a regulation that would address identified harms to public safety, health, or other statutory objectives until it can rescind two or more existing regulations and offset the costs of the new one. No governing statute authorizes any agency to withhold, delay, or revise a regulation that would address identified harms to public safety, health, or other statutory objectives on the basis of an arbitrary upper limit on total costs (for fiscal year 2017, a cap of $0; for fiscal year 2018, a cap of $0 or less) that regulations may impose on regulated entities or the economy.

6. Rulemaking in compliance with the Executive Order's requirements cannot be undertaken without violating the statutes from which the agencies derive their rulemaking authority and the Administrative Procedure Act (APA).

7. The implementation of governing statutes, passed by Congress and signed into law by previous Presidents, is slowing and may largely halt under the Executive Order. In addition to

complying with the substantive requirements of those laws and the procedural requirements of the APA, agencies, to issue a new proposed or final rule, are required to undertake new cost assessments both of the new proposed or final rule and at least two existing rules—although the new rule and the existing rules need not have any substantive relationship to one another and, with approval from OMB, need not even be issued by the same agency. Moreover, for each new regulation that an agency promulgates, it must undertake at least two additional rulemakings to repeal existing regulations.

8. In seeking to impose rulemaking requirements beyond and in conflict with the requirements of the APA and the statutes from which the federal agencies derive their rulemaking authority, the Executive Order exceeds the President's authority under the Constitution, usurps Congress's Article I legislative authority, and violates the President's obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

9. The Executive Order, Interim Guidance, and Guidance are facially unlawful. Implementation and enforcement of the Executive Order, Interim Guidance, and Guidance should be enjoined.

## JURISDICTION AND VENUE

10. This Court has jurisdiction under 28 U.S.C. § 1331.

11. Venue is proper in this district because plaintiff Public Citizen resides and has its principal place of business in this judicial district, and because a substantial part of the acts or omissions giving rise to the claim occurred in this judicial district. 28 U.S.C. § 1391(c)(2), (e)(1).

## PARTIES

12. Plaintiff Public Citizen, Inc., is a national, non-profit consumer advocacy organization with more than 400,000 members and supporters nationwide. Public Citizen engages

in research, advocacy, media activity, and litigation related to advancing health and safety, consumer protection, and the environment, among other things. Public Citizen's members, like most Americans, are the beneficiaries of consumer protection, public health, environmental, and other statutes that Congress enacted to serve the public interest and protect the public. Public Citizen's members, including members Amanda Fleming and Terri Weissman, rely on Public Citizen to petition the government on their behalf, to advocate for strong protections with respect to auto safety, drug and medical device safety, workplace safety, consumer finance, and the environment, among other things. On behalf of its members, and in furtherance of its mission and the interests of its members, Public Citizen petitions federal agencies for rulemaking and comments on proposed regulations issued by federal agencies, and it publishes reports, writes op-eds, and litigates in support of its members' interests in health and safety, consumer protection, and environmental regulation. The Executive Order adversely affects Public Citizen's members by forbidding new regulations to implement laws protecting their interests, unless the government repeals existing regulations that already do so. The Executive Order also injures Public Citizen and its members, including members Amy Allina, Amanda Fleming, and Terri Weissman, by causing agencies to delay, not issue, or repeal regulations that protect their concrete interests in order to comply with the Executive Order.

13. On behalf of its members, Public Citizen engages in research, advocacy, public education, and litigation to advance consumer protections, public health, and the environment. As part of this work, Public Citizen petitions federal agencies to issue new or stronger rules. When Public Citizen considers whether to submit a rulemaking petition, it considers factors such as the governing statute, regulations, and agency practice; the nature of the agency proceedings that would follow a petition; the resources and evidence available to Public Citizen; and likely

outcomes of a rulemaking petition. The Executive Order, however, imposes a new requirement and consideration, directing an agency to repeal two regulations for every significant new regulation issued, and commanding agencies to offset regulated parties' costs through deregulatory actions, regardless of a new regulations' net benefits. These new and extra-statutory agency decisionmaking criteria make it likely that a successful rulemaking petition will be counter-productive and impede Public Citizen's mission. The Executive Order thus adversely affects Public Citizen's ability to advocate on its members' behalf by forcing Public Citizen to choose between advocating for new regulations, at the cost of potential loss of other beneficial regulations, and refraining from advocating for necessary new public protections. The Executive Order injures Public Citizen's ability to advance its mission through petitioning activity.

14. Plaintiff Natural Resources Defense Council, Inc. (NRDC) is a non-profit environmental and public health organization with hundreds of thousands of members nationwide. NRDC members, like most Americans, benefit from statutes that Congress has enacted to protect health and the environment, and these members, including members Karen Bain, Barbara Blau, James Coward, R.J. Mastic, Eduardo Pontoriero, Jose Rivero, and Gerald Winegrad, rely on NRDC to represent their interests in advocating for such protections. For example, NRDC members are exposed to and injured by exposure to pollution regulated under the Clean Air Act and exposed to and injured by exposure to toxic chemicals regulated under the Toxic Substances Control Act; such exposures increase NRDC members' risk of injury to their health. NRDC members live, work, and/or recreate near enough to rail lines used to convey oil and other dangerous substances that an explosion involving such cargo near them would threaten their health, property, and/or recreational and aesthetic enjoyment. NRDC members study, observe, and enjoy species protected under, and that meet the standards for protection under, the Endangered

Species Act. And NRDC and its members buy and use appliances in their personal and professional lives, including residential conventional cooking appliances and commercial water heaters, for which stricter, mandatory energy efficiency standards would benefit NRDC and its members by reducing costs, including lifecycle energy costs, increasing selection and availability of products that are not otherwise available or reliably identifiable by those interested in purchasing energy efficient appliances, and reducing air pollution that causes health, recreational, aesthetic, and economic harm to NRDC members. The Executive Order has harmed and continues to harm NRDC's members' economic, health, scientific, recreational, aesthetic, and other interests, including those NRDC members identified above, by delaying and preventing the adoption of new regulations to implement laws that protect these members' interests.

15. On behalf of its members, NRDC engages in research, advocacy, public education, and litigation to protect public health and the environment. As part of this work, NRDC has for many years petitioned federal agencies to issue new or stronger rules to protect health and the environment. NRDC wishes to continue to be able to do so unburdened by the Executive Order's command that the costs to regulated parties of all new significant regulations be offset by deregulatory actions. When NRDC considers whether to submit a rulemaking petition, it considers factors such as the governing statute, regulations, and agency practice; the nature of the agency proceedings that would follow a petition; the resources and evidence available to NRDC; and likely outcomes of a rulemaking petition. The Executive Order, however, imposes a new requirement and consideration, directing an agency to repeal two regulations for every significant new regulation issued, and commanding agencies to offset regulated parties' costs through deregulatory actions, regardless of a new regulation's net benefits. These new and extra-statutory agency decisionmaking criteria make it likely that a successful rulemaking petition will be counter-

productive and impede NRDC's mission. Because of the Executive Order's offset requirements, NRDC decided not to petition the Environmental protection Agency (EPA) to adopt a new drinking water standard that would have protected NRDC's members from presently unregulated contaminants. The Executive Order has harmed NRDC's ability to advance its mission through petitioning activity.

16. The Communications Workers of America, AFL-CIO (CWA), is an international labor union representing 700,000 workers in the telecommunications, media, manufacturing, airline, and health care industries and in a wide variety of public sector positions in the United States, Canada, and Puerto Rico. In representing such workers, CWA seeks to improve their working conditions, including their health and safety at work, through collective bargaining and public policy advocacy. CWA frequently engages in the federal agency rulemaking process under the APA, advocating for rules that improve workers' wages, hours, and working conditions. The Executive Order threatens this First Amendment-protected petitioning activity and participation in the rulemaking process because, under the Executive Order, successful advocacy in favor of a particular regulation is conditioned on repeal of other important regulations, such as those protecting workers' wages, hours, and working conditions. Workplace hazards currently slated for the federal regulatory process include matters within the scope of federal safety and health laws that directly affect the health and safety of CWA-represented workers, such as trichloroethylene exposure for manufacturing workers and infectious disease exposure for nurses. Although in these examples CWA would press for strong worker protections that would save lives and are feasible, the Executive Order imposes a disturbing Sophie's Choice because new health and safety protections can be issued only if twice as many other protections are repealed. The Executive Order thus chills CWA's activity, to the detriment of its mission and its members, including members

Denise Abbott and James Bauer, Sr. The Executive Order also injures CWA and its members, including members Denise Abbott and James Bauer, Sr., by causing agencies to forgo, delay, or repeal regulations that protect the members' health and safety at work, or other workplace rights, in order to comply with the Executive Order.

17. Defendant Donald J. Trump is the President of the United States and issued the Executive Order challenged in this complaint. Plaintiffs sue President Trump in his official capacity.

18. Defendant Mick Mulvaney is the Director of OMB and OMB's highest-ranking official. He is charged with the supervision and management of all decisions and actions of that agency. Plaintiffs sue Director Mulvaney in his official capacity. OMB is an agency within the meaning of the APA.

19. Defendant Rick Perry is the Secretary of Energy and the highest ranking official of the U.S. Department of Energy (DOE). He is charged with the supervision and management of all decisions and actions of that agency. Plaintiffs sue Secretary Perry in his official capacity. DOE is an agency within the meaning of the APA.

20. Defendant Elaine L. Chao is the Secretary of Transportation and the highest-ranking official of the U.S. Department of Transportation (DOT). She is charged with the supervision and management of all decisions and actions of that agency. Plaintiffs sue Secretary Chao in her official capacity. DOT is an agency within the meaning of the APA.

21. Defendant Heidi King is the Deputy Administrator of the National Highway Traffic Safety Administration (NHTSA) in DOT, and that agency's highest-ranking official. She is charged with the supervision and management of all decisions and actions of that agency. Plaintiffs

sue Deputy Administrator King in her official capacity. NHTSA is an agency within the meaning of the APA.

22. Defendant Loren Sweatt is the Acting Assistant Secretary of Labor for Occupational Safety and Health at the Department of Labor and the highest-ranking official of the Occupational Safety and Health Administration (OSHA). She is charged with the supervision and management of all decisions and actions of that agency. Plaintiffs sue Acting Assistant Secretary Sweatt in her official capacity. OSHA is an agency within the meaning of the APA.

23. Defendant Ryan Zinke is the Secretary of the Interior and the highest-ranking officer in the Department of the Interior. He is charged with the supervision and management of all decisions and actions of that agency. Plaintiffs sue Secretary Zinke in his official capacity. The Department of the Interior is an agency within the meaning of the APA.

24. Defendant R. Alexander Acosta is the Secretary of Labor, U.S. Department of Labor (DOL), and DOL's highest-ranking officer. He is charged with the supervision and management of all decisions and actions of that agency. Plaintiffs sue Secretary Acosta in his official capacity. DOL is an agency within the meaning of the APA.

25. Defendant Raymond Martinez is the Administrator of the Federal Motor Carrier Safety Administration (FMCSA) in DOT, and the agency's highest-ranking official. He is charged with the supervision and management of all decisions and actions of that agency. Plaintiffs sue Administrator Martinez in his official capacity. FMCSA is an agency within the meaning of the APA.

26. Defendant Jim Kurth is the Deputy Director and Acting Director of the U.S. Fish and Wildlife Service, and the agency's highest-ranking official. He is charged with the supervision

and management of all decisions and actions of that agency. Plaintiffs sue Acting Director Kurth in his official capacity. The Fish and Wildlife Service is an agency within the meaning of the APA.

27. Defendant Scott Pruitt is the Administrator of EPA and the agency's highest-ranking official. He is charged with the supervision and management of all decisions and actions of that agency. Plaintiffs sue Administrator Pruitt in his official capacity. EPA is an agency within the meaning of the APA.

28. Defendant Howard "Skip" Elliot is the Administrator of the Pipeline and Hazardous Materials Safety Administration (PHMSA) in DOT, and the agency's highest-ranking official. He is charged with the supervision and management of all decisions and actions of that agency. Plaintiffs sue Administrator Elliott in his official capacity. PHMSA is an agency within the meaning of the APA.

29. Defendant Chris Oliver is the Assistant Administrator for Fisheries at the National Marine Fisheries Service (NMFS), and the agency's highest-ranking official. He is charged with the supervision and management of all decisions and actions of that agency. Plaintiffs sue Assistant Administrator Oliver in his official capacity. NMFS is an agency within the meaning of the APA.

30. Defendant David Zatezalo is the Assistant Secretary for Mine Safety and Health at DOL, and the highest-ranking official of the Mine Safety and Health Administration (MSHA). He is charged with the supervision and management of all decisions and actions of that agency. Plaintiffs sue Assistant Secretary Zatezalo in his official capacity. MSHA is an agency within the meaning of the APA.

31. Defendant Ronald Batory is the Administrator of the Federal Railroad Administration (FRA) and the agency's highest-ranking official. He is charged with the supervision and management of all decisions and actions of that agency. Plaintiffs sue

Administrator Batory in his official capacity. The Federal Railroad Administration is an agency within the meaning of the APA.

BACKGROUND

**The Executive Order**

32. On January 30, 2017, defendant President Trump signed Executive Order 13771, entitled "Reducing Regulation and Controlling Regulatory Costs." 82 Fed. Reg. 9339 (2017).

33. The Executive Order directs that, "[u]nless prohibited by law, whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed." Sec. 2(a).

34. The Executive Order further directs that, for fiscal year 2017, "the heads of all agencies are directed that the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by the Director of [OMB]." Sec. 2(b).

35. In furtherance of the requirement quoted in paragraph 31, above, the Executive Order directs that "any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. Any agency eliminating existing costs associated with prior regulations under this subsection shall do so in accordance with the APA and other applicable law." Sec. 2(c).

36. The Executive Order further directs that, for fiscal year 2018 and subsequent years, "the head of each agency shall identify, for each regulation that increases incremental cost, the offsetting regulations described in paragraph 34, and provide the agency's best approximation of the total costs or savings associated with each new regulation or repealed regulation." Sec. 3(a).

37. The Executive Order further states that, "[d]uring the Presidential budget process, the Director [of OMB] shall identify to agencies a total amount of incremental costs that will be allowed for each agency in issuing new regulations and repealing regulations for the next fiscal year. No regulations exceeding the agency's total incremental cost allowance will be permitted in that fiscal year, unless required by law or approved in writing by the Director. The total incremental cost allowance may allow an increase or require a reduction in total regulatory cost." Sec. 3(d).

38. The Executive Order directs that agencies offset the costs of new regulations and, in doing so, consider costs divorced from consideration of the benefits associated with the new rule or the existing rules designated for repeal, or of whether, taking into account costs and benefits, those rules have net benefits.

39. A true and correct copy of the Executive Order is appended as Exhibit A.

40. The Executive Order instructs the Director of OMB to "provide the heads of agencies with guidance on the implementation of" the requirements of section 2, described in paragraphs 31–33, above. Sec. 2(d).

**OMB's Interim Guidance, Guidance, and Subsequent Actions**

41. On February 2, 2017, OMB issued "Interim Guidance Implementing Section 2 of the Executive Order," which addresses regulations to be issued in fiscal year 2017. The Interim Guidance states that guidance addressing application of the Executive Order for fiscal years 2018 and beyond will be issued at a later date.

42. The Interim Guidance states that the Executive Order applies "only to those significant regulatory actions," as defined in Executive Order 12866, issued after noon on January 20, 2017, including final regulations for which a proposed rule was issued before that date.

Executive Order 12866 defines "significant regulatory actions" to mean, among other things, regulatory actions that have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, jobs, the environment, public health or safety, or State, local, or tribal governments or communities, or that raise novel legal or policy issues.

43. The Interim Guidance further states that "[p]urely deregulatory actions that confer only savings to all affected parties generally will not trigger" the Executive Order's requirement that the agency identify two or more existing rules for repeal, but that "if such deregulatory actions impose costs on individuals or entities, agencies will need to offset those costs."

44. The Interim Guidance does not, however, allow an agency to treat consumer cost savings or other benefits of new or repealed rules as offsets to costs incurred by regulated entities. For example, it states that energy cost savings to consumers from rules requiring appliance manufacturers to make more energy efficient equipment "would not be counted as offset to costs" incurred by those manufacturers.

45. The Interim Guidance states that, in general, agencies cannot base the estimated cost savings of repealing an existing rule on the regulatory impact analysis (RIA) produced when the rule was issued. This direction requires agencies to undertake new cost estimates for each existing rule considered for elimination.

46. The Interim Guidance further states that agencies should not count the "sunk" (or already incurred) costs of repealed rules, but must instead count only those costs that would be incurred after the effective date of the repeal. Because often the bulk of the cost of existing rules (such as the cost of new equipment purchases to meet pollution standards) already have been incurred, this requirement greatly magnifies the number of rules that need to be repealed to permit new rules to be promulgated consistent with the Executive Order.

47. The Interim Guidance states that cost savings from repeal of a rule by one component of an agency may be used to offset the costs of a rule issued by another component of that agency. It further states that cost savings can be transferred between agencies if OMB approves the transfer.

48. A true and correct copy of the Interim Guidance is appended as Exhibit B.

49. On April 5, 2017, OMB issued "Guidance Implementing Executive Order 13771," which "supplements" the Interim Guidance.

50. The Guidance confirms that the Executive Order generally requires agencies to "comply with [its] requirements by issuing two EO 13771 deregulatory actions … for each EO 13771 regulatory action," and that "[t]he incremental costs associated with EO 13771 regulatory actions must be fully offset by the savings of EO 13771 deregulatory actions."

51. The Guidance further provides that even when "a statute prohibits consideration of cost in taking a particular regulatory action," an agency is "required to offset the costs of such regulatory actions through other deregulatory actions."

52. The Guidance further requires agencies not to count benefits of regulatory actions as offsets to the costs, or the loss of benefits of deregulatory actions as offsets to the cost savings, of those actions.

53. A true and correct copy of the Guidance is appended as Exhibit C.

54. In a September 7, 2017, memorandum from OMB, concerning implementation of Executive Order 13771, OMB instructed federal agencies to "propose a net reduction in regulatory costs for FY2018" in their fall regulatory agendas.

**Administrative Procedure Act**

55. Under the APA, an agency must publish a notice of proposed rulemaking in the Federal Register and solicit public comment before adopting, modifying, or repealing a rule. 5 U.S.C. § 553. The APA defines "rule making" as the "agency process for formulating, amending, or repealing a rule." *Id.* § 551(5). The APA defines "rule" to include "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." *Id.* § 551(4). The Executive Order (Sec. 4) largely tracks this definition of a rule.

56. In the APA, Congress directed federal agencies to undertake reasoned and evidence-based decisionmaking when exercising their delegated authority to promulgate rules. An agency must consider the factors that Congress has directed it to consider and cannot "rel[y] on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

57. Under the APA, final agency action is judicially reviewable. A reviewing court shall "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

58. The governing regulatory statutes enacted by Congress do not authorize federal agencies to consider the costs of other regulations issued in the same fiscal year or of regulations issued in prior years when determining whether to promulgate new or repeal existing regulations. Those statutes do not authorize federal agencies to condition issuance of new regulations on the repeal of existing regulations to offset the new regulations' costs.

**Application of the Executive Order**

59. In promulgating a new rule (including a rule repealing an existing rule), each agency must comply with the substantive and procedural requirements of the APA and the agency's governing statute. In a rulemaking, an agency may make decisions based on costs only to the extent and in the manner Congress has provided for in the statute authorizing the authority to issue rules.

60. The agencies' governing statutes do not authorize agencies to repeal an existing regulation, weaken a new regulation, or forgo or delay a new regulation that it would otherwise issue for the purpose of offsetting the costs of new regulations.

61. The Executive Order, by requiring that agencies promulgating new regulations take into account the costs of the new regulation relative to costs of existing regulations that need to be repealed to comply with the Executive Order, as well as the costs of other regulations issued and repealed in the same fiscal year, requires the agencies to consider factors that are not specified in and are inconsistent with their governing statutes, and to repeal, weaken, or delay regulations for an impermissible purpose.

62. Agencies that base their decisions whether to propose, issue, or repeal regulations on the mandates of the Executive Order are acting in violation of their governing statutes. Decisionmaking based on the factors set forth in the Executive Order also constitutes action that is arbitrary and capricious, contrary to law, and in excess of agency authority, in violation of the APA. The adverse impact of the Executive Order is particularly egregious when the new or repealed regulations are designed to address health, safety, or environmental concerns.

63. By instructing the agencies to consider factors and take deregulatory action for reasons beyond those authorized by the agencies' governing statutes, the Executive Order exceeds

presidential authority and usurps Congress's legislative authority. And by directing agencies to violate the law, or rendering them unable to regulate as required by the law, the President, through the Executive Order, is violating his obligation to take care that the law be faithfully executed.

64. The Executive Order states that it shall be "implemented consistent with applicable law," Sec. 5(b); sections 2 and 3 include similar language. If this language were interpreted to mean that the agencies may disregard the Executive Order when applicable statutes do not authorize the conditioning of regulation on the repeal of existing regulations with offsetting costs, the language would render the Executive Order without effect because the Executive Order cannot be implemented by any agency consistent with applicable law. Nonetheless, agencies are undertaking to comply with the Executive Order, and OMB is acting to enforce its mandate that costs of new regulations be offset by the repeals of existing regulations.

65. Plaintiffs would have no complete and effective remedy for an agency's decision not to issue a regulation because of the Executive Order's repeal and offset requirements, although that decision would be based on factors unauthorized by the governing statute or the APA, because plaintiffs would lack an identifiable final agency action to challenge in the vast majority of cases. And even if an agency decision not to regulate were disclosed and a successful legal challenge could be brought, a subsequent court order vacating the agency's ultra vires decision could not undo the regulatory delay caused by the unlawful decision.

66. When it issued the spring 2017 Unified Agenda of Regulatory and Deregulatory Actions, OMB stated that "[a]gencies withdrew 469 actions proposed in the Fall 2016 Agenda" and moved 391 previously active actions to "long-term" or "inactive" categories, as a step toward complying with Executive Order 13771. OMB, Current Unified Agenda of Regulatory and Deregulatory Actions, https://www.reginfo.gov/public/do/eAgendaMain (July 20, 2017).

67. In December 2017, OMB stated that federal agencies in 2017 had withdrawn or delayed 1,579 regulatory actions. *See* OMB, Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions, https://www.reginfo.gov/public/do/eAgendaMain (Dec. 14, 2017). OMB directly attributed these actions to Executive Order 13771. *See* OMB, Regulatory Reform: Two-for-One and Regulatory Cost Caps, https://www.reginfo.gov/public/do/eAgendaEO13771 (Dec. 14, 2017).

68. In addition to delays and withdrawals, OMB reported the "Results" of implementing the Executive Order: "Agencies issued 67 deregulatory actions and only 3 regulatory actions." *Id.*

69. The following examples demonstrate the adverse effects of the Executive Order on plaintiffs and their members, as well as how the Executive Order directs agencies to act unlawfully and why it is unconstitutional.

**A. Motor Vehicle Safety**

70. The Motor Vehicle Safety Act was enacted "to reduce traffic accidents and deaths and injuries resulting from traffic accidents." 49 U.S.C. § 30101. The Act mandates motor vehicle safety standards that are practicable, meet the need for motor vehicle safety, and are stated in objective terms. *Id.* § 30111(a). "Motor vehicle safety standard" means a minimum performance standard for motor vehicles or motor vehicle equipment. When prescribing such standards, NHTSA must consider all relevant, available motor vehicle safety information, and whether a proposed standard is reasonable, practicable, and appropriate for the types of motor vehicles or motor vehicle equipment for which it is prescribed and the extent to which the standard will further the statutory purpose of reducing traffic accidents and associated deaths. *Id.* § 30111(a), (b).

71. The Motor Carrier Safety Acts of 1935 and 1984 require FMCSA to "prescribe requirements for … safety of operation and equipment of, a motor carrier; and … standards of equipment of, a motor private carrier, when needed to promote safety of operation." 49 U.S.C. § 31502(b). Safety standards must, "[a]t a minimum … ensure that—(1) commercial motor vehicles are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely; (3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely …; (4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators; (5) an operator of a commercial motor vehicle is not coerced by a motor carrier, shipper, receiver, or transportation intermediary to operate a commercial motor vehicle in violation of" various laws and regulations. *Id.* § 31136(a).

72. The Executive Order, by requiring that safety regulations issued under the Safety Acts take into account cost—the cost of a new safety standard, that cost in relation to the costs of existing standards or other regulations to be repealed, and the costs of any other standards issued or repealed in that fiscal year—requires the agencies to add a consideration not among the considerations specified in the Safety Acts.

73. For example, pursuant to their authority under the two Safety Acts, and in light of the numerous studies concluding that the severity of a crash increases with increased travel speed, NHTSA and FMCSA in September 2016 proposed to require new multipurpose passenger vehicles, trucks, buses, and school bus vehicles with a gross vehicle weight rating of more than 26,000 pounds to be equipped with speed-limiting devices, and to require motor carriers operating such vehicles in interstate commerce to maintain functional speed-limiting devices set at not more than the maximum specified speed for the service life of the vehicle. 81 Fed. Reg. 61942 (2016).

The comment period ended in December 2016. *See* 81 Fed. Reg. 78103 (2016). NHTSA and FMCSA estimate net benefits of $500 million to $5 billion annually from the rule, including fuel savings and the prevention of thousands of traffic injuries and deaths. 81 Fed. Reg. at 61945, 61961–64. They estimate that the rule will impose minimal cost on vehicle manufacturers related to the installation of speed limiters, but they estimate a social cost from lower travel speeds of $200 million to $1.5 billion annually. *Id*. Therefore, despite the proposed rule's huge net benefits to society, including to plaintiffs' members, the rule will fall within the scope of the Executive Order and cannot be finalized under that Executive Order unless two or more other regulations that impose equivalent or greater costs are repealed.

74. From February 2017 through July 2017, DOT indicated each month that Executive Order 13771 was affecting the timing of ongoing rulemakings: "As DOT rulemakings are being evaluated in accordance with Executive Orders 13771 and 13777, the schedules for many ongoing rulemakings are still to be determined, so we will not post an Internet Report for the month of May." DOT, Significant Rulemaking Reports by Year, https://cms.dot.gov/regulations/significant-rulemaking-report-archive (last visited Mar. 7, 2018). In July 2017, and after completion of the notice and comment process for the speed-limiter rule, NHTSA moved this rulemaking from its "current agenda" to its list of "long term actions," listing the next action as "Undetermined" on a date "To Be Determined."

75. Public Citizen has members, including Amanda Fleming, who have and will for years have a child who rides a school bus and would like the bus to be equipped with a speed-limiting device. The delay of the speed-limiter rule is depriving these members of the ability to use school buses with this desired feature.

76. In another example, NHTSA in January 2017 proposed to require all new light vehicles to include crash-avoidance technologies known as vehicle-to-vehicle (V2V) communications, which will send information about a vehicle's speed, heading, brake status, and other data to surrounding vehicles and receive the same information from other vehicles. 82 Fed. Reg. 3854, 3855–57 (2017). NHTSA expects V2V technology to identify and prevent potential crashes and to advance development of vehicle automation. *Id.* If finalized, the safety standard will be phased in over time, with costs that change over that period. Total estimated vehicle costs per year range from $2 to $5 billion ($135–$300 per vehicle). *Id*. at 3857. On the benefit side, the technology "could potentially prevent 424,901–594,569 crashes and save 955–1,321 lives [annually] when fully deployed throughout the light-duty vehicle fleet. Converting these and the accompanying reductions in injuries and property damage to monetary values, [NHTSA] estimate[s] that in 2051 the proposed rule could reduce the costs resulting from motor vehicle crashes by $53 to $71 billion (expressed in today's dollars)." *Id*. at 3858. NHTSA estimates that the safety standard will have net positive benefits within 3–5 years. *Id*. at 3982–4000. Despite the huge net benefits to society, including benefits to plaintiffs' members, the DOT will not be able to promulgate this safety standard without repealing two or more other regulations that impose equivalent or greater costs.

77. In proposing the V2V rule, NHTSA stated, "Without a mandate to require and standardize V2V communications, the agency believes that manufacturers will not be able to move forward in an efficient way and that a critical mass of equipped vehicles would take many years to develop, if ever." 82 Fed. Reg. at 3854.

78. From February 2017 through July 2017, DOT indicated each month that Executive Order 13771 was affecting the timing of ongoing rulemakings: "As DOT rulemakings are being

evaluated in accordance with Executive Orders 13771 and 13777, the schedules for many ongoing rulemakings are still to be determined, so we will not post an Internet Report for the month of May." DOT, Significant Rulemaking Reports by Year, https://cms.dot.gov/regulations/significant-rulemaking-report-archive (last visited Mar. 7, 2018). In July 2017, DOT moved this rulemaking from its "current agenda" to its list of "long term actions," listing the next action as "Undetermined" on a date "To Be Determined."

79. Public Citizen has members, including Amanda Fleming and Terri Weissman, who would like to purchase vehicles equipped with V2V communications when they purchase new cars in the next several years, but without a federal mandate, such vehicles will not be available. The delay of the V2V rule is depriving these members of the opportunity to purchase vehicles with this desired feature.

80. Until Executive Order 13771, the agency had intended to issue the speed-limiter rule and V2V rule; the Executive Order is delaying the rules, and the delays are causing injury to plaintiff Public Citizen's members.

81. The Executive Order conditions DOT's promulgation of the standards described above on the agencies' ability to offset the costs of these safety regulations by repealing "at least two prior regulations," Executive Order sec. 2(c), without taking into account the net benefits either of the new standards or the existing standards. To promulgate the speed-limiting-device regulation, the agencies would have to repeal regulations with costs of $200 million to $1.5 billion annually, without regard to the net benefits of the new regulation and the repealed regulations. To promulgate the V2V rule, DOT would have to repeal regulations with annual costs of $2 billion to $5 billion, again without regard to the net benefits of both the new and repealed regulations.

82. The Executive Order requires the agencies, when engaged in rulemaking, to make decisions based on an impermissible and arbitrary choice—whether to issue a new standard at the cost of losing the benefits of two or more existing standards. To condition adoption of a vehicle safety standard on the repeal of two or more other standards or other types of regulations is arbitrary, capricious, an abuse of discretion, and contrary to the Safety Acts.

83. By instructing the agencies to repeal two or more standards for the purpose of adopting one, the Executive Order adds considerations inconsistent with the Safety Acts and, accordingly, exceeds the President's authority under the Constitution, usurps Congress's Article I legislative authority, and violates the President's obligation to take care that the laws be faithfully executed. Public Citizen advocates for strong health and safety regulation by NHTSA and FMCSA, petitions NHTSA and FMCSA to issue new rules to protect health and safety, and comments on proposed NHTSA and FMCSA rules to urge NHTSA and FMCSA to craft rules that best protect consumers. Public Citizen's members rely on Public Citizen to represent their interests with respect to vehicle safety. By making issuance of a new DOT rule contingent on repeal of two or more existing rules, the Executive Order requires the agency to reduce, delay, or forgo public protections, including vehicle-safety protections, to the detriment of Public Citizen and its members. Moreover, the Executive Order puts Public Citizen in the untenable position of choosing between either: (a) engaging in statutorily authorized and constitutionally protected advocacy in support of new motor vehicle and motor carrier safety standards, even though, for that advocacy to be successful, two or more existing rules must be repealed; or (b) forsaking this authorized and protected advocacy, to the detriment of Public Citizen and its members who have interests in motor-vehicle and motor-carrier safety.

**B. Transparency of Airline Ancillary Service Fees**

84. In May 2014, DOT issued a notice of proposed rulemaking that proposed to require airlines and ticket agents to disclose at all points of sale the fees for certain basic ancillary services associated with air transportation consumers are buying or considering buying. *See* 79 Fed. Reg. 29970 (2014). DOT stated that "there is a need for rulemaking because we believe that consumers continue to have difficulty finding ancillary fee information." *Id.* at 29977. Of the more than 600 consumers who submitted comments, more than 450 supported the proposed additional disclosure requirements. 82 Fed. Reg. 7536, 7537 (2017). DOT also received comments opposed to any disclosure requirement, including from Airlines for America (the trade association of the major airlines), the international airline trade association, and foreign and domestic air carriers.

85. On January 19, 2017, DOT issued a Supplemental Notice of Proposed Rulemaking (SNPRM) on the same topic, proposing to require air carriers, foreign air carriers, and ticket agents to clearly disclose to consumers at all points of sale customer-specific fee information, or itinerary-specific information if a customer elects not to provide customer-specific information, for a first checked bag, a second checked bag, and one carry-on bag wherever fare and schedule information is provided to consumers. *See* 82 Fed. Reg. at 7536. If an airline or ticket agent has a website that markets to U.S. consumers, the SNPRM proposed to require that the baggage fee information be disclosed adjacent to the fare at the first point in a search process where a fare is listed in connection with a specific flight itinerary. *Id*. The agency designated the proposed rule "significant" under Executive Order 12866. *Id*. at 7554. DOT provided a comment period for the proposal through March 20, 2017. *Id.* at 7536.

86. In the SNPRM, DOT "disagree[d] with airlines and airline associations" that had earlier commented that the facts before DOT "do not reflect consumer harm." DOT stated that "we

believe the additional time spent searching to find the total cost of travel and the additional funds spent on air transportation that might have been avoided if the consumer had been able to determine the true cost of travel up front are the harms suffered by consumers when basic ancillary service fees are not adequately disclosed." *Id.* at 7540–41; *see also id.* at 7536.

87. On March 2, 2017, DOT issued a notice suspending the comment period for the SNPRM indefinitely. 82 Fed. Reg. 13572 (2017). From February 2017 through July 2017, DOT indicated each month that Executive Order 13771 was affecting the timing of ongoing rulemakings: "As DOT rulemakings are being evaluated in accordance with Executive Orders 13771 and 13777, the schedules for many ongoing rulemakings are still to be determined, so we will not post an Internet Report for the month of May." DOT, Significant Rulemaking Reports by Year, https://cms.dot.gov/regulations/significant-rulemaking-report-archive (last visited Mar. 7, 2018).

88. In DOT's spring 2017 regulatory agenda, DOT moved the baggage-fee disclosure rulemaking from the "proposed rule stage" to "long term actions," listing the next action as "Undetermined" on a date "To Be Determined." At the same time, OMB stated in the Unified Agenda of Regulatory and Deregulatory Actions that "[a]gencies withdrew 469 actions proposed in the Fall 2016 Agenda" and moved 391 previously active actions to "long-term" or "inactive" categories, as a step toward complying with Executive Order 13771. OMB, Current Unified Agenda of Regulatory and Deregulatory Actions, https://www.reginfo.gov/public/do/eAgendaMain (July 20, 2017).

89. On December 5, 2017, DOT withdrew the proposal to require air carriers and ticket agents to clearly disclose to consumers certain information about fees for checked bags, wherever fare and schedule information is provided to consumers. *See* DOT, Notice of withdrawal of

proposed rulemaking, 82 Fed. Reg. 58778 (2017). The 1-page Federal Register notice described the reason for the withdrawal as follows: "The Department's existing regulations already provide consumers some information regarding fees for ancillary services. The withdrawal of this rulemaking corresponds with the Department's and Administration's priorities and is consistent with Executive Order 13771." *Id*.

90. Currently, baggage-fee information is available on some websites but not others, and is not available in the manner proposed in the SNPRM.

91. The SNPRM stated DOT's determination that consumer-friendly disclosure of baggage fees will save consumers time and enable them to make better informed purchasing decisions, but that such disclosure will not happen voluntarily. 82 Fed. Reg. at 7556–57, 7541.

92. Plaintiffs' members, such as Public Citizen member Amy Allina, purchase airline tickets online and sometimes check baggage. They have to spend time searching for baggage-fee information, to figure out for themselves the true total cost of listed flights, and sometimes have not gotten accurate information or have misunderstood the information, given the way in which it is provided. They would benefit from having baggage-fee information easily accessible wherever fare and schedule information is provided, to allow them to easily search for and compare the true total cost of air travel among air carriers. Plaintiffs' members are injured by having to spend more time searching to find the total cost of air travel than they would if DOT required baggage fee disclosure as proposed in the SNPRM.

93. Until Executive Order 13771, the agency had intended to issue this rule; the Executive Order is delaying the rule, and the delay is causing injury to plaintiff Public Citizen's members.

94. Executive Order 13771 requires DOT, when engaged in rulemaking, to make decisions based on an impermissible and arbitrary choice—whether to issue a new standard at the cost of losing the benefits of two or more existing standards. To condition adoption of a new rule on the repeal of two or more other rules or other types of regulations is arbitrary, capricious, an abuse of discretion, and contrary to law.

95. By instructing the agencies to repeal two or more standards for the purpose of adopting one, the Executive Order adds considerations inconsistent with the Federal Aviation Act and, accordingly, exceeds the President's authority under the Constitution, usurps Congress's Article I legislative authority, and violates the President's obligation to take care that the laws be faithfully executed.

96. Public Citizen advocates for strong consumer protection regulations, including regulations requiring disclosures to inform consumer choice. Public Citizen's members rely on Public Citizen to represent their interests with respect to consumer advocacy. By making issuance of a new Department of Transportation rule contingent on repeal of two or more existing rules, the Executive Order requires the agency to reduce, delay, or forgo public protections, including consumer protections, to the detriment of Public Citizen and its members. Moreover, the Executive Order puts Public Citizen in the untenable position of choosing between either: (a) engaging in statutorily authorized and constitutionally protected advocacy in support of new consumer protection rules, even though, for that advocacy to be successful, two or more existing rules must be repealed; or (b) forgoing this authorized and protected advocacy, to the detriment of Public Citizen and its members.

### C. Occupational Safety and Health

97. The Occupational Safety and Health Act (OSH Act) aims "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b). It reflects Congress's finding that "personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments." *Id.* § 651(a).

98. The OSH Act requires an occupational health standard involving "toxic materials or harmful physical agents" to "adequately assur[e], to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." *Id.* § 655(b)(5). After a significant risk is identified, OSHA, an agency within the Department of Labor, must promulgate a standard that will eliminate that risk, unless doing so is infeasible in a particular industry. *AFL-CIO v. OSHA*, 965 F.2d 962, 973 (11th Cir. 1992). OSHA has a "duty to keep adding [protective] measures so long as they afford benefit and are feasible, up to the point where [it] no longer finds significant risk." *Bldg. & Constr. Trades Dep't v. Brock*, 838 F.2d 1258, 1269 (D.C. Cir. 1988).

99. Under the OSH Act, "feasibility" encompasses economic feasibility. Under the OSH Act, a "standard is economically feasible if the costs it imposes do not 'threaten massive dislocation to, or imperil the existence of, the industry.'" *Am. Iron & Steel Inst. v. OSHA*, 939 F.2d 975, 980 (D.C. Cir. 1991) (quoting *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1265 (D.C. Cir. 1980)). It is infeasible if it would "threaten the existence or competitive structure of an industry." *Steelworkers*, 647 F.2d at 1272.

100. The Executive Order, by requiring that health regulations issued under the OSH Act take into account the cost of the new health standard, the cost in relation to the costs of existing standards to be repealed, and the costs of any other standards issued or repealed in that fiscal year, requires the agency to add considerations not among those exclusive considerations specified in the OSH Act.

101. For example, before the President issued Executive Order 13771, OSHA was considering whether to set a new occupational health standard for styrene, an industrial chemical that can harm workers' respiration, eyes, and nervous system, and is classified by the Department of Health and Human Services' National Toxicology Program as "reasonably anticipated to be a human carcinogen." OSHA, Occupational Exposure to Styrene (Fall 2016), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201610&RIN=1218-AD09. The current federal permissible exposure limit is two to five times higher than the limits established by the Centers for Disease Control, the State of California, and the European Union. Setting a new standard would be a "significant regulatory action." Therefore, to issue a proposed rule to update the limit, the DOL is required by the Executive Order to offset the costs by repealing "at least two prior regulations," Executive Order sec. 2(c) and 3(a), and to compute the cost offset without taking into account the benefit either of the new standard or the existing ones to be repealed. In March 2017, OSHA withdrew this rulemaking.

102. Before Executive Order 13771, OSHA was developing a standard to protect health care employees and employees in other high-risk environments from exposure to pathogens that can cause significant infectious disease, such as tuberculosis, pandemic influenza, and SARS. 75 Fed. Reg. 24835 (2010). The standard would require employers to establish a comprehensive infection control program and control measures. OSHA had anticipated issuing a proposed rule in

October 2017, but, to do so, OSHA would have been required by the Executive Order to offset the costs of this rule by repealing "at least two prior regulations," Executive Order sec. 2(c) & 3(a)—and to compute the cost offset without taking into account the benefits either of the new standard or the existing standards to be repealed. In the spring 2017 regulatory agenda issued in July 2017, OSHA moved the rulemaking to "Long Term Action" and listed the date for the next action as "NPRM" on a date "To Be Determined." Members of plaintiffs' organizations, such as CWA member Denise Abbott and Public Citizen member Jonathan Soverow, work in healthcare facilities, are exposed to pathogens that can cause significant infectious disease, would benefit from an OSHA standard, and are injured by OSHA's delay in issuing the standard.

103. In addition, in January 2017, OSHA granted citizen petitions requesting that OSHA adopt a safety standard to address prevention of workplace violence in healthcare. Before OSHA can enact any permanent health or safety standard, it must make a threshold finding that a place of employment is unsafe—in the sense that significant risks are present and can be eliminated or lessened by a change in practices. Invoking this standard, OSHA's Administrator, in granting the citizen petitions, stated that workplace violence is a serious occupational hazard that presents a significant risk for healthcare and social assistance workers. In December 2016, OSHA had issued a request for information regarding workplace violence in the healthcare industry, with a comment period ending on April 6, 2017. *See* 81 Fed. Reg. 88147 (2016).

104. Since the close of the comment period in April 2017, OSHA has taken no public action on the rulemaking regarding prevention of workplace violence. In December 2017, in OSHA's fall regulatory agenda, OSHA moved the workplace-violence-prevention rulemaking to "long term actions," listing the next action as "Undetermined" on a date "To Be Determined."

105. Members of plaintiffs' organizations, such as CWA member Abbott, work in healthcare facilities and are exposed to the "significant" risks that an OSHA standard on prevention of workplace violence would address, which would be reduced by a OSHA standard. In addition, plaintiffs' members, such as CWA member Ms. Abbott, would like education and training on prevention of workplace violence at their places of employment, including education and training in de-escalation techniques, which is not readily available to them. Training and education on preventing workplace violence would be available to her and other CWA members who work in healthcare if OSHA issued a safety standard, as it intended to do when it granted the citizen petitions in January 2017. The members' lack of access to education and training in preventing workplace violence is thus caused by the delay attributable to Executive Order 13771.

106. Until Executive Order 13771, OSHA had intended to issue the rules described above; the Executive Order is delaying those rules, and the delay is causing injury to plaintiffs' members.

107. The Executive Order requires the agency to make decisions based on an impermissible and arbitrary choice—whether to issue a new standard at the cost of losing benefits of two or more existing standards. To condition promulgation of an occupational safety and health standard on the repeal of two or more other such standards, or two other regulations, is arbitrary, capricious, an abuse of discretion, and contrary to the OSH Act. Likewise, to condition OSHA's ability to regulate safety or health risks on identification of unrelated regulations of equal cost that the agency may be able to persuade some other agency to repeal is arbitrary, capricious, an abuse of discretion, and contrary to the OSH Act.

108. By conditioning OSHA's ability to regulate safety and health risks on the Department of Labor's repeal of two or more unrelated regulations of equal cost, the Executive

Order adds considerations inconsistent with the agency's and the courts' longstanding interpretations of the OSH Act, and accordingly, exceeds the President's authority under the Constitution, usurps Congress's Article I legislative authority, and violates the President's obligation to take care that the laws be faithfully executed.

109. CWA has advocated for health and safety improvements for workers in the OSHA rulemaking process. CWA represents nurses in a number of private hospitals across the country, as well as other workers in high-risk environments, whose health is at unnecessary risk without federal rulemaking on measures to protect health care employees and employees in other high-risk environments from infectious disease exposures to pathogens that can cause significant disease. Public Citizen likewise has in the past commented on OSHA proposed rules; it has also petitioned OSHA to issue new occupational safety and health rules and is currently contemplating petitioning OSHA to issue two new safety rules. The Executive Order puts CWA and Public Citizen in the untenable position of choosing between either: (a) engaging in statutorily authorized and constitutionally protected advocacy in support of new worker health and safety standards, even though, for that advocacy to be successful, two or more existing rules must be repealed; or (b) forsaking this authorized and protected advocacy, to the detriment of CWA, Public Citizen, and their members who have interests in worker health and safety. Because the Executive Order requires the agency, before it can issue either a proposed or final workplace safety standard, to identify two or more existing rules for repeal, compliance with the Executive Order slows or prevents the issuance of proposed rules and final rules, to the detriment of CWA, Public Citizen, and their members. Because the Executive Order requires the agency to repeal two or more existing rules as a condition of issuing a new workplace safety or health standard, and because the repealed rules must have combined costs equal to or higher than the new rule, compliance with the

Executive Order decreases workplace safety and health, to the detriment of CWA, Public Citizen, and their members.

**D. Mine Safety and Health**

110. The Mine Safety and Health Act (MSH Act) was enacted to protect the health and safety of miners. 30 U.S.C. § 801(a) ("[T]he first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner."). Mirroring the language of the OSH Act, the MSH Act requires a mine safety standard involving "toxic materials or harmful physical agents" to "adequately assure on the basis of the best available evidence that no miner will suffer material impairment of health or functional capacity even if such miner has regular exposure to the hazards dealt with by such standard for the period of his working life." *Id.* § 811(a)(6). Further, the MSH Act also specifically provides that "[n]o mandatory health or safety standard promulgated under this subchapter shall reduce the protection afforded miners by an existing mandatory health or safety standard." *Id.* § 811(a)(9). Regulations under the MSH Act are promulgated by MSHA, an agency within the Department of Labor. *Id.* § 811(a).

111. The Executive Order, by requiring that safety regulations issued under the MSH Act take into account cost—the cost of the new safety standard, the cost in relation to costs of existing standards to be repealed, and the costs of other standards issued and repealed that fiscal year—requires the agency to consider a factor in addition to those exclusive considerations specified in the MSH Act.

112. For example, to reduce mining deaths from pinning, crushing, or striking injuries to miners who work near certain mobile equipment, MSHA has proposed a rule requiring underground coal mine operators to equip that equipment with proximity detection systems, with

a phase-in schedule for newly manufactured and existing equipment. 80 Fed. Reg. 53070 (2015). The comment period for the proposed rule is scheduled to close on April 10, 2017. 82 Fed. Reg. 9369 (2017). The agency estimates that the rule will both impose annualized costs of $16 to $18 million and create annualized benefits of $16 to $18 million, not including benefits that could not be quantified due to a lack of definitive information (such as savings to mine operators who would be able to avoid production delays typically associated with mine accidents). 80 Fed. Reg. at 53082. Because MSHA has determined that the rule qualifies as "significant," the rule will fall within the scope of the Executive Order. The Executive Order will require the Department of Labor to offset the costs of the rule by repealing "at least two prior regulations," Executive Order sec. 2(c) & 3(a), without taking into account the benefits to miner safety either of the new standard or the existing standards to be repealed. In its spring regulatory agenda issued in July 2017, MSHA moved the rulemaking to "Long Term Action," with the "Next Action Undetermined" on a date "To Be Determined."

113. The Executive Order requires the agency to make decisions based on an impermissible and arbitrary choice—whether to issue a new standard at the cost of losing the benefits of two or more existing standards. To repeal two or more standards for the purpose of adopting one would be arbitrary, capricious, an abuse of discretion, and contrary to the MSH Act. Because MSHA is not permitted by statute to reduce protections from existing standards, the Executive Order forces MSHA either to forgo new standards altogether or to make issuance of new standards contingent on repeal of unrelated regulations by another agency (within the Department of Labor or, with OMB's permission, from outside the Department of Labor) to offset the cost of any new safety standard.

114. By conditioning MSHA's ability to issue new regulations on the Department of Labor's repeal of two or more unrelated regulations of equal cost, the Executive Order adds considerations inconsistent with the underlying statutes and, accordingly, exceeds the President's authority under the Constitution, usurps Congress's Article I legislative authority, and violates the President's obligation to take care that the laws be faithfully executed.

115. Public Citizen advocates for strong mine-safety protections, including through press statements, comments to MSHA, and advocacy before Congress. Because the Executive Order requires the agency, before it can issue either a proposed or final safety standard, to identify two or more existing rules for repeal, and because the Executive Order conditions issuance of a new safety regulation on the repeal of two or more existing rules, compliance with the Executive Order deters and prevents issuance of new MSH Act rules, to the detriment of plaintiffs and their members. The Executive Order puts Public Citizen in the untenable position of choosing between either: (a) engaging in statutorily authorized and constitutionally protected advocacy in support of new mine safety standards, even though, for that advocacy to be successful, two or more existing rules must be repealed; or (b) forsaking this authorized and protected advocacy, to the detriment of Public Citizen and its members.

**E. Toxic Substances**

116. The Toxic Substance Control Act (TSCA), as amended in 2016, is based on congressional findings that "human beings and the environment are being exposed each year to a large number of chemical substances and mixtures" that "may present an unreasonable risk of injury to health or the environment." 15 U.S.C. § 2601(a).

117. TSCA directs the administrator of the EPA to evaluate existing chemicals under a risk-based safety standard "without consideration of costs or other nonrisk factors." *Id.* § 2604(b)(4)(A), (f).

118. For example, to prevent documented harms to developing fetuses, carcinogenic effects from all routes of exposure, and respiratory, nervous system, kidney, liver, and immune system effects, EPA proposed two rules in December 2016 and January 2017 that would phase out trichloroethylene (TCE), a highly toxic volatile organic compound, for use in vapor degreasing, aerosol degreasing, and spot cleaning in dry cleaning facilities. 82 Fed. Reg. 7432 (2017) (vapor degreasing); 81 Fed. Reg. 91592 (2016) (aerosol degreasing and spot cleaning). The comment periods closed on March 20, 2017, and February 14, 2017, respectively. The agency estimates that the vapor degreasing rule will impose costs of $30 million to $45 million annually but have benefits (including health protection benefits) that exceed costs by $35 million to $402 million annually, and that the aerosol degreasing and spot cleaning rule will impose costs of $170,000 annually but have benefits that exceed those costs by $9 million to $24.6 million annually. 82 Fed. Reg. at 7453; 81 Fed. Reg. at 91594. Both rules were classified as "significant," 82 Fed. Reg. at 7458; 81 Fed. Reg. at 91622, and therefore fell within the scope of the Executive Order.

119. In another example, methylene chloride poses neurotoxicity, liver toxicity, and liver and lung cancer risks to workers, consumers, and bystanders where it is used, and N-Methylpyrrolidone (NMP) poses health risks to pregnant women and women of child-bearing years. In January 2017, the EPA proposed a rule to regulate methylene chloride and NMP in paint removers. 82 Fed. Reg. 7464 (2017). When finalized, the rule will ban methylene chloride, for all consumer and most types of commercial paint removal, and the rule will either ban NMP or impose a series of restrictions such as limitations on the amount of the substances in paint removal

products, requiring warning labels for consumers, and requiring commercial users to have worker protection programs in place, including specialized gloves, as well as other equipment and hazard communication. The rule was classified as a significant regulatory action and therefore fell within the scope of the Executive Order. In its spring 2017 regulatory agenda, EPA moved the rulemaking to "Long Term Actions," and listed the next action as "Supplemental NPRM" on a date "To Be Determined."

120. The Executive Order prohibits the EPA from promulgating these health regulations unless it offsets their costs by repealing "at least two prior regulations," Executive Order sec. 2(c), and to compute the offset without taking into account the net benefits either of the new standards or the existing standards that will be repealed.

121. The Executive Order requires the EPA to make decisions based on an impermissible and arbitrary choice—whether to issue a new standard at the cost of losing the benefits of two or more existing standards.

122. By making adoption of a new TSCA standard contingent on repeal of two or more other regulations, the Executive Order adds considerations inconsistent with the TSCA and, accordingly, exceeds the President's authority under the Constitution, usurps Congress's Article I legislative authority, and violates the President's obligation to take care that the laws be faithfully executed.

123. Members of Public Citizen, including member Amanda Fleming, NRDC, and CWA are and will be exposed to TCE, methylene chloride, and/or NMP, which present serious health risks. To protect their members and limit their exposure to toxic chemicals, Public Citizen and NRDC have long advocated for regulation of toxic substances, including advocacy for the 2016 TSCA amendments. NRDC has also advocated for effective, timely implementation of the

TSCA and has formally urged EPA to do so through the rulemaking process. CWA similarly advocates for regulation of toxic substances that threaten the health of its members. The Executive Order puts plaintiffs in the untenable position of choosing between either: (a) engaging in statutorily authorized and constitutionally protected advocacy in support of new TSCA standards, even though, for the advocacy to be successful, two or more existing rules must be repealed; or (b) forsaking this authorized and protected advocacy, to the detriment of plaintiffs and their members who have interests in protection from toxic substances. TCE, for example, is present in at least one manufacturing facility where CWA members work, and if EPA adopts a rule regarding the human health risks of this substance, OSHA would normally follow with a rule protecting workers, including CWA members, from the substance's risks in the workplace. Because the Executive Order requires EPA, before it can issue either proposed or final safety standards, to identify two or more for repeal, and because the Executive Order conditions issuance of a new rule on the repeal of two or more existing rules, compliance with the Executive Order deters and prevents issuance of new TSCA rules, to the detriment of plaintiffs and their members.

124. Until Executive Order 13771, the agency had intended to issue the rules described above; the Executive Order is delaying the rules, and the delay is causing injury to plaintiffs' members.

### F. Hazardous Materials Transportation, Federal Railroad Safety, and Federal Water Pollution Control

125. In the past several years, a surge in the transport of volatile and explosive crude oil by rail has led to catastrophic train accidents, causing fire balls, oil spills into rivers, destruction of a city's downtown, and loss of lives. The National Transportation Safety Board has investigated rail accidents and recommended strengthening regulations to prevent future accidents and reduce the harm when accidents occur.

126. DOT regulates rail safety under two overlapping statutes: (1) the Hazardous Materials Transportation Act (HMTA), which directs the Secretary of Transportation to "prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce," 49 U.S.C. § 5103(b), and (2) the Federal Railroad Safety Act (FRSA), which authorizes the Secretary to issue regulations and orders "for every area of railroad safety," 49 U.S.C. § 20103(a). PHMSA administers the HMTA, and the FRA administers the FRSA. 49 C.F.R. §§ 1.89, 1.97(b). PHMSA also has authority under the Federal Water Pollution Control Act to issue regulations requiring railroads and other facilities to submit and obtain approval of oil-spill response plans. 33 U.S.C. § 1321. Such plans must respond "to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil." *Id*. § 1321(j)(5)(A)(ii).

127. In July 2016, PHMSA, in consultation with the FRA, proposed a rule to require railroads to submit and obtain approval of comprehensive oil-spill response plans, to share information about high-hazard flammable train routes and contents with state and tribal emergency response organizations, and to update boiling point testing procedures. 81 Fed. Reg. 50068 (2016). The agency estimates that the rule will provide net benefits by substantially reducing the incidents and severity of oil spills. *Id.* at 50114. The final rule was scheduled for July 2017. In July 2017, the agency delayed the rule to December 2017. In December 2017, the agency estimated that the final rule would be issued in July 2018.

128. Because the rule is classified as a significant regulatory action, *id*. at 50108, it is subject to the Executive Order. Therefore, to issue a final rule, DOT is required to offset its costs by repealing "at least two prior regulations," Executive Order sec. 2(c) & 3(a), and to compute the

offset without taking into account the net benefits of either the new regulation or the existing regulations to be repealed.

129. The Executive Order requires the agencies to make decisions based on an impermissible and arbitrary consideration—whether the new regulation is more important to rail safety than the combined benefits of two or more existing standards—that is nowhere specified in the governing statutes.

130. By conditioning issuance of one new rail safety regulation on the repeal of two or more existing rules, the Executive Order adds considerations inconsistent with the DOT's underlying statutes and, accordingly, exceeds the President's authority under the Constitution, usurps Congress's Article I legislative authority, and violates the President's obligation to take care that the laws be faithfully executed.

131. In the face of crude oil train disasters, NRDC has advocated on behalf of its members who live in the blast zone along rail lines on which hazardous crude oil is shipped. NRDC has commented on proposed rules that improve rail safety, advocated for legislation to require rules to reduce crude oil shipping hazards, and advocated for and commented on rules that will require the railroads to have comprehensive oil spill response plans. The Executive Order puts NRDC in the untenable position of choosing between either: (a) engaging in statutorily authorized and constitutionally protected advocacy in support of new rail safety standards, even though, for that advocacy to be successful, two or more existing rules must be repealed; or (b) forsaking this authorized and protected advocacy, to the detriment of NRDC and its members who have interests in rail safety. Because the Executive Order requires the DOT, before it can issue either proposed or final safety standards, to identify two or more existing rules for repeal, compliance with the Executive Order necessarily slows or effectively prevents the issuance of proposed rules and final

rules, to the detriment of NRDC and its members. Because the Executive Order conditions the issuance of one new safety regulation on repeal of two or more existing rules with equal or higher combined costs, compliance with the Executive Order deters or prevents issuance of new rail safety rules, to the detriment of NRDC and its members.

132. Until Executive Order 13771, the agency had intended to issue this rule; the Executive Order is delaying the rule, and the delay is causing injury to NRDC's members.

**G. Energy Efficiency and Conservation**

133. The Energy Policy and Conservation Act (EPCA) authorizes DOE to set energy conservation standards for various consumer products and certain commercial and industrial equipment. President Reagan signed into law the provisions of EPCA that establish appliance efficiency standards, while Presidents George H.W. Bush and George W. Bush signed into law strengthening legislation. *See* Pub. L. 100-12; Pub. L. 100-357; Pub, L. 102-486; Pub. L. 109-58; Pub. L. 110-140. DOE projects that national energy-efficiency standards completed through 2016 will save as much energy as the entire nation consumes in a year and that consumers will save $1 trillion on their utility bills by 2020 and $2 trillion by 2030.[2]

134. EPCA achieves these savings by providing that any new or amended energy conservation standard for a covered product must be designed to achieve the maximum improvement in energy efficiency that DOE determines is technologically feasible and economically justified. 42 U.S.C. §§ 6295(o)(2)(A), 6313(a)(6)(A)(ii)(II). DOE must periodically review already established energy conservation standards, and any new or amended standard must result in significant conservation of energy. *Id.* § 6295(m), (o)(3)(B); *see id.*

[2] *See* U.S. Dep't of Energy, Saving Energy and Money with Appliance and Equipment Standards in the United States (2017), *available at* https://energy.gov/sites/prod/files/2017/01/f34/Appliance%20and%20Equipment%20Standards%20Fact%20Sheet-011917_0.pdf.

§ 6313(a)(6)(A)(ii)(II). In deciding whether a new or amended standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens, taking into account seven statutory factors: (1) the economic impact of the standard on manufacturers and consumers of the products subject to the standard; (2) the savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the standard; (3) the total projected amount of energy (or as applicable, water) savings likely to result directly from the standard; (4) any lessening of the utility or the performance of the covered products likely to result from the standard; (5) the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard; (6) the need for national energy and water conservation; and (7) other factors the Secretary of Energy considers relevant. *Id.* §§ 6295(o)(2)(B)(i)(I)–(VII); 6313(a)(6)(B)(ii). EPCA also contains an "anti-backsliding" provision that bars the agency from prescribing any standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. *Id.* §§ 6295(o)(1); 6313(a)(6)(B)(iii)(I).

135. The Executive Order requires DOE, when setting energy conservation standards, to make regulatory decisions based on factors other than the exclusive factors specified by EPCA, including the cost of the energy conservation standard in isolation from its cost-saving and pollution-reducing benefits, and the cost (but not the benefits) of an energy-efficiency standard in relation to the costs of unrelated regulations.

**a. Conventional cooking products**

136. For example, in June 2015, DOE proposed a rule under EPCA to amend the energy-efficiency standards for residential conventional cooking products, such as stoves and ovens. 80

Fed. Reg. 33030 (2015). In September 2016, DOE issued a supplemental notice of proposed rulemaking. 81 Fed. Reg. 60784 (2016). DOE was required by statute to publish a final rule no later than two years after the original proposal—that is, by June 2017. 42 U.S.C. § 6295(m)(3)(A). DOE estimates that the standard will impose an additional $42.6 million in increased equipment costs annually, but result in more than $293 million in energy bill savings for consumers, and more than an additional $88 million in reduced pollution benefits, for a net annual benefit of more than $339 million per year. 81 Fed. Reg. at 60789.

137. DOE has designated the cooking appliance standard as "Major" and with "EO 13771 Designation: Regulatory." Therefore, notwithstanding the considerable net benefit to consumers and to the public, the Executive Order requires the agency, as a condition of issuing the new standard, to repeal "at least two prior regulations," Executive Order sec. 2(c), and to offset its costs, computing the offset without regard to the net benefits either of the new standard or the existing regulations being repealed. In its 2017 fall regulatory agenda, DOE indicated that it planned to issue another supplemental notice of proposed rulemaking in October 2018, instead of a final rule as required by June 2017.

138. Some of plaintiffs' members, such as NRDC members Karen Bain, Barbara Blau, Eduardo Pontoriero, and Jose Rivero, intend to purchase new residential cooking appliances, including stoves and ovens, in the next two to five years, and want to purchase reasonably priced, energy-efficient products. Similarly, plaintiff Public Citizen intends to purchase a new residential range and wants to purchase a reasonably priced, energy-efficient product. Energy-efficient stoves and ovens reduce the members' and Public Citizen's energy use and utility bills, and serve their interests in reducing their environmental footprints. In addition, some of plaintiffs' members,

including Mr. Pontoriero and Mr. Rivero, have economic and business interests in wider access to affordable energy-efficient ovens and stoves, with a broader range of features.

139. Plaintiffs' members, including the NRDC members identified above, and Public Citizen have been unable to reliably identify and purchase stoves and ovens that are energy efficient. DOE's proposed standard would require that all residential stoves and ovens marketed in the United States meet DOE's new, stricter energy-efficiency standards. Executive Order 13771 is delaying the rule, and the delay is causing injury to plaintiffs' members and plaintiff Public Citizen.

**b. Commercial water heaters**

140. In May 2016, DOE proposed a rule under EPCA to amend the energy-efficiency standards for commercial water heating equipment. 81 Fed. Reg. 34440 (2016). By law, DOE must publish a final rule no later than two years after this proposal—that is, by April 2018. 42 U.S.C. § 6313(a)(6)(C)(iii)(I). The rule is classified as a significant regulatory action, 81 Fed. Reg. at 34527, and it is subject to Executive Order 13771.

141. DOE estimated that the proposed standard for commercial water heating equipment would reduce energy use by 1.8 quadrillion British thermal units, or a savings of about 8 percent. 81 Fed. Reg. at 34445. DOE estimated that the proposed standard would increase annual equipment costs by $144 million, but provide annual benefits of $367 million in reduced equipment operating costs, and annual benefits from reduced air pollution of more than $200 million, with an annualized net benefit of more than $427 million per year. *Id*. at 34526. DOE calculated that the cumulative net present value of total commercial consumer savings from the proposed standard would be from $2.26 billion to $6.75 billion. DOE further calculated that the standard would result in cumulative emissions reductions of 98 million metric tons of carbon

dioxide, more than 1000 tons of methane, and significant quantities of other air pollutants, providing air-pollution reduction benefits with a net present value of between about $1 billion and $10 billion. *Id*. at 34445.

142. Notwithstanding the proposed commercial water heating equipment standard's considerable net benefits, the Executive Order requires DOE to offset the proposed standard's costs, and to repeal "at least two prior regulations." Executive Order sec. 2(c). In its 2017 fall regulatory agenda, DOE moved this rulemaking to its list of "long term actions," listing the next action as "Undetermined" on a date "To Be Determined."

143. Some of plaintiffs' members, such as NRDC member R.J. Mastic, have a direct professional and business interest in having access to a wider degree of availability, affordability, and range of features on energy-efficient commercial water heating equipment. By, among other things, increasing the selection and reducing the costs of energy efficient products and encouraging manufacturers to develop more efficient technologies, energy-efficiency standards allow plaintiffs' members to attract and better serve clients.

144. NRDC, Public Citizen, and their members benefit from improved appliance energy efficiency, including improved energy efficiency for residential conventional cooking products and commercial water heating equipment. Plaintiffs and their members use these products, and improved energy-efficiency standards will reduce their operating costs, including by reducing utility bills. In addition, reduced consumption of energy will lessen air pollution to which plaintiffs' members are exposed and that adversely affects plaintiffs' members' health, recreational, aesthetic, and economic interests. Public Citizen and NRDC have long advocated for strong energy-efficiency standards. NRDC has submitted multiple rounds of formal public comments in support of stronger energy-efficiency standards for residential conventional cooking

products and commercial water heating equipment. Moreover, the Executive Order puts plaintiffs in the untenable position of choosing between either: (a) engaging in statutorily authorized and constitutionally protected advocacy in support of new energy-efficiency standards, even though, for that advocacy to be successful, two or more existing rules must be repealed; or (b) forsaking this authorized and protected advocacy, to the detriment of plaintiffs and their members.

145. Plaintiffs and their members directly benefit from the significant energy savings and pollution reductions achieved through EPCA energy-efficiency standards. They are and will be harmed by implementation of Executive Order 13771, which has caused delay of the proposed standard for residential conventional cooking products and the proposed standard for commercial water heating equipment, and will likely weaken final regulations to avoid imposing regulatory costs that would need to be offset. Because the Executive Order requires DOE to identify two or more existing rules for repeal before DOE can issue either a proposed or final energy-efficiency standard, compliance with the Executive Order has delayed or prevented the issuance of these standards and other rules, to the detriment of plaintiffs and their members. Because the Executive Order conditions the issuance of one new energy-efficiency standard on repeal of two or more existing rules that have combined costs equal to or higher than the new rule, compliance with the Executive Order limits the adoption of new and more stringent energy-efficiency standards, to the detriment of plaintiffs and their members.

146. Until Executive Order 13771, DOE had intended to issue the rules described above; the Executive Order is delaying the rules, and the delay is causing injury to plaintiffs and their members.

147. As these examples show, the Executive Order requires the agency to make decisions based on an impermissible and arbitrary choice—whether to issue a new standard at the

cost of losing the benefits of two or more existing standards. Because DOE is forbidden by statute to reduce protections from existing standards, the Executive Order forces DOE either to forgo new standards altogether for appliances such as residential stoves and ovens and commercial water heating equipment, or to repeal or convince some other agency to repeal unrelated regulations to offset the cost of any new standard.

148. By conditioning DOE's issuance of one new rule on repeal of two or more existing rules, the combined costs of which offset the costs of the new rule, the Executive Order adds considerations inconsistent with the underlying statutes and, accordingly, exceeds the President's authority under the Constitution, usurps Congress's Article I legislative authority, and violates the President's obligation to take care that the laws be faithfully executed.

**H. Clean Air**

149. Congress enacted the Clean Air Act to protect and enhance air quality "to promote the public health and welfare and the productive capacity of [the] population." 42 U.S.C. § 7401(b)(1). The Act requires EPA to establish emissions standards and to review and update the standards to ensure they meet the statutory criteria and keep up with technological advances. *Id.* § 7411. The Clean Air Act has saved over 150,000 lives per year and spared more than 100,000 people per year from hospital visits from respiratory ailments like asthma and bronchitis. According to the EPA, in the Act's first 40 years, benefits—in the form of longer lives, healthier children, greater workplace productivity, and ecosystem protection—outweighed costs by more than 30 to 1.[3]

[3] EPA, The Benefits and Costs of the Clean Air Act from 1990 to 2020, *available at* https://www.epa.gov/sites/production/files/2015-07/documents/fullreport_rev_a.pdf (Apr. 2011).

150. In the Clean Air Act, Congress directed EPA to establish several types of standards based on prescribed factors. For example, the Act directs EPA to promulgate national ambient air quality standards (NAAQS) for air pollution from numerous and diverse mobile and stationary sources, including emissions of such substances as ozone, particulate matter, and sulfur dioxide. *Id*. § 7409. The Act directs EPA to set primary NAAQS at levels "requisite to protect the public health" with "an adequate margin of safety." *Id*. § 7409(b)(1). At five-year intervals, EPA must review and revise the NAAQS as appropriate to meet the controlling statutory standard. *Id*. § 7409(d)(1). The Act does not permit EPA to consider implementation costs in setting the NAAQS. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

151. The Clean Air Act also requires EPA to set new source emission standards for a wide range of industries and to review and update those standards every 8 years. 42 U.S.C. § 7411. EPA must require the best system of emission reduction that has been adequately demonstrated. In doing so, it is to take into account the cost of achieving emission reductions, as well as health and environmental impact and energy requirements. *Id*. § 7411(a)(1). EPA is allowed to consider costs only in this manner.

152. In addition, under the Clean Air Act, because greenhouse gasses are "air pollutants," EPA had a duty to determine whether greenhouse gas pollution in the atmosphere endangers public health and welfare. *Massachusetts v. EPA*, 549 U.S. 497 (2007). In 2009, EPA made an endangerment determination, which was upheld in *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), *cert. denied* 134 S. Ct. 468 (2013). In light of this determination, when EPA determines that emissions from a category of mobile sources (e.g., cars, trucks, airplanes) "cause or contribute" to elevated atmospheric greenhouse gas levels, EPA has a mandatory obligation to promulgate a regulation controlling the emissions. *E.g*., 42 U.S.C.

§ 7521(a)(1). The Executive Order unlawfully conditions EPA's issuance of one new Clean Air Act rule on the repeal of two or more existing rules, the combined costs of which offset the costs of the new rule, in derogation of the Clean Air Act.

153. The Executive Order requires the agency to make an impermissible and arbitrary choice—whether to issue a new standard at the cost of the benefits of two or more existing standards.

154. By instructing EPA to repeal two or more regulations for the purpose of adopting one, the Executive Order adds considerations inconsistent with EPA's underlying statutes and, accordingly, exceeds the President's authority under the Constitution, usurps Congress's Article I legislative authority, and violates the President's obligation to take care that the laws be faithfully executed.

155. NRDC, for more than 45 years, has worked to protect its members' lives, health, and welfare, advocating on behalf of its members for vigorous and effective implementation of the Clean Air Act. NRDC regularly advocates on behalf of its members in rulemakings over national standards, state implementation proceedings, and enforcement cases. NRDC has prevailed in dozens of cases challenging failures to perform mandatory duties or to meet statutory deadlines, and overturning regulatory standards and actions that are arbitrary, capricious, or contrary to law. NRDC has also supported EPA as an intervenor in many cases to defend EPA rules against challenges by regulated entities. NRDC's members are adversely affected by the Executive Order because it prevents issuance, or causes the delay, weakening, or repeal, of critical life-saving and environment-protecting air pollution limits. The Executive Order puts NRDC in the untenable position of choosing between either: (a) engaging in statutorily authorized and constitutionally protected advocacy in support of new environmental protections, even though, for that advocacy

to be successful, two or more existing rules must be repealed; or (b) forsaking this authorized and protected advocacy, to the detriment of NRDC and its members who have interests in environmental protection.

FIRST CAUSE OF ACTION

(Non-statutory review of ultra vires action; violation of separation of powers)

156. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs as if fully set forth herein.

157. Plaintiffs have a non-statutory right of action to enjoin and declare unlawful official action that is ultra vires.

158. The Constitution vests executive power in the President. U.S. Const., art. II. The President of the United States has only those powers conferred on him by the Constitution and federal statutes.

159. Federal legislation must be passed by both chambers of Congress before it may be presented to the President and, if signed, become law. U.S. Const., art. I. The President has no authority under the Constitution to amend federal statutes unilaterally.

160. By requiring agencies engaged in rulemaking to consider and take final action or to withhold final action based on factors that are impermissible and arbitrary under the governing statutes, the Executive Order purports to amend the statutes through which Congress has delegated rulemaking authority to federal agencies.

161. Such action by the President exceeds presidential authority and usurps legislative power conferred by the Constitution exclusively on Congress.

162. Plaintiffs and their members will suffer irreparable injury if the Executive Order is not declared unlawful, and plaintiffs and their members have no adequate remedy at law.

163. The public interest favors entry of a declaration that the Executive Order is unconstitutional, in violation of the separation of powers, because the Executive Order prevents, weakens, delays, and eliminates regulations that protect plaintiffs and the public from harm.

164. Accordingly, the Executive Order violates the constitutional separation of powers and compliance with or enforcement of the Executive Order is ultra vires.

SECOND CAUSE OF ACTION

(Non-statutory review of ultra vires action; violation of the Take Care Clause)

165. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs as if fully set forth herein.

166. Plaintiffs have a non-statutory right of action to enjoin and declare unlawful official action that is ultra vires.

167. Under the Constitution, the President has duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

168. The Take Care Clause is judicially enforceable against presidential action that undermines statutes enacted by Congress and signed into law. *See, e.g.*, *Angelus Milling Co. v. Comm'r of Internal Revenue*, 325 U.S. 293, 296 (1945) ("Insofar as Congress has made explicit statutory requirements, they must be observed and are beyond the dispensing power of [the Executive Branch]."); *Kendall v. United States ex. Rel. Stokes*, 37 U.S. (12 Pet.) 524, 612–13 (1838).

169. The Take Care Clause limits the President's power and ensures that he will faithfully execute Congress's laws.

170. Under the Constitution, the President lacks the authority to direct federal officers or agencies to act in derogation of the statutes that authorize them to promulgate rules.

171. The Executive Order directs agencies to take action contrary to numerous laws passed by Congress, including but not limited to the Motor Vehicle Safety Act, the Motor Carrier Safety Acts of 1935 and 1984, the OSH Act, the MSH Act, TSCA, HMTA, the FRSA, the Federal Water Pollution Control Act, the EPCA, the ESA, the Clean Air Act, and the APA.

172. Plaintiffs and their members will suffer irreparable injury if the Executive Order is not declared unlawful and in violation of the Take Care Clause. Plaintiffs and their members have no adequate remedy at law.

173. The public interest favors entry of a declaration that the Executive Order is contrary to law and unconstitutional, because the Executive Order prevents, weakens, delays, and eliminates regulations that protect plaintiffs and the public from harm.

174. Accordingly, the Executive Order is in violation of the Take Care Clause and compliance with or enforcement of the Executive Order is ultra vires.

THIRD CAUSE OF ACTION

(Non-statutory review of ultra vires action by agency officials)

175. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs as if fully set forth herein.

176. Plaintiffs have a non-statutory right of action to enjoin and declare unlawful official action that is ultra vires.

177. Congress has delegated authority to the agency defendants to administer specific programs to achieve public policy objectives, such as clean air, highway safety, workplace safety, protection of endangered species, and energy efficiency. As part of that authorization, Congress

has given the agency defendants the authority to promulgate regulations to promote the objectives of the specific programs. Congress has not authorized the agency defendants to promulgate, modify, or weaken regulations to offset the costs of other, unrelated regulatory programs.

178. Neither the statutes from which the agency defendants derive their rulemaking authority nor the APA authorizes these defendants to delay, weaken, or forgo new regulations based on whether they can repeal two or more existing regulations to offset the new costs or to satisfy an annual cost cap.

179. The Executive Order directs these defendants to exercise their authority in ways that are arbitrary, capricious, an abuse of discretion, in violation of the governing statutes, and in violation of the APA, 5 U.S.C. § 706. The agency defendants cannot implement the Executive Order without violating the statutes from which they derive their rulemaking authority and the APA.

180. Plaintiffs and their members will suffer irreparable injury if the agency defendants comply with the Executive Order. Plaintiffs and their members have no adequate remedy at law.

181. The public interest favors barring the agency defendants from complying with the Executive Order because the Order is unconstitutional and compliance with it is contrary to law, and prevents, weakens, delays, and eliminates regulations that protect plaintiffs and the public from harm.

182. Because the Executive Order is unconstitutional and directs agencies to violate the law, this Court should declare that the Executive Order is of no force and effect and enjoin compliance with the order.

FOURTH CAUSE OF ACTION

(Non-statutory review of ultra vires action by director of OMB)

183. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs as if fully set forth herein.

184. Plaintiffs have a non-statutory right of action to enjoin and declare unlawful official action that is ultra vires.

185. The director of OMB may act only pursuant to authority lawfully delegated by Congress or the President. 31 U.S.C. § 501 *et seq*.

186. Because the Executive Order violates the President's authority under the Constitution and directs action contrary to law, implementation of the Executive Order by the director of OMB is ultra vires.

187. Plaintiffs and their members will suffer irreparable injury if the agency defendants comply with the Executive Order and OMB's implementation of it. Plaintiffs and their members have no adequate remedy at law.

188. The public interest favors entry of an injunction barring implementation by OMB of the Executive Order and OMB's Interim Guidance and Guidance because the Interim Guidance and Guidance, and the Executive Order on which they are based, are contrary to law, and prevent, weaken, delay, and eliminate regulations that protect plaintiffs and the public from harm.

189. Because the Executive Order is unconstitutional and directs agencies to violate the law, this Court should declare that the OMB Interim Guidance and Guidance implementing the Executive Order, as well as the Executive Order, are of no force and effect and enjoin the director of OMB from implementing the Executive Order.

FIFTH CAUSE OF ACTION

(Violation of the APA)

190. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs as if fully set forth herein.

191. The APA requires this Court to hold unlawful and set aside any agency action that is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2).

192. The OMB Interim Guidance and Guidance, which implement section 2 of the Executive Order and purport to be binding on federal agencies, constitute final agency action under the APA.

193. The President lacks constitutional authority to issue the Executive Order and to direct the director of OMB to implement it, including by issuing the Interim Guidance and Guidance. The Interim Guidance and Guidance are arbitrary, capricious, an abuse of discretion, not in accordance with law, or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, in contravention of the APA. *Id.*

194. Plaintiffs and their members will suffer irreparable injury if the director of OMB implements the Executive Order. Plaintiffs and their members have no adequate remedy at law.

195. The public interest favors entry of an injunction barring implementation of the Interim Guidance and Guidance because they violate the APA and are in excess of OMB's authority, chill First Amendment activity, and stand as an obstacle to fulfillment of congressional mandates and purposes discharged through agency rulemaking.

196. Because the Executive Order is unconstitutional and directs unlawful action, its implementation by the director of OMB will cause other federal agencies to violate the APA and numerous statutes, as discussed above. This Court should hold the Interim Guidance and Guidance unlawful and set them aside, declare that they are of no force and effect, and enjoin the director of OMB from implementing the Executive Order.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this Court:

(A) Declare the Executive Order in violation of the Take Care Clause, in excess of presidential authority under Article II of the Constitution, an infringement on legislative authority, and invalid; and

(B) Declare that defendants cannot lawfully implement or comply with sections 2 and 3(a) and (d) of the Executive Order;

(C) Declare unlawful and set aside the OMB Interim Guidance and Guidance;

(D) Enjoin the agency defendants, including the director of OMB, from complying with the Executive Order;

(E) Grant such other relief as this Court may deem just and proper.

Dated: April 2, 2018

Respectfully submitted,

/s/

Michael E. Wall
(CA Bar No. 170238)
Cecilia D. Segal
(CA Bar No. 310935)
NATURAL RESOURCES DEFENSE COUNCIL, INC.
111 Sutter Street, Floor 21
San Francisco, CA 94104
(415) 875-6100

Allison M. Zieve
(DC Bar No. 424786)
Scott L. Nelson
(DC Bar No. 413548)
Sean M. Sherman
(DC Bar No. 1046357)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Natural Resources Defense Council, Inc.

Patricia M. Shea
(DC Bar No. 367231)
COMMUNICATIONS WORKERS OF AMERICA
501 3rd Street NW
Washington, DC 20001
(202) 434-1100

Counsel for Communications Workers of America

Counsel for all Plaintiffs

Patti A. Goldman
(DC Bar No. 398565)
EARTHJUSTICE
705 2nd Avenue, #203
Seattle, WA 98104
(206) 343-7340

Counsel for all Plaintiffs

**EXHIBIT A**

# Presidential Documents

**Executive Order 13771 of January 30, 2017**

## Reducing Regulation and Controlling Regulatory Costs

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Budget and Accounting Act of 1921, as amended (31 U.S.C. 1101 *et seq.*), section 1105 of title 31, United States Code, and section 301 of title 3, United States Code, it is hereby ordered as follows:

**Section 1.** *Purpose.* It is the policy of the executive branch to be prudent and financially responsible in the expenditure of funds, from both public and private sources. In addition to the management of the direct expenditure of taxpayer dollars through the budgeting process, it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations. Toward that end, it is important that for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.

**Sec. 2.** *Regulatory Cap for Fiscal Year 2017.* (a) Unless prohibited by law, whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed.

(b) For fiscal year 2017, which is in progress, the heads of all agencies are directed that the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by the Director of the Office of Management and Budget (Director).

(c) In furtherance of the requirement of subsection (a) of this section, any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. Any agency eliminating existing costs associated with prior regulations under this subsection shall do so in accordance with the Administrative Procedure Act and other applicable law.

(d) The Director shall provide the heads of agencies with guidance on the implementation of this section. Such guidance shall address, among other things, processes for standardizing the measurement and estimation of regulatory costs; standards for determining what qualifies as new and offsetting regulations; standards for determining the costs of existing regulations that are considered for elimination; processes for accounting for costs in different fiscal years; methods to oversee the issuance of rules with costs offset by savings at different times or different agencies; and emergencies and other circumstances that might justify individual waivers of the requirements of this section. The Director shall consider phasing in and updating these requirements.

**Sec. 3.** *Annual Regulatory Cost Submissions to the Office of Management and Budget.* (a) Beginning with the Regulatory Plans (required under Executive Order 12866 of September 30, 1993, as amended, or any successor order) for fiscal year 2018, and for each fiscal year thereafter, the head of each agency shall identify, for each regulation that increases incremental cost, the offsetting regulations described in section 2(c) of this order, and provide the agency's best approximation of the total costs or savings associated with each new regulation or repealed regulation.

(b) Each regulation approved by the Director during the Presidential budget process shall be included in the Unified Regulatory Agenda required under Executive Order 12866, as amended, or any successor order.

(c) Unless otherwise required by law, no regulation shall be issued by an agency if it was not included on the most recent version or update of the published Unified Regulatory Agenda as required under Executive Order 12866, as amended, or any successor order, unless the issuance of such regulation was approved in advance in writing by the Director.

(d) During the Presidential budget process, the Director shall identify to agencies a total amount of incremental costs that will be allowed for each agency in issuing new regulations and repealing regulations for the next fiscal year. No regulations exceeding the agency's total incremental cost allowance will be permitted in that fiscal year, unless required by law or approved in writing by the Director. The total incremental cost allowance may allow an increase or require a reduction in total regulatory cost.

(e) The Director shall provide the heads of agencies with guidance on the implementation of the requirements in this section.

**Sec. 4**. *Definition.* For purposes of this order the term "regulation" or "rule" means an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency, but does not include:

(a) regulations issued with respect to a military, national security, or foreign affairs function of the United States;

(b) regulations related to agency organization, management, or personnel; or

(c) any other category of regulations exempted by the Director.

**Sec. 5**. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
*January 30, 2017.*

[FR Doc. 2017–02451
Filed 2–2–17; 11:15 am]
Billing code 3295–F7–P

**EXHIBIT B**

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

February 2, 2017

MEMORANDUM FOR: REGULATORY POLICY OFFICERS AT EXECUTIVE DEPARTMENTS AND AGENCIES AND MANAGING AND EXECUTIVE DIRECTORS OF CERTAIN AGENCIES AND COMMISSIONS

FROM: Dominic J. Mancini, Acting Administrator
Office of Information and Regulatory Affairs

SUBJECT: Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs"

## I. General Requirements

This interim guidance, in the form of Questions and Answers (Q&As), addresses the requirements in Section 2, "Regulatory Cap for Fiscal Year 2017," of the Executive Order of January 30, 2017, titled "Reducing Regulation and Controlling Regulatory Costs" (EO). Specifically, the guidance explains, for purposes of implementing Section 2 in Fiscal Year 2017, the following requirements:

1) "Unless prohibited by law, whenever an executive department or agency . . . publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed." Sec. 2(a).
2) "For fiscal year 2017, . . .the heads of all agencies are directed that the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by the Director of the Office of Management and Budget . . . ." Sec. 2(b).
3) "In furtherance of the requirement of subsection (a) of this section, any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations." Sec. 2(c).

In general, executive departments and agencies ("agencies") may comply with those requirements by issuing two "deregulatory" actions (described below) for each new significant regulatory action that imposes costs. The savings of the two deregulatory actions are to fully offset the costs of the new significant regulatory action.

In addition, beginning immediately, agencies planning to issue one or more significant regulatory action on or before September 30, 2017, should for each such significant regulatory action:

1) A reasonable period of time before the agency issues that action, identify two existing regulatory actions the agency plans to eliminate or propose for elimination on or before September 30, 2017; and
2) Fully offset the total incremental cost of such new significant regulatory action as of September 30, 2017.

Please consult with your Office of Information and Regulatory Affairs (OIRA) Desk Officer if you have any particular questions regarding the applicability or interpretation of the EO not addressed in these Q&As. The Office of Management and Budget (OMB) plans to issue further guidance regarding the application of EO for Fiscal Years 2018 and beyond soon. In addition, OMB may revise these Q&As.

Comments on this interim guidance should be provided to reducingregulation@omb.eop.gov by February 10, 2017.

## II. Coverage

***Q: Which new regulations are covered?***

A: The EO's requirements for Fiscal Year 2017 apply only to those significant regulatory actions, as defined in Section 3(f) of Executive Order 12866, an agency issues between noon on January 20 and September 30, 2017. This includes significant final regulations for which agencies issued a Notice of Proposed Rulemaking before noon on January 20, 2017. Significant guidance documents may also be covered (see below).

Please continue to follow the standard significance determination process outlined in Executive Order 12866. Regulations that affect only other Federal agencies (and not the public); that are issued with respect to a military, national security, or foreign affairs function of the United States; and that are related to agency organization, management, or personnel are not subject to Section 2's requirements.

***Q: What about rules that implement Federal spending programs?***

A: In general, Federal spending rules that primarily cause income transfers from taxpayers to program beneficiaries (*e.g.*, rules associated with Pell grants and Medicare spending) are considered "transfer rules" and are not covered by this EO. However, in cases where these rules impose requirements on non-Federal entities, such as reporting or recordkeeping, agencies would need to account for these costs. Please consult with your OIRA Desk Officer on these rules. See OMB Circular A-4 for a discussion of the distinction between transfers and costs generally.

***Q: Do Section 2's requirements apply to significant regulatory actions of independent agencies?***

A: No, the requirements of Section 2 apply only to those agencies required to submit significant regulatory actions to OIRA for review under EO 12866. Nevertheless, we encourage independent regulatory agencies to identify existing regulations that, if repealed or revised, would achieve cost savings that would fully offset the costs of new significant regulatory actions.

***Q: Are new guidance/interpretive documents covered?***

A: New significant guidance or interpretive documents will be addressed on a case-by-case basis. Consult with your OIRA Desk Officer before issuing new significant guidance or regulatory interpretations. Agencies should continue to adhere to OMB's 2007 Memorandum on Good Guidance Practices. As always, agencies should ensure that such documents are the appropriate vehicle for the particular policy goal, and that it is clear that compliance with any agency guidance is voluntary. Any cost savings claimed for guidance or other documents must be specific and verifiable.

***Q: Which existing regulatory actions, if repealed or revised, would be considered deregulatory actions, and thus qualify for savings?***

A: Any existing regulatory action that imposes costs and the repeal or revision of which will produce verifiable savings may qualify. Meaningful burden reduction through the repeal or streamlining of mandatory reporting, recordkeeping or disclosure requirements may also qualify. Agencies should also confirm that they will continue to achieve their regulatory objectives after the deregulatory action is undertaken. Please consult with your OIRA Desk Officer regarding information collections or other actions you believe should qualify as deregulatory actions under Section 2.

***Q: Do regulatory actions issued before January 20 that are vacated or remanded by a court after that date qualify for savings*?**

A: Generally no, based on the presumption that a court determined these regulatory actions were issued, at least in part, with insufficient legal basis. There may be individual cases, however, where we would consider counting such savings, and specifically request comment on this topic. As one example, the agency may be directed by a court, under remand, to modify a rule through full notice and comment rulemaking, in order address particular issues.

***Q: Do regulatory actions overturned by subsequently enacted laws qualify for savings?***

A: Generally yes. We will consider Acts of Congress that overturn final regulatory actions, such as disapprovals of rules under the Congressional Review Act, to operate in a similar manner as agency deregulatory actions for the purposes of the requirements of Section 2 of the EO.

## III. Accounting Questions

***Q: How should costs be measured?***

A: Costs should be measured as the opportunity cost to society. OMB Circular A-4 defines this concept.

***Q: How should agencies account for deregulatory actions that do not outright repeal existing regulations but revise existing requirements to produce real cost savings?***

A: OMB will address deregulatory actions that continue to allow agencies to meet regulatory goals on a case-by-case basis. Purely deregulatory actions that confer only savings to all affected parties generally will not trigger the requirement under Section 2(a) for the agency to identify two existing regulatory actions to be repealed. However, if such deregulatory actions impose costs on individuals or entities, agencies will need to offset those costs.

***Q: Can effects such as future energy cost savings for rules that require the adoption of more energy efficient technologies be counted against the compliance costs of a regulatory action for purposes of Section 2(b) of the EO?***

A: In most circumstances, such effects would not be counted as offsets to costs according to OIRA's reporting conventions for benefit-cost analysis.

***Q: What about costs that occur over different time periods?***

A: All costs estimates should be annualized in accordance with OMB Circular A-4. While timing issues will be handled on a case-by-case basis, in general, the start and end points for the annualization of costs should be directly comparable across the new and corresponding repealed regulatory actions.

***Q: Can agencies use previously estimated costs from an original Regulatory Impact Analyses (RIA) in determining the cost savings generated by an eliminated regulatory action?***

A: In general, no. While the original RIA may have information that will be useful in calculating cost savings, the most current information available on projected cost savings (*e.g.*, new information on the cost of operating compliance technologies) must be included to the extent feasible. Agencies are also strongly encouraged to use program evaluations and similar techniques to determine the actual cost and other effects of eliminating regulatory actions.

***Q: What costs of existing regulatory actions should be counted as cost savings from a deregulatory action?***

A: All costs that would have occurred after the effective date of the repeal of the existing regulatory action should be the basis for the cost savings estimate. This means, for example, that agencies should not count sunk costs.

***Q: How should costs that duplicate those in another regulatory action be addressed?***

A: In general, costs should be counted only once, in the regulatory action that imposes the legally binding requirement resulting in those costs. Exceptions should be discussed on a case-by-case basis with your OIRA Desk Officer.

***Q: How should agencies treat unquantified costs and cost savings?***

A: These will be handled on a case-by-case basis. As a general matter, the weight assigned to unquantified effects will depend on their significance and degree of certainty. See OMB Circular A-4 for more information on unquantified costs.

## IV. Process and Waiver Questions

***Q: Which significant regulatory actions might qualify for individual waivers?***

A: Emergencies addressing critical health, safety, or financial matters, or for some other compelling reason, may qualify for a waiver from some or all of the requirements of Section 2. Please submit requests for a waiver assessment to your OIRA Desk Officer prior to submitting the rule for OMB review under EO 12866.

Note that Section 2(b) of EO applies "unless otherwise required by law." Agencies may proceed with significant regulatory actions that need to be finalized in order to comply with an imminent statutory or judicial deadline even if they are not able to identify offsetting regulatory actions by the time of issuance. In the unlikely case where your agency believes other regulatory actions, which are not needed to comply with an imminent statutory or judicial deadline, are required by law, please consult with your OIRA Desk Officer. In all cases, however, agencies should identify additional regulatory actions to be repealed in order to offset the cost of the new significant regulatory action, even if such action is required by law.

***Q: Can regulatory and deregulatory actions be bundled in the same regulatory action?***

A: Yes, under certain circumstances. In practice, many regulatory actions can both impose new requirements and remove or streamline existing requirements on the same regulated entities and within the same regulatory program. In this case, the agency must clearly identify the specific provisions that are counted within the regulatory and deregulatory portion of the rules, and the costs and cost savings associated with each. The net cost impact (the different

between costs imposed and cost savings) of such rules will generally determine whether they are regulatory actions that need to be offset. Agencies, however, should avoid artificially bundling provisions that are not logically connected in a single regulatory action.

***Q: What must agencies do to "identify" existing regulatory actions to be repealed?***

A: At a minimum, the agency should identify all of the associated regulatory actions to be repealed, along with cost saving estimates, no later than the date of issuance of the corresponding new significant regulatory action. Agencies should confirm that they will continue to achieve their regulatory objectives (such as health or environmental protection). All of the regulatory actions slated for repeal but not yet finalized also must be included in the *Unified Regulatory Agenda*.

***Q: Do deregulatory actions have to be finalized before new regulatory actions can be finalized?***

A: Per Section 2(a), each agency must identify two existing regulatory actions to be repealed. For many significant regulatory actions, the most appropriate place for such an identification is in the preamble of the rule being issued for notice and comment or promulgated. To the extent feasible, regulatory actions should be eliminated before or on the same schedule as the new regulatory action they offset. In cases where finalizing an offsetting regulation is not possible, agencies should provide a plan for finalizing the offsetting regulation. The most appropriate place for such a plan is the preamble of the rule being issued. The plan should include a commitment to include the offsetting regulation in the next addition of the *Unified Regulatory Agenda*, with dates for any required regulatory actions and estimates of the associated cost savings.

***Q: How does this EO interact with other EOs and guidance addressing regulatory activities?***

A: All requirements under other EOs and implementing guidance (*e.g.*, EO 12866 and OMB Circular A-4) remain applicable.

***Q: Can savings be transferred within an agency?***

A: Yes. The requirements of this EO apply agency-wide. Regulatory savings by a component in one agency can be used to offset a regulatory burden by a different component in that same agency.

***Q: Can savings be transferred from other agencies?***

A: Agencies that are not able to generate sufficient savings to account for new regulatory actions they must issue may submit a written request to the Director of OMB to transfer savings from another agency before they submit a regulatory action for review that does not contain the needed offset. However, if the Director does not concur with this request, the Agency must identify adequate offsets absent a waiver.

***Q: How does the regulatory cost cap in Section 2 of the EO affect the consideration of regulatory benefits or other requirements under EO 12866?***

A: The regulatory cost cap has no effect on the requirements of EO 12866 or the consideration of regulatory benefits in making regulatory decisions. The goal of the requirement to eliminate two existing regulatory actions for each new significant regulatory action is to provide a mechanism for agencies to identify and repeal outdated, ineffective, or unnecessary regulatory actions. Similar to fiscal spending caps, the goal of the regulatory cost cap is to provide a mechanism for the prudent management and control of regulatory costs imposed on society by agencies attempting to achieve regulatory benefits.

**EXHIBIT C**

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 5, 2017

M-17-21

MEMORANDUM FOR: REGULATORY POLICY OFFICERS AT EXECUTIVE DEPARTMENTS AND AGENCIES AND MANAGING AND EXECUTIVE DIRECTORS OF CERTAIN AGENCIES AND COMMISSIONS

FROM: Dominic J. Mancini, Acting Administrator
Office of Information and Regulatory Affairs

SUBJECT: Guidance Implementing Executive Order 13771, Titled "Reducing Regulation and Controlling Regulatory Costs"

## I. Introduction

This guidance, in the form of Questions and Answers (Q&As), addresses the requirements of Executive Order (EO) 13771, titled "Reducing Regulation and Controlling Regulatory Costs." It applies to Fiscal Years (FY) 2017 and beyond. This guidance supplements the Office of Management and Budget (OMB) interim guidance issued on February 2, 2017, titled "Interim Guidance Implementing Section 2 of the EO of January 30, 2017, Titled 'Reducing Regulation and Controlling Regulatory Costs.'" While OMB's Office of Information and Regulatory Affairs (OIRA) believes this guidance largely treats the subjects covered in the February 2, 2017 interim guidance in a consistent manner, where these two memoranda are in conflict, this guidance supersedes the previous guidance. It reflects OIRA's consideration of the comments received in response to the February 2, 2017, interim guidance. Comments sent by members of the public are available on Regulations.gov in docket ID OMB-2017-0002.

## II. General Requirements

The guidance explains, for purposes of implementing Section 2, the following requirements:

- "Unless prohibited by law, whenever an executive department or agency . . . publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed." Sec. 2(a).
- "For fiscal year 2017 . . . the heads of all agencies are directed that the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by the Director of the Office of Management and Budget . . . ." Sec. 2(b).
- "In furtherance of the requirement of subsection (a) of this section, any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations." Sec. 2(c).

In general, executive departments or agencies ("agencies") may comply with those requirements by issuing two EO 13771 deregulatory actions (described below) for each EO 13771 regulatory action (described below). The incremental costs associated with EO 13771 regulatory actions must be fully offset by the savings of EO 13771 deregulatory actions.

In addition, agencies planning to issue one or more EO 13771 regulatory actions on or before September 30, 2017, should for each such EO 13771 regulatory action:

- Identify two existing regulatory actions the agency plans to eliminate or propose for elimination on or before September 30, 2017 in a reasonable period of time before the agency issues the EO 13771 regulatory action; and
- Fully offset the total incremental cost of such EO 13771 regulatory action as of September 30, 2017.

Guidance on the requirements of Section 3(a) is forthcoming.

Beginning with FY 2018, Section 3(d) requires the Director of OMB to identify to agencies a total amount of incremental costs (or "regulatory cap" as stated in Section 2) for all EO 13771 deregulatory and EO 13771 regulatory actions finalized during the fiscal year. The total incremental cost imposed by each agency should not exceed the agency's allowance for that fiscal year, unless required by law or approved by the Director. The total incremental cost allowance may be an increase or reduction in total regulatory cost, and will be informed by agencies' draft submissions for the *Regulatory Plan*.

Please consult with OIRA if you have any particular questions regarding the applicability or interpretation of EO 13771 not addressed in these Q&As.

Agencies should continue to comply with all applicable laws and requirements. In addition, EO 12866 remains the primary governing EO regarding regulatory planning and review. Accordingly, among other requirements, except where prohibited by law, agencies must continue to assess and consider both the benefits and costs of regulatory actions, including deregulatory actions, when making regulatory decisions, and issue regulations only upon a reasoned determination that benefits justify costs.

## III. Definitions

This section provides definitions for terms used in this guidance. The definitions should not necessarily be applied to other sections of EO 13771 that this guidance does not cover, and do not replace definitions used in other EOs or statutes.

***Q1. What is an "agency"?***

A: An "agency," unless otherwise indicated, means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5). A cabinet department is considered a single agency for purposes of EO 13771 compliance.

***Q2. What is an "EO 13771 regulatory action"?***

A: An "EO 13771 regulatory action" is:

(i) A significant regulatory action as defined in Section 3(f) of EO 12866 that has been finalized and that imposes total costs greater than zero; or

(ii) A significant guidance document (*e.g.,* significant interpretive guidance) reviewed by OIRA under the procedures of EO 12866 that has been finalized and that imposes total costs greater than zero.

For example, EO 13771 regulatory actions include negotiated rulemakings that are significant as defined in Section 3(f) of EO 12866, that have been finalized, and that impose total costs greater than zero.

***Q3. What is a "significant guidance document"?***

A: As defined in OMB's *Final Bulletin for Agency Good Guidance Practices*, a "significant guidance document" is a guidance document disseminated to regulated entities or the general public that may reasonably be anticipated to:

(i) Lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
(ii) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
(iii) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
(iv) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in EO 12866, as further amended.

A significant guidance document does not include legal advisory opinions for internal Executive Branch use and not for release (such as Department of Justice Office of Legal Counsel opinions); briefs and other positions taken by agencies in investigations, pre-litigation, litigation, or other enforcement proceedings; speeches; editorials; media interviews; press materials; Congressional correspondence; guidance documents that pertain to a military or foreign affairs function of the United States (other than guidance on procurement or the import or export of non-defense articles and services); grant solicitations;

warning letters; case or investigatory letters responding to complaints involving fact-specific determinations; purely internal agency policies guidance documents that pertain to the use, operation or control of a government facility; internal guidance documents directed solely to other Federal agencies; and any other category of significant guidance documents exempted by an agency in consultation and concurrence with the OIRA Administrator. In the list above, "internal" policies and guidance documents do not include those that materially affect an agency's interactions with non-Federal entities, even if nominally directed only to agency personnel. For example, an internal directive to field staff on how to implement a regulatory requirement could be a significant guidance document if it satisfied any of (i) through (iv) above.

If they satisfy the definition above, modifications to existing guidance and interpretative documents would be considered significant guidance documents.

***Q4. What is an "EO 13771 deregulatory action"?***

A: An "EO 13771 deregulatory action" is an action that has been finalized and has total costs less than zero. An EO 13771 deregulatory action qualifies as both: (1) one of the actions used to satisfy the provision to repeal or revise at least two existing regulations for each regulation issued, and (2) a cost savings for purposes of the total incremental cost allowance. EO 13771 deregulatory actions are not limited to those defined as significant under EO 12866 or OMB's *Final Bulletin on Good Guidance Practices.*

An EO 13771 deregulatory action may be issued in the form of an action in a wide range of categories of actions, including, but not limited to:

- Informal, formal, and negotiated rulemaking;
- Guidance and interpretative documents;
- Some actions related to international regulatory cooperation; and
- Information collection requests that repeal or streamline recordkeeping, reporting, or disclosure requirements.

Significant proposed rules issued before noon on January 20, 2017, that are formally withdrawn by notice in the *Federal Register* and removed from the *Unified Agenda of Regulatory and Deregulatory Actions* may qualify as repeal actions, but do not qualify for cost savings.

Please consult with OIRA regarding other actions your agency believes should qualify as an EO 13771 deregulatory action.

***Q5. What does "offset" mean?***

A: The term "offset" means at least two EO 13771 deregulatory actions have been taken per EO 13771 regulatory action and that the incremental cost of the EO 13771 regulatory action has been appropriately counterbalanced by incremental cost savings from EO 13771 deregulatory actions, consistent with the agency's total incremental cost allowance.

***Q6. What is a "statutorily or judicially required" rulemaking?***

A: A statutorily required rulemaking is one for which Congress has provided by statute an explicit requirement and explicit timeframe for rulemaking. For example, a statute that states, an agency "shall issue nutrition labeling requirements within 10 years" of the statute's enactment date would be considered a statutorily required rule.

A judicially required rulemaking is one for which there is a judicially established binding deadline for rulemaking, including deadlines established by settlement agreement or consent decree.

Agencies should consult with OIRA to determine whether a rule falls within the definition of a statutorily or judicially required rulemaking.

***Q7. What is a rule issued with respect to a "national security function" of the United States?***

A: For the purposes of EO 13771, a regulation issued with respect to a national security function is a regulation that satisfies the two following requirements:

(1) The benefit-cost analysis demonstrates that the regulation is anticipated to improve national security as its primary direct benefit; and
(2) (A) For regulations the agency considers legislative rules: OIRA and the agency agree the regulation qualifies for a "good cause" exception under 5 U.S.C. 553(b)(3)(B); or (B) For other regulations (including significant guidance) the agency and OIRA agree that applying the requirements of EO 13771 to the regulation would be impracticable or contrary to public interest.

***Q8. What is "total incremental cost"?***

A: The term "total incremental cost" means the sum of all costs from EO 13771 regulatory actions minus the cost savings from EO 13771 deregulatory actions.

## IV. Scope Questions

***Q9. Which new regulations as defined in EO 13771 must be offset?***

A: Agencies are required to offset EO 13771 regulatory actions issued after noon on January 20, 2017. This includes those EO 13771 regulatory actions that are rules finalizing a Notice of Proposed Rulemaking (or in certain instances an interim final rule; see Question 11 for a further discussion) issued before noon on January 20, 2017.

Agencies should use the existing significance determination process outlined in EO 12866 for determining whether an action is an EO 13771 regulatory action. Agencies should not assume that actions that appear, or have appeared, in the *Unified Agenda of Regulatory and*

*Deregulatory Actions* as nonsignificant have been determined by OIRA to be nonsignificant. Agencies should obtain an affirmative significance determination from OIRA before publishing regulatory actions.

***Q10. How are interim and direct final rules treated?***

A: In general, significant interim and direct final rules must be offset. However, a significant interim final rule or direct final rule may qualify for an exemption with respect to the timing for identifying and issuing the EO 13771 deregulatory actions.

***Q11. How are significant rules that finalize interim final rules (IFR) treated?***

A: If the final rule neither increases nor decreases the cost of the IFR, then the action does not need to be offset nor does it qualify as an EO 13771 deregulatory action. If the final rule includes changes that increase the cost of the IFR, then the final rule must be offset (however, if the final rule imposes only *de minimis* costs relative to the IFR, the final rule may qualify for an exemption). If the final rule reduces the cost of the IFR, then the rule and the cost savings relative to the IFR may qualify as an EO 13771 deregulatory action.

***Q12. Must agencies identify EO 13771 deregulatory actions for significant advance notices of proposed rulemaking (ANPRM)?***

A: No. With respect to rulemaking, the requirements of EO 13771 do not apply to pre-notice of proposed rulemaking activities such as ANPRMs.

***Q13. How are regulatory actions that implement Federal spending programs or establish fees and penalties treated?***

A: In general, Federal spending regulatory actions that cause only income transfers between taxpayers and program beneficiaries (*e.g.*, regulations associated with Pell grants and Medicare spending) are considered "transfer rules" and are not covered by EO 13771. Additionally, an action that establishes a new fee or changes the existing fee for a service, without imposing any new costs, does not need to be offset; nor does an action that establishes new penalties or fines or changes those already in existence.

However, in some cases, such regulatory actions may impose requirements apart from transfers, or transfers may distort markets causing inefficiencies. In those cases, the actions would need to be offset to the extent they impose more than *de minimis* costs. Examples of ancillary requirements that may require offsets include new reporting or recordkeeping requirements or new conditions, other than user fees, for receiving a grant, a loan, or a permit. Analogously, if an action reduces the stringency of requirements or conditions for transfer recipients or permit holders, the action may qualify as an EO 13771 deregulatory action. Also, an action that causes transfers that, for example, induce moral hazard or other inefficient behavior may need to be offset and an action that reduces such transfers may qualify as an EO 13771 deregulatory action.

Please consult with OIRA on these actions, especially with regards to potential distortionary costs due to transfers. See OMB Circular A-4 for a discussion of the distinction between transfers and costs generally.

***Q14. How are activities treated that are associated with regulatory cooperation or international standards?***

A: Regulatory activities associated with regulatory cooperation with foreign governments that reduce costs to entities or individuals within the United States, including at the border, or otherwise lower the cost of regulations on the United States economy, may qualify as EO 13771 deregulatory actions. Activities associated with standard-setting that reduce costs to entities or individuals within the United States may also qualify as EO 13771 deregulatory actions. However, agency actions to harmonize with the standards of an international body or foreign government that increase costs on United States entities or individuals may need to be offset. OIRA recognizes such harmonization could also lead to operating efficiencies for businesses that agencies may be able to capture in their analysis of the benefits and costs of EO 13771 actions.

Agencies should consult OIRA on how to treat specific regulatory activities related to regulatory cooperation or international standard-setting.

***Q15. Do regulatory actions overturned by subsequently enacted laws qualify for savings?***

A: Generally, yes. OIRA considers Acts of Congress that overturn final regulatory actions, such as disapprovals of rules under the Congressional Review Act, to operate in a similar manner as agency EO 13771 deregulatory actions.

**Q16.** ***Do regulatory actions that are vacated or remanded by a court qualify as EO 13771 deregulatory actions?***

A: If a regulatory action issued before noon on January 20, 2017, is vacated by a judicial order for which all appeals have been resolved, OIRA will consider on a case-by-case basis whether the regulatory action being vacated qualifies as an EO 13771 deregulatory action.

If an EO 13771 regulatory action was issued on or after noon on January 20, 2017, any judicial order for which all appeals have been resolved vacating the regulatory action, and any related subsequent agency action (such as a withdrawal of a vacated regulation from the Code of Federal Regulations in order to comply with the order), will not qualify as an EO 13771 deregulatory action. Any EO 13771 deregulatory actions used to offset a vacated EO 13771 regulatory action, however, would be available to offset other EO 13771 regulatory actions (after accounting for any sunk costs incurred in complying with the vacated action).

If a court permits a regulatory action to remain in effect after a judicial remand for further agency proceedings, such as through remand without vacatur, the remanded action remains in effect. Therefore, there is no action at the time of remand that could qualify as an EO 13771

deregulatory action. In the same way that an agency complies with EO 12866 when issuing a subsequent agency action to revise a remanded regulatory action, an agency will similarly need to comply with EO 13771. A subsequent agency action may qualify as an EO 13771 deregulatory action if the subsequent agency action is deregulatory in nature, or may need to be offset if the action is a significant regulatory action that is final and that imposes costs (*i.e.,* an EO 13771 regulatory action).

Agencies should notify OIRA of any judicial decisions that affect regulatory actions subject to EO 13771.

***Q17. What happens if an EO 13771 deregulatory action is remanded or vacated by a court?***

A: As in the answer to the previous question, OIRA recognizes the inherent case-by-case nature of the issues raised by the potential remand or vacatur of an EO 13771 deregulatory action. For example, such decisions may happen years after a rule is finalized, and may affect compliance with both the cost allowances and the repeal provisions established pursuant to EO 13771. The agency should contact OIRA to determine how a remand or vacatur of an EO 13771 deregulatory action affects the agency's obligations under EO 13771.

***Q18. Does EO 13771 apply to significant regulatory actions in which the law prohibits the consideration of costs in determining a statutorily required standard?***

A: Because EO 13771 applies only to the extent permitted by law, agencies are still required to comply with their statutory obligations. Accordingly, if a statute prohibits consideration of cost in taking a particular regulatory action, EO 13771 does not change the agency's obligations under that statute. However, agencies will generally be required to offset the costs of such regulatory actions through other deregulatory actions taken pursuant to statutes that do not prohibit consideration of costs. Because each agency's obligations will differ depending on the particular statutory language at issue, these issues must be addressed on a case-by-case basis.

Please consult with OIRA regarding questions about particular statutory language and its relationship to EO 13771.

***Q19. How do the requirements of EO 13771 apply to significant regulatory actions issued by one agency that do not have the force and effect of law until adopted, with or without change, by another agency?***

A: Because the agency authorities that establish such sequential or otherwise overlapping regulatory responsibilities differ by program, these actions will need to be handled on a case-by-case basis. However, agencies in these circumstances should always work together to avoid double-counting costs and cost savings; they should also work together as closely as possible when developing regulatory approaches for such programs. In cases where one agency's action does not qualify as an EO 13771 regulatory action because it is not a significant regulatory action under EO 12866, associated actions by other agencies may still be covered by EO 13771.

***Q20. Does EO 13771 apply to regulatory actions of independent regulatory agencies?***

A: No. EO 13771 applies only to those agencies that meet the definition of "agency" in this guidance. Nevertheless, independent regulatory agencies are encouraged to identify existing regulations that, if repealed or revised, would achieve cost savings that would fully offset the costs of significant regulatory actions while continuing to meet the agency's statutory obligations.

## V. Accounting Questions

***Q21. How should costs and cost savings be measured?***

A: Except where noted in other portions of this guidance, costs should be estimated using the methods and concepts appearing in OMB Circular A-4. There are several types of impacts that, under OMB Circular A-4, could be reasonably categorized as either benefits or costs, with the only difference being the sign (positive or negative) on the estimates. In most cases where there is ambiguity in the categorization of impacts, agencies should conform to the accounting conventions they have followed in past analyses. For example, if medical cost savings due to safety regulations have historically been categorized as benefits rather than reduced costs, they should continue to be categorized as benefits for EO 13771 regulatory actions. Identifying cost savings, such as fuel savings associated with energy efficiency investments, as benefits is a common accounting convention followed in OIRA's reports to Congress on the benefits and costs of Federal regulations.

Cost savings estimates for EO 13771 deregulatory actions should follow the same conventions, but in reverse. Only those impacts that have been traditionally estimated as costs when taking a regulatory action should be counted as cost savings when taking an EO 13771 deregulatory action. For example, the medical cost savings described above as historically being counted as benefits when regulating should not then be counted as "negative cost savings" when deregulating.

An agency that has used different accounting conventions across different past analyses should consult with OIRA regarding the categorization of ambiguous impacts. In general, when faced with ambiguity, OIRA will attempt to achieve greater consistency in the categorization of similar types of costs and benefits across different agencies.

OIRA notes that rules that cause an increase in the resources used by Federal agencies to accomplish their programmatic goals may need to be offset, and rules that reduce the real resources used by Federal agencies to accomplish their goals may qualify as EO 13771 deregulatory actions. These types of impacts have long been considered regulatory costs under OMB Circular A-4, and are a component of the costs OIRA includes in its reports to Congress on the benefits and costs of Federal regulations.

For EO 13771 deregulatory actions that revise or repeal recently issued rules, agencies generally should not estimate cost savings that exceed the costs previously projected for the

relevant requirements, unless credible new evidence show that costs were previously underestimated. On the other hand, a less recent regulatory impact analysis (RIA) may need revision to reflect, among other things, the fact that only costs occurring after the effective date of the regulatory repeal should be the basis for the cost savings estimate (*i.e.,* agencies should not count sunk costs). Where an agency believes it can significantly improve upon a prior cost estimate, especially a recent one, through methodological enhancements, the agency should first discuss those methodologies with OIRA.

***Q22. How should cost savings be determined for regulatory actions that expand consumption and/or production options?***

A: For regulatory actions that expand consumption and/or production options—sometimes referred to as "enabling" regulatory actions or regulations—cost savings should include the full opportunity costs of the previously forgone activities. Opportunity cost in this context would equal the sum of consumer and producer surplus, minus any fixed costs. See OMB Circular A-4 for a more detailed discussion of these concepts.

Generally, "one-time" regulatory actions (*i.e.,* those actions that are not periodic in nature) that expand consumption and/or production options would qualify as EO 13771 deregulatory actions.

There may be situations where this approach for determining the cost offsets generated by an enabling regulatory action is inappropriate. For instance, this approach may not be appropriate in certain circumstances where, if an agency were to fail to issue a regulatory action, a significant existing and ongoing economic activity would be prohibited. See Question 26. Cost offsets for such regulatory actions will be determined on a case-by-case basis.

Please consult with OIRA on all such non-routine regulations.

***Q23. How does Executive Order 13771 apply to routine hunting and fishing regulatory actions?***

A. Routine hunting and fishing regulatory actions that establish annual harvest limits are not required to be offset, and are not eligible to be used as cost savings. This includes migratory bird hunting frameworks under the Migratory Bird Treaty Act and fishery management plans and amendments under the Magnuson-Stevens Fishery Conservation and Management Act. This exemption does not apply to regulatory actions that affect hunting and fishing activity that are not routine regulatory actions.

***Q24. What base year should agencies use?***

A: Agencies should adjust all estimates to 2016 dollars using the GDP deflator, as released on March 30, 2017, until further guidance is provided by OIRA.

***Q25. How should agencies calculate cost and cost savings for the purpose of EO 13771 accounting?***

A: Agencies should calculate the present value (as of 2016) of costs for EO 13771 regulatory actions and cost savings for EO 13771 deregulatory actions over the full duration of the expected effects of the actions using both 7 percent and 3 percent end-of-period discount rates.

***Q26. In determining costs and cost savings under EO 13771, how should regulatory baselines be determined?***

A: For the most part, agencies should follow the guidance about regulatory baselines provided in OMB Circular A-4. However, there can be uncertainty, which is recognized in OMB Circular A-4, regarding how best to capture the directive to assess impacts against the state of the world in the absence of the regulation. Provided below are two cases in which this uncertainty, or other challenges arising in the context of OMB Circular A-4, have often been addressed by performing analyses with multiple baselines. In each of these cases, OIRA has also provided guidance about how to determine costs or cost savings for the purposes of EO 13771:

(1) When a regulatory action finalizes an interim final rule (IFR), agencies are typically encouraged to present two sets of estimates: the overall regulatory impacts and the incremental impacts relative to the IFR. For purposes of determining costs or available cost savings under EO 13771, agencies finalizing an IFR should include only the incremental impacts of the final rule, relative to the IFR.

(2) There are multiple Federal programs and policies—such as discharge general permitting under the Clean Water Act or Medicare quality performance tracking—that are updated or renewed at regular intervals via rulemaking. Because these updates reliably occur, an assessment of the incremental changes between the previous and updated programs is often much more informative than a comparison of the updated programs against hypothetical discontinuance. Although multiple-baseline analysis is likely to continue to be encouraged in such cases for analysis conducted under EO 12866, for purposes of EO 13771, costs or cost savings should be determined by the incremental changes between previous and updated programs. For example, if an agency is statutorily or judicially required to issue a regulation every five years to permit or prohibit an activity, and the agency previously issued a regulation to address the requirement, the appropriate baseline to use for estimating the costs or cost savings of the new regulation under EO 13771 is likely the existing regulation (or interim operating conditions if there is temporarily no regulation in effect).

Please consult with OIRA if you have questions regarding the appropriate baseline upon which to calculate costs or cost savings.

***Q27. How should agencies treat unquantified costs and cost savings?***

A: As stated in OMB Circular A-4, agencies should use their best efforts to monetize the effects of both regulatory actions and deregulatory actions and, in some cases, significant guidance documents. Depending on the likely magnitude of the effects, such efforts may include conducting or sponsoring studies to develop monetized estimates. In proposed/draft regulatory actions expected to lead to EO 13771 regulatory actions or EO 13771 deregulatory actions agencies should, at a minimum, clearly identify any non-monetized costs or cost savings, explain the key reason(s) why monetization is not possible, discuss any information the agency has that is relevant to estimating such costs, and request information from the public to monetize such costs at the final stage.

The weight assigned to unquantified effects will depend on their significance and degree of certainty, and will be handled on a case-by-case basis. See OMB Circular A-4 for more information on unquantified costs.

***Q28. How should agencies treat EO 13771 regulatory actions and EO 13771 deregulatory actions published by multiple agencies?***

A: These will be handled on a case-by-case basis. Agencies should consult OIRA as early as possible to determine the appropriate treatment of the action.

***Q29. Can agencies "bank" cost savings and deregulatory actions?***

A: Yes. Agencies may bank both EO 13771 deregulatory actions and the associated cost savings for use in the same or a subsequent fiscal year towards EO 13771's requirement to identify at least two existing regulations to be repealed (unless prohibited by law) and, separately, to comply with the total incremental cost allowance. Surplus EO 13771 deregulatory actions and cost savings do not expire at the end of a fiscal year and can be used in subsequent fiscal years.

For example, if an agency issues four EO 13771 deregulatory actions, the agency may apply them to up to two subsequent EO 13771 regulatory actions, including those occurring in a future fiscal year. Regardless, at the end of each fiscal year, an agency must be able to identify, and should have finalized, twice as many EO 13771 deregulatory actions as EO 13771 regulatory actions.

Similarly, if an agency issues two EO 13771 deregulatory actions with total cost savings of $200 million to offset the cost of an EO 13771 regulatory action with a cost of $150 million, the agency may bank the surplus cost savings of $50 million to offset the cost of another EO 13771 regulatory action, regardless of when the latter action is issued. See Questions 24 and 25 for accounting conventions that allow for appropriate comparison of costs and cost savings experienced at different time periods.

***Q30. Can EO 13771 deregulatory actions (and associated cost savings) be transferred within an agency?***

A: Yes. The requirements of EO 13771 apply agency-wide. An EO 13771 deregulatory action issued by a component in one agency can be used to offset an EO 13771 regulatory action issued by a different component in that same agency.

***Q31. Can EO 13771 deregulatory actions (and associated cost savings) be transferred between agencies?***

A: An agency that is not able to identify sufficient EO 13771 deregulatory actions for an EO 13771 regulatory action it intends to issue may submit a written request to the Director of OMB to assess whether the transfer of EO 13771 deregulatory action credits (after consultation with the supplying agency) would be appropriate before submitting the EO 13771 regulatory action to OMB for review under EO 12866. However, if the transfer is not appropriate, the agency must identify adequate offsets absent an exemption.

## VI. Process Questions

***Q32. How does EO 13771 affect the consideration of regulatory benefits or other requirements under EO 12866?***

A: EO 13771 does not change the requirements of EO 12866, which remains the primary governing EO regarding regulatory review and planning. In particular, EO 13771 has no effect on the consideration of benefits in informing any regulatory decisions. For all EO 13771 regulatory actions and EO 13771 deregulatory actions, except where prohibited by law, agencies must continue to assess and consider both benefits and costs and comply with all existing requirements and guidance, including but not limited to those in EO 12866 and OMB Circular A-4.

***Q33. Which EO 13771 regulatory actions might qualify for a full or partial exemption from EO 13771 requirements?***

A: The following categories of EO 13771 regulatory actions may qualify for a full or partial exemption from EO 13771's requirements: 1) expressly exempt actions; 2) emergency actions; 3) statutorily or judicially required actions; and 4) *de minimis* actions. These categories are not exhaustive. For any EO 13771 regulatory action an agency believes qualifies for an exemption under any of the circumstances provided below, agencies should submit exemption requests to OIRA prior to submitting the action to OMB for review under EO 12866 or prior to publication of the EO 13771 regulatory action if it was not subject to EO 12866 review.

- Expressly exempt – EO 13771 expressly exempts regulations issued with respect to a military, national security (see Question 7 above), or foreign affairs function, and regulations related to agency organization, management, or personnel. These actions qualify for a full exemption. See 5 USC 553.

- Emergencies – EO 13771 regulatory actions addressing emergencies such as critical health, safety, financial, non-exempt national security matters, or for some other compelling reason, may qualify for an exemption. In most cases, exemptions for such rules will be granted with respect to the timing of required offsets, allowing the agency to address the emergency before identifying and issuing EO 13771 deregulatory actions. Agencies will generally still be required to offset such actions. If necessary, the costs of such actions, and the requirement to identify for repeal at least two existing regulations, will be moved to the subsequent fiscal year for purposes of determining EO 13771 compliance.
- Statutorily or judicially required – EO 13771 does not prevent agencies from issuing regulatory actions in order to comply with an imminent statutory or judicial deadline, even if they are not able to satisfy EO 13771's requirements by the time of issuance. However, agencies will be required to offset any such EO 13771 regulatory actions as soon as practicable thereafter. In addition, this flexibility may not apply to discretionary provisions attached to EO 13771 regulatory actions required to comply with statutory or judicial deadlines.
- *De minimis* – EO 13771 regulatory actions with *de minimis* costs may qualify for an exemption. For example, if OIRA designates a proposed rule as significant under EO 12866 because it raises novel legal or policy issues, and the agency estimates the action would have present value costs of $50,000 spread over a large number of persons and/or entities, OIRA may exempt the action from some or all of the requirements of EO 13771.

***Q34. Is a significant final regulatory action exempt from the requirements of EO 13771 if the action was designated not significant at a prior stage?***

A: Generally, no. Any regulatory action that is identified as significant at the final rule stage that imposes total costs greater than zero would need to be offset to comply with EO 13771, regardless of the determination in an earlier phase. Therefore, the agency should consult OIRA as soon as possible if it believes an action that was not determined to be significant at the draft or proposed rule stage may now be determined to be significant, perhaps due to substantive issues identified through public comment or further agency analysis.

***Q35. How should agencies prioritize existing requirements to repeal or revise?***

A: Agencies should follow the requirements in EO 13777 for prioritizing existing requirements to repeal or revise. EO 13777 establishes Regulatory Reform Task Forces in agencies, and directs those task forces to evaluate existing regulations and make recommendations to the agency head regarding their repeal, replacement, or modification, consistent with applicable law. EO 13777 directs each Regulatory Reform Task Force to identify regulations that:

- Eliminate jobs, or inhibit job creation;
- Are outdated, unnecessary, or ineffective;
- Impose costs that exceed benefits;
- Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;

- Are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note), or the guidance issued pursuant to that provision, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or
- Derive from or implement EOs or other Presidential directives that have been subsequently rescinded or substantially modified.

EO 13777 further directs each Regulatory Reform Task Force to seek input and other assistance, as permitted by law, from entities significantly affected by Federal regulations, including State, local, and tribal governments, small businesses, consumers, non-governmental organizations, and trade associations. Input from such public engagement may be used to prioritize recommendations to repeal or revise.

Finally, where the costs of an EO 13771 regulatory action will be incurred entirely or to a large degree by a certain sector or geographic area, the agency should prioritize EO 13771 deregulatory actions that affect the same sector or geographic area, to the extent feasible and permitted by law.

***Q36. Can regulatory and deregulatory actions be bundled in the same action?***

A: Yes, under certain circumstances. Many actions submitted to OIRA for review under EO 12866 consist of logically connected changes to multiple but related sections of the Code of Federal Regulations. For example, a rule exempting some categories of regulated entities from compliance with a previously issued regulation may also require eligible entities to submit additional documentation to demonstrate eligibility for the exemption. In these cases, it may be legitimate and appropriate to pursue such changes through a single "bundled" action, and this guidance is not meant to materially change agency decision making in this area. Where an agency combines such provisions, the cost impact (the difference between costs imposed and cost savings, per Question 21) of such rules will generally determine whether such actions are EO 13771 regulatory actions that need to be offset, or EO 13771 deregulatory actions. Agencies, however, should avoid artificially bundling provisions that are not logically connected in a single regulatory action. OIRA may determine that the regulatory and deregulatory portions of the rule should be considered separately for purposes of EO 13771 compliance.

Agencies should consult with OIRA when considering bundling regulatory and deregulatory actions.

***Q37. When and how should agencies identify EO 13771 deregulatory actions?***

A: The agency's *Unified Agenda of Regulatory and Deregulatory Actions* should reflect compliance with the requirements of EO 13771, and should include, to the extent practicable, EO 13771 deregulatory actions that, when combined with EO 13771 deregulatory actions that are not regulations (such as Paperwork Reduction Act information collection reforms), are sufficient to offset those actions appearing in the Agenda that are or are expected to result

in EO 13771 regulatory actions. At a minimum, the agency should identify all EO 13771 deregulatory actions, along with cost savings estimates, by the time it submits to OMB for review under EO 12866 the corresponding EO 13771 regulatory action. In the rare event that an agency is unable to identify sufficient EO 13771 deregulatory actions, OIRA will address such a situation on a case-by-case basis.

While each *Federal Register* notice should identify whether the regulation is an EO 13771 regulatory action, there is no need to discuss specific offsetting EO 13771 deregulatory actions within the same *Federal Register* entry. Additionally, offsetting the costs of regulatory actions to comply with the requirements of EO 13771 should not serve as the basis or rationale, in whole or in part, for issuing an EO 13771 deregulatory action.

***Q38. When must identified EO 13771 deregulatory actions be finalized?***

A: To the extent practicable, agencies should issue EO 13771 deregulatory actions before or concurrently with the EO 13771 regulatory actions they are intended to offset. By the end of each fiscal year, including any carryover from previous fiscal years, agencies should have: (1) issued at least twice the number of EO 13771 deregulatory actions as EO 13771 regulatory actions; and (2) appropriately offset the cost of all final EO 13771 regulatory actions issued. The offset should be consistent with their respective total incremental cost allowance for future fiscal years, and agencies are expected to maintain compliance, to the extent practicable, throughout the year. These requirements exclude those EO 13771 regulatory actions issued during the year for which either law prohibits compliance with EO 13771 or the agency received an exemption from OIRA. When an agency receives a partial exemption from OIRA (*e.g.,* with respect to the timing of EO 13771 deregulatory actions), the requirements should be addressed as soon as practicable. Agencies should plan in advance and leave sufficient time, if necessary, for OIRA to complete its review under EO 12866 or the Paperwork Reduction Act, and for agencies to publish in the *Federal Register* any EO 13771 deregulatory actions needed to comply with EO 13771 before the end of each fiscal year.

***Q39. What happens if an agency is not in full compliance with the requirements of EO 13771 at the end of a fiscal year?***

A: If, by the end of a fiscal year, an agency does not finalize at least twice as many EO 13771 deregulatory actions as EO 13771 regulatory actions issued during the fiscal year, or has not met its total incremental cost allowance for that fiscal year, the agency must, within 30 days of the end of the fiscal year, submit for the OMB Director's approval, a plan for coming into full compliance with EO 13771 that addresses each of the following:

(1) The reasons for, and magnitude of, non-compliance;
(2) How and when the agency will come into full compliance; and
(3) Any other relevant information requested by the Director.

This excludes EO 13771 regulatory actions that are exempt or where compliance with EO 13771 is prohibited by law.

OMB may recommend that an agency take additional steps to achieve compliance, such as publishing a notice in the *Federal Register* requesting ideas from the public on EO 13771 deregulatory actions to pursue. OMB may also request that agencies post plans approved by the Director.

This guidance is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.