



June 30, 2017

VIA ELECTRONIC SUBMISSION

Attn: Kelly Denit, National Marine Fisheries Service, NOAA, Office of Sustainable Fisheries

Re: NOAA-NMFS-2017-0054: Plan for Periodic Review of Regulations

The Institute for Policy Integrity (“Policy Integrity”) at New York University School of Law¹ respectfully submits the following comments to the National Marine Fisheries Service (“NMFS”) (also known as “NOAA Fisheries”) regarding its obligation, under the Regulatory Flexibility Act (RFA), to review regulations that affect “small entities,” including small businesses, small Governmental jurisdictions, and small organizations, as well as similar obligations under Executive Orders 13,771 and 13,777.² 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.

The RFA requires Federal agencies to review existing regulations which have or will have a significant economic impact on a substantial number of small entities.³ We understand that NMFS’s RFA review will also inform its upcoming review under Executive Orders 13,771 and 13,777. Executive Order 13,771 dictates that agencies identify for repeal two regulations for every new regulation they issue and that “the cost of planned regulations be prudently managed and controlled through a budgeting process.”⁴ Executive Order 13,777 requires agencies to seek input on identifying regulations that “impose costs that exceed benefits” and prioritize “outdated, unnecessary, or ineffective” regulations for repeal, replacement, and modification.⁵ Policy Integrity submits these comments to ensure that NMFS stays focused on its mandates to review regulations that have a significant effect on small entities and to identify outdated, unnecessary, ineffective, or net costly regulations for repeal, replacement, or modification and does not instead prioritize recently promulgated and overwhelmingly cost-benefit justified rules identified by industry commenters.

Policy Integrity offers one main comment. 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**

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

² 5 U.S.C. 601 et seq. ; Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017); Exec. Order No. 13,777, 82 Fed. Reg. 12,285, 12,286 (Feb. 24, 2017).

³ *Id.* § 610

⁴ Exec. Order No. 13,771

⁵ Exec. Order No. 13,777

retrospective review based purely on the volume of opposition from regulated entities—without consideration of regulatory benefits—is an irrational and inefficient approach.

Below, we explain this comment in detail.

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. NMFS must approach the review of existing regulations with a plan for identifying appropriate candidates for such modification. Under the RFA, NMFS must review regulations that have a significant impact on small entities. Under Executive Order 13,771 and 13,777, NMFS's review may be larger in scope.

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."⁶ Executive Order 13,777 embraces past methodologies for identifying such regulations, reaffirming President Obama's Executive Order 13,563,⁷ 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."⁸ 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."⁹ Thus, the procedures underlying retrospective review pursuant to Executive Order 13,777 should be consistent with those underlying past efforts.

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, NMFS 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.

⁶ *Id.* § 3(d),(f).

⁷ *Id.* § 2(iii).

⁸ Exec. Order No. 13,563 § 6(b), 76 Fed. Reg. 3821 (Jan. 21, 2011).

⁹ Exec. Order No. 12,866 § 5, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

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 changed 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.¹⁰ 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. *NMFS 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 are likely to encourage NMFS to do exactly that. When 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, with at least one commenter targeting a NMFS rule.¹¹ Many targeted rules had not yet been fully implemented, making them particularly poor candidates for retrospective review for the

¹⁰ 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 OFFICE OF MGMT. & BUDGET, OMB CIRCULAR NO. A-4, REGULATORY ANALYSIS (2003) [hereinafter CIRCULAR NO. A-4].

¹¹ 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>.

reasons discussed previously. The commenters tended to offer 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 to and considered by agencies during the initial notice-and-comment rulemaking process.

We suspect that NMFS 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, NMFS 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 by itself weigh in favor of conducting a retrospective review.

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, NMFS cannot abandon its statutory obligation to ensure productive and sustainable fisheries, safe sources of seafood, the recovery and conservation of protected resources, and healthy ecosystems. NMFS must keep its objectives—the goals of Executive Order 13,777 and its statutory obligations—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, NMFS 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.¹² These practices include such factors as choosing an appropriate baseline¹³ and identifying the proper scope of the analysis.¹⁴ One of the persistent difficulties in prospective cost-benefit analysis is ensuring that evaluations sufficiently address the unquantified impacts of regulation.¹⁵ 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.

¹² CIRCULAR NO. A-4, *supra* note 9, at 14-42.

¹³ *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).

¹⁴ CIRCULAR NO. A-4, *supra* note 9, at 15.

¹⁵ *Id.* at 27 (“You should carry out a careful evaluation of non-quantified benefits and costs.”).

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

If commenters recommend to NOAA rules for repeal based on alleged “job-killing” effects, note that well-accepted economic theory and strong evidence indicate otherwise. Policy Integrity submits the following findings, detailed in an issue brief (appended to these comments and available online¹⁶):

(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.

Respectfully,

Caroline Cecot
Jason A. Schwartz
Iliana Paul

Institute for Policy Integrity

Attached:

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

¹⁶ See Policy Integrity, “Does Environmental Regulation Kill or Create Jobs?” (2017), http://policyintegrity.org/files/media/Jobs_and_Regulation_Factsheet.pdf.