May 15, 2017

Samantha Dravis
Associate Administrator, Office of Policy
U.S. Environmental Protection Agency

Re: Comments for Docket ID No. EPA-HQ-OA-2017-0190

Dear Associate Administrator Dravis:

The Environmental Protection Agency's (EPA) work over the last 40-plus years is a great American success story. Where once rivers burned and acid rain destroyed forests and aquatic ecosystems, we now enjoy far cleaner air and water. But that progress will not continue without an ongoing commitment by the EPA and others to identify and mitigate environmental hazards through bold regulatory action. President Trump's Executive Orders 13771 and 13777, and the EPA's implementation of these orders, threaten to reverse course on the progress we have made, putting human health and the environment in danger in pursuit of cost savings for polluters.

Executive Summary

As explained below, the EPA's process for reviewing its existing regulations in furtherance of Executive Orders 13771 and 13777 has two significant and interrelated flaws. First, the EPA's regulatory review process lacks effective safeguards for ensuring that the results of its review are consistent with its legal authorities. As a result, any regulatory actions undertaken in response to this review are vulnerable to legal challenge. Below, we urge the EPA to adopt a "rubric" for assessing the legal validity of its regulatory review recommendations and some of the basic criteria this rubric should include.

Second, the EPA's singular focus on reducing burdens on industry builds a one-way ratchet into the term "modification," meaning that only changes that favor the regulated community, as opposed to the general public, may be considered as part of the regulatory review process. The model compounds the legal vulnerability (discussed above) of any resulting agency action, because the modification would have emerged from a review process that was arbitrarily committed to investigating only one side of the story.

Moreover, the EPA's regulatory review process misses an ideal opportunity to identify existing regulations that could be improved by enhancing the protections they offer for public health and the environment, even though such modifications might impose marginally greater costs on regulated entities. To demonstrate the value of a wider-ranging inquiry, we identify several examples of existing regulations that should be strengthened. We then subject each of the recommended rule revisions to our proposed legal screening rubric to demonstrate how the EPA's use of a broader definition of "modification" – one that includes changes that would enhance public protections – could guide its review process

We are a group of Member Scholars and Staff affiliated with the Center for Progressive Reform (CPR). Founded in 2002, the nonprofit CPR connects a nationwide network of scholars with policymakers and allied public interest advocates. CPR pursues a vision of legal and regulatory policies that put health, safety, and environmental protection before private interests and corporate profit. With rigorous analysis, strategic engagement in public interest campaigns, and a commitment to social welfare, CPR supports thoughtful government action, ready public access to the courts, enhanced public participation, and freer access to information.

The EPA's Regulatory Review Process Lacks Effective Safeguards for Screening out Potentially Illegal Actions, Making the Results of Its Review More Vulnerable to Expected Legal Challenges

President Trump is pursuing an aggressive agenda aimed at alleviating what he believes are "unnecessary regulatory burdens" on polluters and other businesses that put workers, the general public, and the environment in danger. Consistent with the president's views but without due regard for the public health and environmental benefits of federal regulatory action, his Executive Order 13777 charges the EPA and other executive branch agencies to carry out a systematic review of existing rules to identify candidates for "repeal, replacement, or modification." To guide the EPA's and other agencies' evaluations of their existing regulations, the order outlines a set of six policy and legal criteria. It charges the EPA and other agencies with prioritizing for repeal, replacement, or modification those among their existing rules that meet some or all of these criteria.

While the policy and legal criteria outlined in Executive Order 13777 can permissibly guide the exercise of discretion that the EPA applies in carrying out its regulatory review process, they cannot supersede the agency's existing and applicable legal obligations. Nor can these criteria justify actions that exceed the agency's existing and applicable legal authorities. As the order itself notes, its provisions "shall be implemented consistent with applicable law."

Distressingly, the EPA's *Federal Register* notice soliciting public comment makes no mention of the legal constraints on its regulatory review process. In addition, it does not appear the agency has taken any steps to ensure that its regulatory review is "implemented consistent with applicable law."

To rectify this problem, we urge the EPA to incorporate into its regulatory review process a rubric for evaluating the legal validity of the recommendations that the agency's process might generate. Specifically, the EPA should apply that rubric to ensure that any recommendations it generates for repealing, replacing, or modifying existing regulations do not run afoul of the agency's legal authorities. Doing so would carry many benefits for the EPA and society at large, including avoiding unnecessary litigation that wastes scarce judicial resources and contributes to costly regulatory uncertainty and wasteful misuse of scarce agency resources, which are provided at taxpayer expense.

At a minimum, the rubric should ensure that:

- Any rulemaking actions taken in response to its regulatory review process that would repeal, replace, or modify an existing rules be supported by policy rationales or assessments that are allowed under the agency's statutory authorization, keeping in mind that Congress often defines when and how an agency can consider regulatory costs;

- The executive orders' enthusiasm to reduce regulatory costs does not push the agency to make decisions based on capricious or arbitrary factors;

- The proposed action is supported by proper factual analysis; and

- Any resulting rulemakings would be consistent with the express policy objectives of the National Environmental Policy Act (NEPA), which includes "to declare a national policy which will encourage productive and enjoyable harmony between man and his environment, [and] to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. Specifically, NEPA requires that "to the fullest extent possible" the policies, regulations, and public laws of the United States "shall" be interpreted and administered with the policies set forth in NEPA. *See* 42 U.S.C. § 4332 (1).

By applying this rubric to all regulatory reviews, the Administration will increase the likelihood that any resulting regulatory actions are legally defensible and, accordingly, reduce legal vulnerabilities.

Careful Attention to Questions of Legal Validity Throughout the Regulatory Review Process Would Also Help the EPA Identify "Modifications" of Existing Rules that Would Strengthen Public Health and Environmental Safeguards

One of the fundamental criticisms of Executive Orders 13771 and 13777, which we share, *see* Ctr. for Progressive Reform, Letter to Acting Administrator Dominic J. Mancini, Office of Information and Regulatory Affairs: Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs," (February 10, 2017) *available at* http://progressivereform.org/articles/CPR_Comments_2-for-1_EO_Guidance_021017.pdf, is that it is entirely one-sided in nature. In particular, even though one of the goals of the regulatory review process these orders compel agencies to undertake is to identify

existing rules that should be modified, the orders make clear that the term “modification” covers only changes to existing rules that would weaken the protections they offer to the public and the environment. Such a narrow, one-sided focus would be a mistake.

Instead, we urge the EPA to use the occasion of this regulatory review process to identify existing rules that could be modified to enhance the protections they provide. Anything less would be a wasted opportunity.

The legal screening rubric described above would facilitate this broader review of existing regulations. In particular, when reviewing existing regulations, the EPA should actively consider whether increasing their stringency would either be required by the EPA’s existing legal authorities or would more effectively accomplish the objectives of those legal authorities.

Accordingly, we further urge the EPA to employ the rubric outlined above as part of its regulatory review process in order to identify existing rules that through “modification” would advance the EPA’s statutory mission of promoting public health and environmental protection.

The following examples illustrate how the application of the rubric outlined above would help the EPA identify existing regulations that should be strengthened:

Reforms to the Clean Air Act’s New Source Review program. The EPA should strengthen its Clean Air Act New Source Review (NSR) program by modifying several key existing regulations that govern its implementation. As explained below, these regulatory modifications are fully consistent with the EPA’s authority under the Clean Air Act and would certainly constitute a rational exercise of policymaking under the Administrative Procedure Act. Because these modifications would ensure that the objectives of the Clean Air Act’s NSR program are more fully effectuated, they are also consistent with the requirement that the EPA carry out its regulatory authorities “to the fullest extent possible” to advance the environmental policies articulated in NEPA.

First, the EPA should modify its regulations governing the routine maintenance, repair, and replacement (RMRR) exemption to NSR to ensure that it truly exempts only *de minimis* changes. The agency’s current approach to delineating the types of activities covered by this exemption continues to be unsuccessful in providing adequate environmental protections, as required by the Clean Air Act, as well as in minimizing regulatory uncertainty for regulated sources. The agency relies on informal guidance that directs sources and regulators to consider on a case-by-case basis the nature, extent, purpose, frequency, and cost of any physical changes. Courts have construed these factors to exempt very substantial (and certainly not *de minimis*) physical changes at several power plants. As a result, the plants have remained exempt from NSR and the requirement to achieve emissions limitations based on the use of modern pollution control technologies. These regulations should be further modified to codify and clarify the informal factors the EPA uses to evaluate whether a change is RMRR and to provide much clearer guidance regarding how regulators, regulated sources, and courts are to construe those factors.

Second, the EPA should modify its existing regulations to prevent covered sources from underestimating their post-change emissions as a way to avoid NSR. Under the agency's current regulations, emissions increases are regulated only if they qualify as "major modifications." To qualify as "major," the regulation specifies that the modification must result in 1) a significant emissions increase of a pollutant, which considers whether the change at issue will increase emissions by a significant amount compared to baseline emissions, and 2) a significant net increase of that pollutant, which considers whether the change at issue, in combination with emissions increases and decreases over the past five or ten years (depending on the source), will still be significant. If a source concludes that its project will not result in a significant emissions increase, it does not need to engage in the netting process under step two or, in certain cases, maintain records regarding its analysis. Industrial sources of air pollutants have long been adept at gaming this regulatory definition to avoid NSR. In addition, the EPA should modify its regulations to require all major sources that make physical changes to conduct regular monitoring and reporting of post-change emissions so that regulators and the public can have access to data in a complete and timely fashion.

Third, EPA should modify its existing regulations to specify that the Prevention of Significant Deterioration (PSD) component of NSR regulates both construction and operation of major sources. This modification is necessary because, through a cramped reading of the PSD provisions of the Clean Air Act, several courts have concluded that PSD regulates only the construction and modification, but not the operation, of major stationary sources. As part of this regulation, the EPA should provide a thorough description of the PSD program, explain how the PSD programs were developed and enforced before the 1990 Clean Air Act Amendments, and explain how the statute, when read in context, clearly anticipates that PSD permits will regulate operations, not simply construction. The EPA should also modify its existing regulations so that they require states to amend their State Implementation Plans to clarify that PSD permits regulate operations.

Modernizing the Clean Water Act's water quality standards programs to account for climate change. Anthropogenic climate change is having and will continue to have significant implications for the health and ecological integrity of U.S. waterways and coastal waters. To ensure that its Clean Water Act water quality standards program remains successful in the face of these ongoing changes to the nation's water resources, the EPA should modify several existing regulations governing the implementation of this program. Again, each of these regulatory modifications would satisfy all of the conditions of the legal rubric outlined above. These modifications would be consistent with the EPA's authorities under the Clean Water Act and would constitute rational exercises of policymaking. Moreover, they are also consistent with the requirement that the EPA carry out its regulatory authorities "to the fullest extent possible" to advance the environmental policies articulated in NEPA.

First, the EPA should examine ways to modify existing regulations governing its Total Maximum Daily Load (TMDL) program so that this program is better able to address the problem of industrial contributions to sediment and nutrient nonpoint source pollution. Combined with rising surface air temperatures driven by global climate change, ongoing increases in these forms of water pollution are causing a greater number of waterbodies

to become hotter and eutrophic, with the result that they will violate applicable water quality standards.

Second, to acknowledge the potential absurdities resulting from climate change impacts on waterbodies, and to reduce the potential political backlash that could result from the Clean Water Act being viewed as an unnecessary obstruction to adaptation pressures, the EPA should modify its water quality standards and antidegradation regulations to allow "existing uses" to be eliminated when climate change impacts on baseline ecological conditions (primarily, water quantity, water timing, and water temperature) have made attainment or retention of those existing uses impossible. For example, the current regulatory scheme effectively prevents western states such as Montana, Oregon, and northern California from avoiding perpetual violations of the Clean Water Act, such as those that can result when small streams within their borders are no longer to support cold water species like salmon and trout due to rising water temperatures.

Third, the EPA should modify its reference water quality criterion for marine pH to more specifically reflect the baseline conditions of particular coastal waters and then work with coastal states and NOAA to more comprehensively monitor coastal pH. The ocean is absorbing carbon dioxide from the atmosphere, decreasing its own pH in the process, a phenomenon generally known as ocean acidification. Most coastal states base their pH water quality standards on the EPA's reference criterion for coastal waters, which has not changed since at least 1976 and is not tailored to the specific conditions of coastal waters in specific locations. As a result, with few exceptions, neither the EPA nor the coastal states have concrete information regarding the magnitude of ocean acidification impacts or building threats to fishing and aquaculture industries throughout the United States.

Opportunities abound for stronger environmental protections. Reforming the NSR program and modernizing Clean Water Act regulations to address climate change impacts are just two examples of opportunities for continued environmental improvement. Each of these recommended modifications of existing regulations would better protect our air and water, delivering significant public health and environmental benefits.

Others examples of modifications of existing rules that would produce stronger protections include:

- Stronger drinking water standards for lead and other contaminants;
- Stronger effluent limitation guidelines for concentrated animal feeding operations;
- Enhanced measures to address stormwater pollution from developed sites;
- Stronger protections for farmworkers who are exposed to dangerous neurotoxins by expanding the pesticide worker protection standard to include a requirement for medical monitoring;

- Improvements to rules governing confidential business information about chemicals in commerce that would give the public better access to information about those chemicals and the risks they pose; and
- Strengthening the existing chemical facility safety rules to require prevention-first disaster planning, more robust and timely reporting from facilities and their parent companies, and greater public access to information so Americans can easily learn which facilities in their neighborhoods use, store, or manufacture dangerous and/or highly toxic chemicals and which ones have had recent leaks, fires, or explosions.

Extension of Comment Deadline Is Necessary and Appropriate for this Request

Given the stakes involved and the complexity of the matters at issue, the 30-day comment period afforded for this request is wholly inadequate. This regulatory review process, if carried out haphazardly, has the potential to eliminate or weaken regulatory programs that deliver significant public health and environmental benefits to the American people, whether measured in lives saved, asthma attacks prevented, emergency room visits averted, missed work days and school days avoided, endangered species preserved, or fragile ecosystems protected. Decisions involving the future enforcement of these safeguards should not be taken lightly or made hastily.

Various guidance documents from the White House Office of Information and Regulatory Affairs to the EPA and other agencies have made clear that actions to eliminate or weaken existing rules must be supported by legally valid policy rationales and comply with relevant analytical requirements, including Executive Order 12866's cost-benefit analysis requirements. In addition, as Trump administration officials have repeatedly emphasized, the regulatory review process set in motion by Executive Orders 13771 and 13777 is unprecedented in its nature and scope. The failure to afford the public adequate opportunity to offer comments would result in this already fraught and complicated process getting off on the wrong foot.

Finally, the short timeframe further undermines the ability of ordinary citizens and public interest organizations to participate meaningfully. Ordinary citizens already face significant hardship in participating meaningfully given the inherently one-sided nature of the review (*i.e.*, its focus on reducing burdens on regulated interests to the exclusion of reducing burdens on the public at large). The short timeframe thus reinforces this hardship, all but guaranteeing skewed, kangaroo court-like results.

An extension of the deadline would not fully alleviate our concerns about the nature of this process, but it would marginally help. Consequently, we request that the EPA extend the deadline for receiving comments by at least 60 days.

Conclusion

Empirical research and everyday experience demonstrate unequivocally that strong public safeguards are fundamental conditions for achieving our economic goals. The underlying premise of the EPA's regulatory review process – namely, that strong

protective safeguards for public health and the environment are incompatible with a strong economy and that these safeguards must be compromised to the detriment of the public interest in order to promote economic growth and job creation – is false.

If carried out according to the strict parameters of Executive Orders 13771 and 13777, this regulatory review process will undermine decades of environmental progress and leave all Americans at greater risk of preventable harm. Thus, the best thing for the EPA to do would be to abandon this process altogether. Short of that, however, we recommend that the EPA adopt a more balanced approach to its review, as outlined and illustrated above.

Sincerely,

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