



May 15, 2017

VIA ELECTRONIC SUBMISSION

Attn: Samantha K. Dravis, Regulatory Reform Officer and Associate Administrator, Office of Policy, Environmental Protection Agency

Re: EPA-HQ-OA-2017-0190-0042

The Institute for Policy Integrity (“Policy Integrity”) at New York University School of Law¹ respectfully submits the following comments to the Environmental Protection Agency (“EPA”) regarding its obligation, pursuant to Executive Order 13,777, to evaluate existing regulations and identify some for repeal, replacement, or modification.² Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

Executive Order 13,777 directs agencies to identify regulations that “impose costs that exceed benefits” and prioritize “outdated, unnecessary, or ineffective” regulations for repeal, replacement, and modification.³ It requires agencies to seek input on identifying such regulations from interested persons.⁴ Policy Integrity submits these comments to ensure that EPA stays focused on its objective to identify outdated, unnecessary, ineffective, or net costly regulations for repeal, replacement, or modification and does not prioritize recently promulgated and overwhelmingly cost-benefit justified rules identified by industry commenters. Policy Integrity offers four main comments:

- First, retrospective review should prioritize reanalysis of regulations for which actual costs and benefits diverge significantly from predicted costs and benefits because of changing economic circumstances, new technological innovations, or emerging scientific understandings. **Prioritizing retrospective review based purely on the volume of opposition from regulated entities—without consideration of regulatory benefits—is an irrational and inefficient approach.**
- Second, to the extent that other stakeholders suggest repealing rules by attacking cost-benefit methodologies, **EPA should reaffirm that estimates of health and environmental benefits used in recent regulatory impact analyses, including the value of mortality risk reduction and the social cost of greenhouse gases, remain the best available estimates.**

¹ This document does not purport to present New York University School of Law’s views, if any.

² Exec. Order No. 13,777, 82 Fed. Reg. 12,285, 12,286 (Feb. 24, 2017).

³ *Id.* § 3(d),(f).

⁴ *Id.* § 3(e).

- Third, to the extent that other stakeholders submit information to EPA on alleged impacts to employment from regulation, Policy Integrity provides a different view grounded in basic economic theory and evidence: **Regulations have little effect on aggregate employment or unemployment rates.**
- Finally, these comments identify one regulation ripe for modification as an example of the type of rule that EPA should prioritize under Executive Order 13,777. Specifically, **EPA should modify 40 C.F.R. § 122.4(i) to more clearly authorize water quality trading under the Clean Water Act.** The relevant part of that regulation has not been amended since the 1980s, and over the subsequent decades its outdated language has created legal uncertainty about the availability of water quality trading. A simple modification could correct this outdated language and more clearly authorize water quality trading, which has the potential to save industry significant compliance costs without sacrificing any environmental quality protections.

Below, we explain each comment in turn.

I. Retrospective review should prioritize reanalysis of regulations for which actual costs and benefits diverge significantly from predicted costs and benefits because of changed circumstances—and should not rehash recent debates over massively cost-benefit justified rules.

Retrospective review is an opportunity to recalibrate regulations to improve efficiency and effectiveness. EPA must approach the review of existing regulations—and the review of the more than 50,000 comments submitted so far—with a plan for identifying appropriate candidates for such modification.

Every President since Carter has sought to identify and address inefficient existing regulations through a process of retrospective review of regulatory costs and benefits. President Trump’s Executive Order 13,777 follows this tradition by directing agencies to identify regulations for repeal, replacement, and modification that are “outdated, unnecessary, or ineffective” or that “impose costs that exceed benefits.”⁵ Executive Order 13,777 embraces past methodologies for identifying such regulations, reaffirming President Obama’s Executive Order 13,563,⁶ which called on agencies to develop plans “to promote retrospective analysis of rules that are outmoded, ineffective, insufficient, or excessively burdensome” and “to modify, streamline, expand, or repeal them in accordance with what has been learned.”⁷ It also reaffirms President Clinton’s Executive Order 12,866, particularly its call for agencies “to determine whether regulations promulgated by the executive branch of the Federal Government have become unjustified or unnecessary as a result of changed circumstances.”⁸ Thus, the procedures underlying retrospective review pursuant to Executive Order 13,777 should be consistent with those underlying past efforts.

⁵ *Id.* § 3(d),(f).

⁶ *Id.* § 2(iii).

⁷ Exec. Order No. 13,563 § 6(b), 76 Fed. Reg. 3821 (Jan. 21, 2011).

⁸ Exec. Order No. 12,866 § 5, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

In other words, agencies should identify net costly or otherwise outdated rules by determining whether, in light of changed circumstances, the actual benefits of the implemented rules no longer justify the actual costs, or the rules as implemented do not maximize net benefits. To prioritize such regulations for modification, EPA must not get diverted by comments from stakeholders complaining about recently promulgated and overwhelmingly cost-benefit justified rules. Retrospective review should strive to enhance net benefits, not just to decrease compliance costs.

1. *Retrospective review should prioritize reanalysis of older regulations for which actual costs and benefits diverge significantly from predicted costs and benefits.*

Retrospective review is an opportunity to go back and fix some regulations that have become “outdated, unnecessary, or ineffective” due to changing economic circumstances, new technological innovations, or emerging scientific understandings. When promulgating new rules, agencies make estimates about what the rules’ future costs and benefits will likely be. These *ex ante* estimates typically reflect the best available data, scientific models, and economic tools. Nevertheless, *ex ante* estimates are still estimates made in the face of uncertainty. Changing economic conditions, new technological innovations, or emerging scientific understandings can cause a rule’s actual costs and benefits to diverge greatly from the agency’s *ex ante* estimates. Consequently, after a rule takes effect, *ex post* calculations of actual costs and benefits may reveal that the rule was poorly calibrated. A rational approach to retrospective review would identify such rules and initiate a process to modify them.

New rules are typically not good candidates for retrospective review because, in most cases, regulated entities have not yet fully implemented and adapted to the rules. For such rules, there have been no economic, technological, scientific, or other changed circumstances that shed light on the true costs and benefits of the rules. The cost-benefit analyses conducted before the rules were issued continue to reflect society’s best estimates of the costs and benefits of these rules. There is nothing yet to fix; there is only industries’ unwillingness to make changes necessary to implement and adapt to the rules. Eliminating such rules under the guise of “retrospective review” would be premature and irrational.

In fact, agencies should be careful not to review existing rules so early as to reduce the ability or incentive for industry to adapt. Adaptation, learning, and innovation by industry in the early years of implementation have often brought down compliance costs.⁹ Moreover, these rules are often overwhelmingly cost-benefit justified. Thus, older rules are better candidates for review because technological or other relevant changed circumstances are more likely to have occurred since the rules were issued.

2. *EPA must not rely exclusively on the volume of complaints it receives from stakeholders to prioritize rules for review.*

Although eliminating new rules under the guise of “retrospective review” would be premature and irrational, many stakeholders will encourage EPA to do exactly that. When

⁹ See Winston Harrington, Richard D. Morgenstern, & Peter Nelson, On the Accuracy of Regulatory Cost Estimates, Resources for the Future Discussion Paper #99-18 (1999); see also EPA, GUIDELINES FOR PREPARING ECONOMIC ANALYSES at 5-7 to 5-8, 8-10 to 8-12 (2010); OFFICE OF MGMT. & BUDGET, OMB CIRCULAR NO. A-4, REGULATORY ANALYSIS (2003) [hereinafter CIRCULAR NO. A-4].

the Department of Commerce recently sought input from manufacturers on existing regulations, for example, the agency received many comments recommending repeal of recently issued and overwhelming cost-benefit justified rules, many issued by EPA.¹⁰

In particular, after reviewing the 171 comments submitted to the Department of Commerce, Policy Integrity identified 20 substantive EPA final rules that at least one commenter recommended for repeal. These rules are summarized in the table below.¹¹

Rule	Description	Annual Net Benefits^a	Year Issued
Mercury and Air Toxics Standards for Electric Generating Units	Reduces emissions of hazardous air pollutants, including mercury, from power plants	\$63,087 million + “important” unquantified benefits	2012
Major Boiler MACT Rule (40 C.F.R. Part 63 Subpart DDDDD)	Reduces pollutants from boilers at major sources	\$51,069 million + unquantified benefits including benefits from reducing exposure to hazardous air pollutants and ozone	2013
Clean Power Plan ^b	Reduces greenhouse gas emissions from existing power plants	\$22,592 million + “important” unquantified benefits	2015
2012 PM _{2.5} NAAQS ^c	Revises the primary standards for particulate matter to provide requisite protection of public health and welfare	\$6,943 million + unquantified benefits	2013
Lead Renovation, Repair, and Painting Rule	Protects the public from lead-based paint hazards	\$6,068 million “[b]ased on the subset of benefits that have been monetized”	2008
2015 Ozone NAAQS ^c	Increased ozone standards to protect public health and welfare	\$3,604 million + unquantified health and welfare benefits	2015
2008 Ozone NAAQS	Increased ozone standards to protect public health and welfare	\$2,509 million + unquantified benefits	2008

¹⁰ See Department of Commerce, Public Comments on Impact of Federal Regulations on Domestic Manufacturing, *available at* <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=D OC-2017-0001>.

¹¹ Criteria for inclusion in this table are as follows: (1) at least one commenter requested repeal of the final rule; (2) it was not a permitting or reporting rule; and (3) the agency conducted an analysis of the costs and benefits of the rule. There were many other EPA rules targeted by commenters for significant modification, but short of repeal, that are not included in this table.

Rule	Description	Annual Net Benefits^a	Year Issued
Interstate Transport Rule for 2008 Ozone NAAQS	Improves air quality and public health in downwind areas	\$683 million + “important” unquantified benefits	2016
NESHAP and NSPS for Combustion Engines et al. (40 C.F.R. Part 60 Subparts IIII & JJJJ & 40 C.F.R. Part 63 Subpart ZZZZ)	Reduces pollutants from stationary engines	\$521 million + “important” unquantified benefits	2010 & 2016
Waters of the United States	Defines the scope of protected waters under the Clean Water Act	\$146 million	2015
Formaldehyde Emissions Standards for Composite Wood Products Rule	Limits adverse health effects from exposures to formaldehyde	\$65 million + “important” unquantified benefits	2016
Steam Electric Effluent Limitation Guidelines (ELG) Final Rule	Strengthens existing controls on discharges from steam electric power plants	\$29 million + unquantified benefits	2015
Section 111(b) NSPS for Electric Generating Units	Limits carbon dioxide emissions from new power plants	0 (reflecting zero costs and zero benefits in the most likely scenario, but with benefits outweighing costs overall across all scenarios)	2015
New Source Performance Standards Review for Nitric Acid Plants ^{cd}	Regulates pollution from nitric acid production units	-\$1 million in costs + non-monetized benefits, resulting in a “reasonable” cost-effectiveness estimate	2012
Refrigerant Management Requirements ^d	Prohibits the release of ozone-depleting and substitute refrigerants	-\$1 million in costs + non-monetized benefits	2016
Worker Protection Standard	Protects agricultural workers and pesticide handlers from unreasonable adverse effects from pesticide exposure	-\$62 million + “great” unquantified benefits that “are likely to exceed” costs	2015
Refinery Sector Rule ^{cd}	Controls air toxics emissions from petroleum refineries	-\$69 million in costs + non-monetized benefits and unquantified benefits	2015
Risk Management Plan Rule Amendments (RMP Rule) ^d	Prevents and mitigates accidents at facilities that use hazardous chemicals	- \$133 million in costs + reduced accident damages, including quantified and “important” unquantified benefits	2017
Area Boiler MACT (40 C.F.R. Part 63 Subpart JJJJJ)	Reduces pollutants from boilers at area source facilities	-\$140 million + “important” unquantified benefits	2011

Rule	Description	Annual Net Benefits ^a	Year Issued
Cooling Water Intake Rule	Reduces harm to aquatic organisms from the withdrawal of cooling water by facilities	-\$260 million + “important” unquantified benefits	2014

^a The net benefit estimates are calculated using a 3% discount rate where possible and reflect 2016 dollars updated using the Consumer Price Index. All estimates and quoted text come from the *Federal Register* notice or regulatory impact analysis associated with each rule.

^b For the Clean Power Plan, the table includes the mass-based 2025 estimate.

^c At least some costs or benefits were not monetized using a 3% discount rate in these rules. Estimating net benefits for these rules using a 7% discount rate does not change the qualitative results.

^d Some benefits were quantified, but not monetized, for the New Source Performance Standards Review for Nitric Acid Plants, Refrigerant Management Requirements, and Refinery Sector Rule.

Overall, **these 20 rules are estimated to contribute more than \$155 billion in net benefits to society each year.** In other words, the benefits of the rules to society exceed the costs to regulated entities by *more than a hundred fifty-five billion dollars each year.* While repealing these rules may reduce some burdens to regulated entities, these burden reductions would come at great cost to the health and welfare of the rest of society.

Importantly, the estimate of total net benefits takes into account only monetized benefits. Almost all of the rules contain multiple categories of benefits that could not be quantified or monetized. In particular, **unquantified benefits play an especially important role in justifying the seven rules summarized in the table that otherwise appear net costly.** For four of these rules—the New Source Performance Standards for Nitric Acid Plants, the Refrigerant Management Requirements, the Refinery Sector Rule, and Risk Management Plan Rule Amendments—the agency did not monetize *any* benefits, meaning that the monetized “net benefit” estimates reflect just the total costs of these rules. Instead, for three of the rules (the New Source Performance Standards for Nitric Acid Plants, the Refrigerant Management Requirements, and the Refinery Sector Rule), the agency simply quantified the substantial emissions reductions of air pollutants and found the costs reasonable in light of the reductions.¹² The three other rules with negative net monetized benefits, meanwhile, contain important categories of benefits that could not be quantified. For example, the rule that appears most “net costly” according to just monetized effects—the Cooling Water Intake Rule—protects aquatic organisms, including plankton, fish, shellfish, sea turtles, and marine mammals. Benefits from saving the lives of such aquatic organisms and avoiding potentially devastating ecosystem-level effects accrue to fisherman, both recreational and commercial, and people interested in well-functioning and healthy aquatic ecosystems among others, but these benefits are notoriously difficult to calculate. As such, the agency monetized only a small portion of these benefits.

¹² The Risk Management Plan Rule Amendments prevent and mitigate facility accidents, reducing accident damages. In its cost-benefit analysis, the agency calculated the 10-year average annual monetized damages from accidents (\$278 million), and it emphasized that these monetized damages omit many categories of important accident impacts, such as “significant” avoided emergency response costs, among other impacts. The agency also did not consider avoided catastrophic accidents—but found that if the rule “were to prevent or substantially mitigate even one accident of this magnitude, the benefits generated would be dramatic.”

Nevertheless, each of these rules underwent thorough review by the public, other agencies, and the Office of Information and Regulatory Affairs, after which EPA concluded in each case that, under the longstanding principles of Executive Order 12,866, the rule's benefits fully justified the costs. Therefore, **none of these rules meet Executive Order 13,777's criteria for review, as they do not impose costs that exceed total quantified and unquantified benefits**, nor are they otherwise outdated, unnecessary, or ineffective. To the contrary, they are crucial to fulfilling EPA's statutory missions to protect human health and the environment.

Moreover, many of these rules have not yet been fully implemented, making them particularly poor candidates for retrospective review for the reasons discussed previously. More than 90 percent of these rules targeted by industry were issued within the last eight years. In fact, 64 percent were issued within the last two years. The commenters requesting repeal offered no new information on costs or benefits in their comments to the Department of Commerce; the majority of comments simply rehashed the same arguments and facts presented and considered by EPA during the initial notice-and-comment rulemaking process.

We suspect that EPA will receive similar kinds of requests from stakeholders. Of course, public comments, including from regulated entities, should play a role in informing regulatory review. But it would waste significant resources if the retrospective review process simply provided another opportunity to rehash prior arguments. Therefore, EPA should resist the urge to review rules solely as a result of intensive lobbying by regulated entities. A high volume of repetitive comments resulting from such lobbying should not in and of itself weigh in favor of conducting a retrospective review. For example, in our analysis of the comments received by the Department of Commerce, we found that most comments targeted the national emission standards for hazardous air pollutants from major source categories of boilers ("Major Boiler MACT Rule"), the national ambient air quality standards for ozone ("Ozone NAAQS"), and the Clean Water Rule defining "Waters of the United States"—three overwhelmingly cost-benefit justified rules.

Instead, agencies should prioritize rules for reconsideration based on evidence of changed costs or benefits. Public comments are most useful to the extent they offer evidence of circumstances that have changed since the rules were originally promulgated. The agency must remember that the goal of Executive Order 13,777 is not the elimination of cost-benefit justified rules. Moreover, regardless of the goal of the Order, EPA cannot abandon its statutory obligation to protect the environment and the health and welfare of the public. EPA must keep its objectives—the goals of Executive Order 13,777 and its statutory obligation—in mind as it critically reviews requests from regulated entities.

3. Retrospective review should include a thorough and balanced review of identified rules' actual impacts, including both costs and benefits.

As discussed above, EPA should identify rules that are ripe for retrospective review based on changed costs and benefits over time. Once it identifies promising candidates for the review, the review should include a thorough and balanced assessment of a rule's actual impacts, including both costs and benefits and distributional consequences.

Agencies should aim to follow the same best practices in their retrospective analyses as they do when conducting a regulatory impact analysis during the notice-and-comment process.¹³ These practices include such factors as choosing an appropriate baseline¹⁴ and identifying the proper scope of the analysis.¹⁵ One of the persistent difficulties in prospective cost-benefit analysis is ensuring that evaluations sufficiently address the unquantified impacts of regulation.¹⁶ Some unquantified benefits and costs may be particularly amenable to retrospective analysis, as they may be easier to identify and measure after implementation of the regulation.

II. Estimates of health and environmental benefits used in recent regulatory impact analyses, including the value of mortality risk reduction and the social cost of greenhouse gases, remain the best available estimates.

EPA should identify rules that are ripe for retrospective review based on changed costs and benefits over time, where estimates of benefits and costs reflect the best available scientific evidence. EPA should not be diverted by comments arguing for a lower value of statistical life, a lower or no social cost of greenhouse gases, or other changes to cost-benefit methodology that are not supported by best available evidence.

In particular, EPA should continue to use existing best estimates of the social cost of greenhouse gases in regulatory analyses. Although Executive Order 13,783 withdrew the technical documents prepared by the Interagency Working Group on the Social Cost of Greenhouse Gases,¹⁷ leaving agencies without specific guidance for how to incorporate the social cost of greenhouse gases, the estimates developed by the Interagency Working Group continue to reflect the best available data and methodological choices consistent with Circular A-4, as required by the new Executive Order.¹⁸ As discussed more thoroughly in joint comments recently submitted to the Army Corps of Engineers by Policy Integrity, Environmental Defense Fund, Natural Resources Defense Council, and Union of Concerned Scientists (appended to these comments and available online¹⁹), a central estimate of about \$40 per ton or higher for the value of year 2015 carbon dioxide emissions continues to reflect the best available, peer-reviewed scientific and economic data, models, methodological choices, and literature. No new scientific or economic evidence supports a central estimate lower than \$40, a discount rate higher than 3%, a different treatment of uncertainty, a shorter time horizon, or ignoring the significant costs and benefits to U.S. citizens accruing from effects beyond our geographic borders. It would be irrational and inconsistent with Circular A-4 to prioritize rules for review based on attacks on the

¹³ CIRCULAR NO. A-4, *supra* note 9, at 14-42.

¹⁴ *Id.* at 15; *see also* Thomas O. McGarity & Ruth Ruttenberg, *Symposium: What We Know and Do Not Know About the Impact of Civil Justice on the American Economy and Policy: Counting the Cost of Health, Safety and Environmental Regulation*, 80 TEX. L. REV. 1997, 2039 (2002).

¹⁵ CIRCULAR NO. A-4, *supra* note 9, at 15.

¹⁶ *Id.* at 27 (“You should carry out a careful evaluation of non-quantified benefits and costs.”).

¹⁷ Exec. Order. No. 13,783 § 5(b), 82 Fed. Reg. 16,093 (Mar. 28, 2017).

¹⁸ *Id.* § 5(c).

¹⁹ *See* Environmental Defense Fund, Policy Integrity, Natural Resources Defense Council, and Union of Concerned Scientists, “Comments on the Use of the Social Cost of Greenhouse Gases in the Draft Environmental Impact Statement for the Proposed Missouri River Recovery Management Plan,” http://policyintegrity.org/documents/Joint_Comments_to_Army_Corps_on_SCC_in_EIS.pdf.

estimates of the social cost of greenhouse gases, the value of mortality risk reduction, or other well-established values used in cost-benefit analysis.

III. Regulations have little effect on aggregate employment or unemployment rates.

In addition to identifying outdated and net costly regulations, Executive Order 13,777 directs agencies to identify regulations that “eliminate jobs, or inhibit job creation.”²⁰ Undoubtedly, industry representatives will take this opportunity to make broad claims about alleged “job-killing” effects of regulations. But basic economic theory and evidence indicate otherwise. Policy Integrity submits the following findings, detailed in an issue brief (appended to these comments and available online²¹):

- (1) Regulations have little effect on aggregate employment or unemployment rates.
- (2) While regulatory or deregulatory action may temporarily create labor demand or lead to temporary layoffs, such actions do not typically affect long-term job growth across all sectors and regions.
- (3) Job analysis models can easily be manipulated to predict either job losses or gains, and therefore should not be relied upon to prioritize regulatory targets for retrospective review.
- (4) Blocking or repealing regulations solely based on job effects without consideration of broader benefits and costs is bad economics, bad policy, and bad law.
- (5) Regulations are poor tools for addressing the negative impacts from jobs shifting from one sector to another.

IV. As one example of a rule appropriate for retrospective review under Executive Order 13,777, EPA should modify 40 C.F.R. § 122.4(i) to more clearly authorize cost-saving water quality trading programs.

Under current EPA policy, a proposed new source of water pollution may meet the Clean Water Act’s permitting requirements under 40 C.F.R. § 122.4(i) by offsetting its discharge through off-site reductions. A decision by the U.S. Court of Appeals for the Ninth Circuit, however, has created some uncertainty around the legality of water quality trading under 40 C.F.R. § 122.4(i). Because that regulation was written before the advent of water quality trading, it is “outdated” under Executive Order 13,777. Because water quality trading can significantly reduce compliance costs for sources without reducing environmental benefits, the legal uncertainty on water quality trading created by 40 C.F.R. § 122.4(i) makes the rule unnecessarily costly and “ineffective” under Executive Order 13,777. EPA should use the retrospective review process under Executive Order 13,777 as an opportunity to amend 40 C.F.R. § 122.4(i) to explicitly provide for the use of offsets.

²⁰ Exec. Order No. 13,777, *supra* note 2, § 3(d)(i).

²¹ See Policy Integrity, “Does Environmental Regulation Kill or Create Jobs?” (2017), http://policyintegrity.org/files/media/Jobs_and_Regulation_Factsheet.pdf.

40 C.F.R. § 122.4(i) was first promulgated in the 1980s²² to implement the permitting requirements of the Clean Water Act § 301. Clean Water Act § 301(b)(1)(C) mandates the issuance of “any more stringent limitation . . . required to implement any applicable water quality standard.”²³ No such additional limitation is needed where a Total Maximum Daily Load (“TMDL”) has been implemented under Clean Water Act § 303 to cap total pollution into a waterbody from all sources. However, TMDL development has historically lagged, and a TMDL can only be implemented where it has been developed.²⁴ Despite a marked increase recently in the number of developed TMDLs, thousands of impaired waterbodies still lack TMDLs²⁵ and untold more have TMDLs that are yet to be implemented. For example, as of 2014, in Massachusetts 86% of impaired miles of rivers and streams, 25% of impaired acres of lakes and ponds, and 65% of impaired square miles of bays and estuaries still needed TMDLs.²⁶ As a result, the mandate of § 301(b)(1)(C)—to impose “any more stringent limitation . . . required to implement any applicable water quality standard”—is operable,²⁷ and the implementing language of 40 C.F.R. § 122.4(i) remains crucial.

§ 122.4(i) consists of two sentences. The first sentence, known as the “cause or contribute” requirement, states:²⁸ “No permit may be issued to a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards.” The second sentence sets forth additional conditions for permitting:²⁹

The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by sections 301(b)(1)(A) and 301(b)(1)(B) of Clean Water Act, and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that: (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards

§ 122.4(i) thus prevents a new source from further impairing an impaired waterbody in the period prior to TMDL implementation.

²² 48 Fed. Reg. 14,153 (Apr. 1, 1983), as amended at 50 Fed. Reg. 6940 (Feb. 19, 1985).

²³ Clean Water Act § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

²⁴ See Claudia Copeland, Cong. Research Serv., RL97-831, Clean Water Act and Total Maximum Daily Loads (TMDLs) of Pollutants 2 (2008) (“Most states have lacked the resources to do TMDL analyses, which involve complex assessment in order to ascribe and quantify environmental effects for particular discharge sources.”).

²⁵ See *National Summary of Impaired Waters and TMDL Information*, EPA.GOV, http://iaspub.epa.gov/waters10/attains_nation_cy.control?p_report_type=T (last visited May 10, 2017).

²⁶ See *Massachusetts Water Quality Assessment Report*, EPA.GOV, https://iaspub.epa.gov/waters10/attains_state.control?p_state=MA&p_cycle=2014. The report also shows few TMDL developments to date since 2014.

²⁷ Clean Water Act § 301(b)(1)(C), *supra* note 23.

²⁸ 40 C.F.R. § 122.4(i).

²⁹ *Id.*

The first water quality trading pilot program started in the 1980s, and since then the concept of water quality trading has spread to about two dozen active programs across 16 states.³⁰ Trading allows sources of water pollution to purchase offsetting credits from other sources, as off-site or non-point sources may have much cheaper opportunities for emissions reductions. According to EPA, if a proposed new source demonstrates that off-site pollutant reductions will offset its discharge, such that there is no net increase in the impairment-causing loadings, it does not “cause or contribute to the violation of water quality standards” under the first sentence of § 122.4(i).³¹ As for the second sentence of § 122.4(i), EPA has occasionally posited that it is not operable when the “cause or contribute” language has been satisfied, such that § 122.4(i) is never a bar to new source permitting when an offset is in place.³² In the alternative, EPA has argued that the second sentence operates regardless of the “cause or contribute” clause, but only after TMDL development.³³ In practice, EPA has allowed states to issue permits to a range of new sources utilizing offsets, including on impaired waterbodies for which a TMDL had not yet been developed and implemented.³⁴

The ability of EPA and the states to authorize offset-dependent permits for new sources is complicated by the position taken in dicta by the U.S. Court of Appeals for the Ninth Circuit.³⁵ *Friends of Pinto Creek v. EPA* considered a permit issued to a new source that had offset its discharge subsequent to TMDL development.³⁶ The Court stated that the only exception to the prohibition of discharge by a new source on an impaired waterbody is

³⁰ See Administrative Conference of the United States, *Marketable Permits: Recommendations on Applications and Management*, Draft Report, at 10 (2017),

<https://www.acus.gov/sites/default/files/documents/marketable-permits-draft-report.pdf>.

³¹ EPA, Decision on Petition for Rulemaking to Address Nutrient Pollution from Significant Point Sources in the Chesapeake Bay Watershed at 40 (June 13, 2005) [hereinafter EPA, Decision on Petition]. See also EPA, *WATER QUALITY TRADING TOOLKIT FOR PERMIT WRITERS* (2009) (“EPA interprets 40 CFR 122.4(i) to allow for a new source or new discharger to compensate for its entire increased load through trading.”).

³² See *Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1013 (9th Cir. 2007) (“Initially . . . EPA contended that the first and second sentences of § 122.4(i) could be construed to apply independently, thus not requiring compliance with clauses (1) and (2) when an offset would result in a substantial net reduction of pollution to the impaired waters.”).

³³ EPA, Decision on Petition, *supra* note 31, at 40.

³⁴ See, e.g., ENVIRONOMICS, *A SUMMARY OF U.S. EFFLUENT TRADING AND OFFSET PROJECTS 17* (1999) (chronicling a permit issued for new discharge from a wastewater treatment plant on an impaired river in Massachusetts); *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502 (Minn. 2007) (reviewing a permit issued to a new wastewater treatment plant on an impaired river in Minnesota); *Assateague Coastkeeper v. Md. Dept. of Env’t*, 200 Md. App. 665 (2011) (reviewing a general permit issued to Animal Feeding Operations on impaired waters in Maryland). See also *Frequent Questions: Nutrient Criteria Implementation*, EPA.GOV, <https://www.epa.gov/nutrient-policy-data/frequent-questions-nutrient-criteria-implementation> (last visited May 10, 2017) (“When a TMDL has yet to be developed, the new source or new discharger can obtain a permit when . . . other pollutant source reductions will offset the new discharge.”).

³⁵ In *Friends of Pinto Creek*, EPA had granted a permit to a copper mine in Arizona on a copper-impaired waterbody, where compliance with § 122.4(i) was to have been satisfied by the partial remediation of an existing copper mine on the same waterbody. Reviewing the validity of the permit solely under the second sentence of § 122.4(i), as per the parties’ joint request to the Environmental Appeals Board, the Court invalidated the permit, finding that the TMDL had not been sufficiently implemented to issue a new source permit. See *Friends of Pinto Creek*, 504 F.3d at 1010–15.

³⁶ *Friends of Pinto Creek*, 504 F.3d at 1012.

“whe[n] a TMDL has been performed . . . and the new source can demonstrate that, under the TMDL, the [implementation] plan is designed to bring the waters into compliance with the applicable water standards.”³⁷ Explaining its view, the Court noted “*there is nothing in the Clean Water Act or the regulation that provides an exception for an offset* when the waters remain impaired and the new source is discharging pollution into that impaired water.”³⁸

Though some state courts have declined to follow the *Friends of Pinto Creek* ruling and instead have found it “reasonable” to interpret the existing language of 40 C.F.R. § 122.4(i) to allow offsets,³⁹ the Ninth Circuit’s dicta may still constitute a bar to the use of offsets prior to TMDL implementation.⁴⁰ At the very least, *Friends of Pinto Creek* has generated uncertainty about whether offsets may be used to satisfy § 122.4(i) requirements. Participants at EPA’s 2015 workshop on water quality trading blamed the relatively slow development of water quality trading partly on the lack of legal certainty and clarity and called for more explicit regulatory authority.⁴¹

In short, the existing language of 40 C.F.R. § 122.4(i), as written before water quality trading had fully developed, does not clearly describe whether and when offsets are consistent with the Clean Water Act’s requirements. The regulation is outdated and unnecessarily costly. Despite EPA’s 2003 guidance encouraging water quality trading, the regulatory language and cases like *Friends of Pinto Creek* have created uncertainty and may have slowed the spread of water quality trading. Because water quality trading is a powerful cost-saving tool, modifying 40 C.F.R. § 122.4(i) and increasing confidence in the legal availability of offsets could significantly reduce industry compliance costs without sacrificing any environmental quality protections.

A simple modification can accomplish this goal. In the proposed changes below, textual additions are underlined and deletions are struck out.

Proposal for Amended 40 C.F.R. § 122.4(i)

No permit may be issued: . . . (i) To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards.

1. A new source or new discharger does not cause or contribute to the violation of water quality standards if its discharge is offset by other pollutant reductions.

³⁷ *Id.*

³⁸ *Id.* (emphases added).

³⁹ *Assateague Coastkeeper v. Md. Dept. of Env’t*, 200 Md. App. 665 (2011) (following *In the Matter of the Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502, 524 (Minn. 2007)).

⁴⁰ This is the view of at least some analysts. See STEPHANIE SHOWALTER & SARAH SPIGENER, NAT’L SEA GRANT L. CTR., PENNSYLVANIA’S NUTRIENT TRADING PROGRAM: LEGAL ISSUES AND CHALLENGES 9 (2007) (“The [Pinto Creek] ruling prohibits EPA from issuing any new permits in the Western states . . . for discharges into impaired waterbodies unless it has established compliance schedules for all existing point sources in the area.”).

⁴¹ EPA & USDA, *Report on 2015 National Workshop on Water Quality Markets* (2016); see also WILLAMETTE PARTNERSHIP, *IN IT TOGETHER: A HOW-TO REFERENCE* (2012); EPA, *WATER QUALITY TRADING EVALUATION – FINAL REPORT* 3-23 (2008).

2. The owner or operator of a new source or new discharger that does not offset its discharge but is proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by sections 301(b)(1)(A) and 301(b)(1)(B) of CWA, and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that:
- ~~1. A.~~ There are sufficient remaining pollutant load allocations to allow for the discharge; and
 - ~~2. B.~~ The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards. The Director may waive the submission of information by the new source or new discharger required by paragraph (i) of this section if the Director determines that the Director already has adequate information to evaluate the request. An explanation of the development of limitations to meet the criteria of this paragraph (i)(2)(B) is to be included in the fact sheet to the permit under § 124.56(b)(1) of this chapter.

For more on this proposed change, please see the 2012 Letter from Policy Integrity to EPA, on RIN 2040-AF17.⁴² Please also note that this proposed change is consistent with pending Draft Recommendations from the Administrative Conference of the United States (“ACUS”), which advise: “Agencies should consider using notice-and-comment rulemaking to establish marketable permit programs, in order to reduce uncertainty and inconsistent implementation.”⁴³ Because EPA’s 2003 guidance on water quality trading has left legal uncertainty, notice-and-comment rulemaking is appropriate to resolve this uncertainty.

Respectfully,

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Jason A. Schwartz

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Attached:

- (1) Environmental Defense Fund, Policy Integrity, Natural Resources Defense Council, and Union of Concerned Scientists, “Comments on the Use of the Social Cost of Greenhouse Gases in the Draft Environmental Impact Statement for the Proposed Missouri River Recovery Management Plan,”
http://policyintegrity.org/documents/Joint_Comments_to_Army_Corps_on_SCC_in_EIS.pdf
- (2) Policy Integrity, “Does Environmental Regulation Kill or Create Jobs?” (2017),
http://policyintegrity.org/files/media/Jobs_and_Regulation_Factsheet.pdf

⁴² See Policy Integrity, Water Quality Trading under the Clean Water Act (2012),
http://policyintegrity.org/documents/Policy_Integrity_Final_Water_Quality_Trading_Letter.pdf

⁴³ Draft Proposed Recommendation for Committee on Regulation, April 27, 2017.