



July 10, 2017

VIA ELECTRONIC SUBMISSION

Attn: U.S. Department of Energy, Office of the General Counsel

Re: Regulatory Burden Reduction RFI

The Institute for Policy Integrity (“Policy Integrity”) at New York University School of Law¹ respectfully submits the following comments to the Department of Energy (“DOE”) regarding its obligation, pursuant to Executive Order 13,777, to evaluate existing regulations and identify some for repeal, replacement, or modification and as part of its implementation of Executive Order 13,771.² 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Order 13,777 directs agencies to identify regulations that “impose costs that exceed benefits” and prioritize “outdated, unnecessary, or ineffective” regulations for repeal, replacement, and modification.³ It requires agencies to seek input on identifying such regulations from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persons.⁴ Policy Integrity submits these comments to ensure that DOE stays focused on its mandate to identify outdated, unnecessary, ineffective, or net costly regulations for repeal, replacement, or modification and does not instead prioritize recently promulgated and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 three 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, **DOE should reaffirm that benefit estimates 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); Exec. Order No. 13,771, 82 Fed. Reg. 9339, 9339 (Jan. 30, 2017).

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

⁴ *Id.* § 3(e).

- Third, to the extent that other stakeholders argue for the repeal of regulations by alleging large negative impacts on employment, Policy Integrity urges reliance on well-accepted economic theory and strong evidence: **Regulations have little effect on aggregate employment or unemployment rates.**

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. DOE must approach the review of existing regulations 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.

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, DOE 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 changed economic circumstances,

⁵ *Id.* § 3(d),(f).

⁶ *Id.* § 2(iii).

⁷ Exec. Order No. 13,563 § 6(b), 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011).

⁸ Exec. Order No. 12,866 § 5, 58 Fed. Reg. 51,735, 51,739-40 (Oct. 4, 1993).

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. *DOE 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 DOE 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, some issued by DOE.¹⁰

In particular, after reviewing the 171 comments submitted to the Department of Commerce, Policy Integrity identified two substantive DOE final rules and two substantive

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

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>.

DOE proposed rules that at least one commenter recommended for repeal or rescission. These rules are summarized in the table below.¹¹

| Rules Not Appropriate for Retrospective Review | Stage of Rulemaking | Annual Net Benefits^a | Year Issued |
|--|----------------------------|--|--------------------|
| Commercial Refrigeration Equipment Energy Conservation Standards | Final | \$1,106 million | 2014 |
| Residential Furnace Fans Energy Conservation Standards | Final | \$2,251 million | 2014 |
| Gas Furnace Energy Conservation Standards | Proposed | \$2,082 million | 2015 |
| Manufactured Housing Energy Conservation Standards | Proposed | \$1,024 million | 2016 |

^a The net benefit estimates come from the *Federal Register* notice associated with each rule. We present the midpoints of ranges reported in the underlying rules and update estimates to 2016 dollars using the Consumer Price Index. We present estimates reflecting a 3% discount rate where possible.

Overall, **these four rules are estimated to contribute about \$6.5 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 *almost seven 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 welfare of the rest of society.

Therefore, **none of these rules meet Executive Order 13,777's criteria for review, as they do not impose costs that exceed benefits**, nor are they otherwise outdated, unnecessary, or ineffective. To the contrary, the rules, all issued under statutes that require DOE to promote energy conservation, are crucial to fulfilling DOE's statutory missions.

Moreover, some of the targeted rules had not yet been fully implemented or even finalized, making them particularly poor candidates for retrospective review for the 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 the agency during the initial notice-and-comment rulemaking process. In particular, commenters tended to focus on three issues that have already been thoroughly reviewed by DOE and by courts:

¹¹ Criteria for inclusion in this table are as follows: (1) at least one commenter requested repeal or rescission of the 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.

(1) *Valuing reductions in greenhouse gas emissions*

It is long established that agencies must monetize important greenhouse gas effects when their decisions are grounded in cost-benefit analysis. Most recently, for example, in *Zero Zone Inc. v. Department of Energy*, the U.S. Court of Appeals for the Seventh Circuit held that “the expected reduction in environmental costs needs to be taken into account” for DOE “[t]o determine whether an energy conservation measure is appropriate under a cost-benefit analysis.”¹² And in response to petitioners’ challenge that the agency’s consideration of the global social cost of carbon was arbitrary, the Seventh Circuit responded that the agency acted reasonably in monetizing the global climate effects.¹³ Therefore, DOE should continue to use best estimates of the social costs of greenhouse gases in regulatory analyses, notwithstanding any commenters’ objections. As we explain below (and in a separate attachment), the best estimates continue to be the estimates developed by the Interagency Working Group on the Social Cost of Greenhouse Gases.

(2) *Promoting cost savings for manufacturers and consumers*

DOE has statutory obligations to promote the conservation of energy. When it issues rules pursuant to these statutes, it values the cost savings to manufacturers and consumers from increases in energy efficiency. Nonetheless, some commenters argued that there is “no need” for new DOE rules that result in energy savings because “[t]he market, driven by consumer choice, is moving toward higher efficient [appliances].”¹⁴ Putting aside DOE’s statutory obligations to issue such rules, the reality is that technologies that offer cost-effective increases in energy efficiency might not be adopted on their own, despite their potential to repay buyers’ higher upfront costs within a short period of time. Economic research provides several potential explanations for this so-called “energy efficiency gap” or “energy paradox.”¹⁵ For example, buyers might have inadequate or unreliable information about cost savings from more efficient appliances. Or appliances might not be purchased by those who will be paying energy-use costs. Or buyers may be uncertain about future energy prices, or about maintenance costs and reliability of some energy efficiency technologies. This may be true whether the buyer is a private individual or a commercial

¹² *Zero Zone, Inc. v. DOE*, 832 F.3d 654, 677 (7th Cir. 2016).

¹³ *Id.* at 679. For more on applying standards of rationality to the social cost of carbon, see Peter Howard & Jason Schwartz, *Think Global: International Reciprocity as Justification for a Global Social Cost of Carbon*, 42 COLUMBIA J. ENVTL. L. 203 (2017).

¹⁴ United Technologies Climate, Controls, and Security and Carrier Corporation, “Comments to Docket ID Number: DOC-2017-0001-0001 Regulatory Burden RFI,” <https://www.regulations.gov/document?D=DOC-2017-0001-0145>.

¹⁵ See, e.g., U.S. Environmental Protection Agency & U.S. Department of Transportation, *Regulatory Impact Analysis for Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles at 8-3 to 8-9* (Aug. 2016), <https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/phase-2-hd-fuel-efficiency-ghg-final-ria.pdf> (providing more detailed discussion of these explanations in the context of the motor vehicle market).

enterprise.¹⁶ These hypotheses would explain why buyers would be hesitant to pay higher prices to purchase appliances equipped with energy efficient technologies and why manufacturers would be reluctant to offer such appliances in the absence of regulatory incentives.

(3) *Setting technology-forcing standards*

To the extent that DOE's standards under the Energy Policy and Conservation Act force manufacturers to design innovative technologies in order to comply, Congress intended the Act to be technology-forcing.¹⁷

We suspect that DOE will receive similar kinds of requests from stakeholders, raising similar issues. 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, DOE 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, DOE cannot abandon its statutory obligations to promote energy conservation. DOE 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, DOE 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

¹⁶ See Policy Integrity, Regulatory Report: 2011 Heavy-Duty Trucks Rule at 7 (Feb. 2011), available at http://policyintegrity.org/files/publications/2211_Regulatory_Report_2011_Heavy_Trucks_Rule.pdf (explaining how energy-efficiency rules can help private firms overcome the first mover disadvantage of generating an uncompensated positive informational externality by broadcasting to competitors whether a new efficiency technology works).

¹⁷ See, e.g., S. Rep. No. 179, 94th Cong., 1st Sess. at 9 (1975) (explaining that mandatory fuel economy standards for automobiles were necessary because “market forces to which the industry says it is responding may not be strong enough to bring about the necessary fuel conservation which a national energy policy demands”); *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 793 F.2d 1322, 1339 (D.C. Cir. 1986) (recognizing that Congress intended the Energy Policy and Conservation Act to be technology-forcing).

process.¹⁸ These practices include such factors as choosing an appropriate baseline¹⁹ and identifying the proper scope of the analysis.²⁰ One of the persistent difficulties in prospective cost-benefit analysis is ensuring that evaluations sufficiently address the unquantified impacts of regulation.²¹ Some unquantified costs and benefits may be particularly amenable to retrospective analysis, as they may be easier to identify and measure after implementation of the regulation.

II. Benefit estimates 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.

DOE should identify rules that are ripe for retrospective review based on changed costs and benefits over time, where estimates of costs and benefits reflect the best available scientific evidence. DOE 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, if DOE considers repeals of energy-efficiency rules or of other rules with greenhouse gas effects, then it 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,²² 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.²³ 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 online²⁴), 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 percent, 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 estimates of the social cost of greenhouse gases, the value of

¹⁸ CIRCULAR NO. A-4, *supra* note 9, at 14-42.

¹⁹ *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).

²⁰ CIRCULAR NO. A-4, *supra* note 9, at 15.

²¹ *Id.* at 27 (“You should carry out a careful evaluation of non-quantified benefits and costs.”).

²² Exec. Order. No. 13,783 § 5(b), 82 Fed. Reg. 16,093, 16,095 (Mar. 28, 2017).

²³ *Id.* § 5(c).

²⁴ *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.

mortality risk reduction, or other well-established values used in cost-benefit analysis.

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

If commenters recommend to DOE 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 online²⁵):

- (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 costs and benefits 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,

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Institute for Policy Integrity

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.

²⁵ See Policy Integrity, “Does Environmental Regulation Kill or Create Jobs?” (2017),
http://policyintegrity.org/files/media/Jobs_and_Regulation_Factsheet.pdf.