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## Environmental Health Regulation in the Trump Era: How President Trump's Two-for-One Regulatory Plan Impacts Environmental Regulation

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**ENVIRONMENTAL HEALTH REGULATION IN THE TRUMP ERA: HOW PRESIDENT TRUMP’S TWO-FOR-ONE REGULATORY PLAN IMPACTS ENVIRONMENTAL REGULATION**

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Elizabeth Ann Glass Geltman\*

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INTRODUCTION

The most important lawsuit you have never heard of was filed against President Donald Trump on February 8, 2017.<sup>1</sup> Plaintiffs

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This paper benefitted from workshops at the CUNY School of Public Health on December 13, 2016, and the University of Maryland School of Public Health, Maryland Institute of Applied Environmental Health, on February 3, 2017. The author would like to thank the following professors for generously providing their time, thoughts, and comments: Dr. Glen Johnson, Dr. Daliah Heller, Dr. Lynn Roberts, Dr. Nick Freudenberg, Dr. Chris Palmedo, Dr. Grace Sembajwe, Dr. Sean Haley, Dr. Stephen M. Roth, Dr. Donald K. Milton, Dr. Paul Turner, and Dr. Devon C. Payne-Sturges.

1. Complaint for Declaratory and Injunctive Relief, Pub. Citizen v. Trump, No. 17-253 (D.D.C. 2017); Plaintiff’s Motion for Leave to File Second Amended Complaint, Pub. Citizen v. Trump, No. 17-253 (D.D.C. 2018).

were an unlikely alliance between a congressional watch group, an environmental group, and a labor group: Public Citizen, Inc., the Natural Resources Defense Council, Inc. (NRDC), and the Communications Workers of America, an affiliate of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).<sup>2</sup> While this was not the classic “Baptists and Bootleggers”<sup>3</sup> scenario, it was certainly an illustration of how the Trump administration’s efforts at regulatory reform created a truly novel paradigm. President Trump signed Executive Order (E.O.) 13771 shortly after his inauguration. E.O. 13771 implemented President Trump’s campaign promise that the federal government would repeal two federal regulations for every new regulation it promulgated. The crux of the 2017 lawsuit argued that E.O. 13771

corrupts agency decisionmaking across the board because every decision whether to issue a significant new rule, every decision about the content of the rule, and every decision about repealing a rule must be made under the shadow of the Order’s mandate to identify and repeal two regulations to offset the cost of any one regulation issued.<sup>4</sup>

While media attention focused extensively on the Executive Order 13769 travel ban,<sup>5</sup> few media outlets addressed the equally important series of executive orders issued by President Trump that spelled out the new President’s regulatory reform agenda.<sup>6</sup> E.O. 13771 was only the first in a series of President Trump’s regulatory reform initiatives issued in fulfillment of his campaign promise to reduce the burden of federal regulation on American businesses. The presidential deregulatory directives dismantling prior envi-

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2. Complaint for Declaratory and Injunctive Relief, *Pub. Citizen v. Trump*, No. 17-253 (D.D.C. 2017); see also *Consumer, Environmental and Workers Groups File Legal Challenge to Trump’s One-in, Two-out Executive Order on Regulations*, PUBLIC CITIZEN (Feb. 8, 2017), <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=10155>.

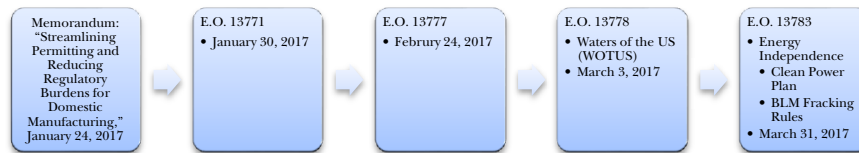
3. See Bruce Yandle, *Bootleggers and Baptists: The Education of a Regulatory Economist*, 7 REG. 12 (1983) (discussing the Baptists and Bootlegger economic theory); see also Bruce Yandle & Stuart Buck, *Bootleggers, Baptists, and the Global Warming Battle*, 26 HARV. ENVT’L L. REV. 177 (2002).

4. Motion for Summary Judgment at 17, *Pub. Citizen v. Trump*, No. 17-253 (D.D.C. 2017).

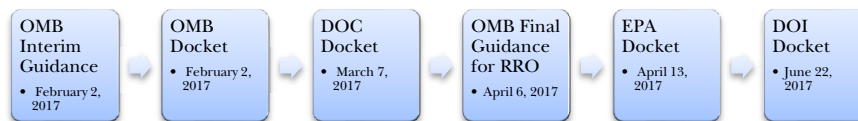
5. Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8,977 (Feb. 1, 2017).

6. Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16,093 (Mar. 31, 2017); Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the Waters of the United States Rule, 82 Fed. Reg. 12,497 (Mar. 3, 2017); Enforcing the Regulatory Reform Agenda, 82 Fed. Reg. 12,285 (Mar. 1, 2017); Reducing Regulation and Controlling Regulatory Costs, 82 Fed. Reg. 9,339 (Feb. 3, 2017).

ronmental and natural resources policy came quickly and can be summarized in the flowchart below<sup>7</sup>:



Regulatory responses implementing the presidential directives took more time and can be summarized in the flowchart below:



On April 17, 2017, fourteen states filed an amicus brief supporting Trump’s deregulatory initiative.<sup>8</sup> The brief signaled that the civil war over the efficacy of federal regulation ignited during the 2016 election cycle would continue with vigor during the Trump presidency. The states supporting Trump’s deregulation plans were: Alabama, Arizona, Arkansas, Georgia, Kansas, Louisiana, Michigan, Nevada, Oklahoma, South Carolina, Texas, West Virginia, Wisconsin, and Wyoming.<sup>9</sup>

The states supporting E.O. 13771 argued that “the administrative state has accelerated further the long-term growth of new regulatory burdens, while rarely eliminating unnecessary regulations issued in the past” and the “unlawfully-imposed burden has been largely borne by the States and their citizens.”<sup>10</sup> The United States Chamber of Commerce, America Fuel and Petrochemical Manufacturers, American Petroleum Institute, the Association of Ameri-

7. Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing, 82 Fed. Reg. 8,667 (Jan. 30, 2017); Reducing Regulation and Controlling Regulatory Costs, 82 Fed. Reg. 9,339 (Feb. 3, 2017); Exec. Order 13777, Enforcing the Regulatory Reform Agenda, 82 Fed. Reg. 12,285 (Mar. 1, 2017); Exec. Order 13778, Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule, 82 Fed. Reg. 12,497 (Mar. 3, 2017); Executive Order 13783, Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16,093 (Mar. 31, 2018).

8. See Brief of the States of West Virginia, et al. as Amici Curiae Supporting Respondent, Pub. Citizen v. Trump, No. 17-253 (D.D.C. 2017).

9. *Id.*

10. *Id.* at 1 (citing PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 26–29 (2014)); Michael R. See, *Willful Blindness: Federal Agencies’ Failure to Comply with the Regulatory Flexibility Act’s Periodic Review Requirement—And Current Proposals to Invigorate the Act*, 33 FORDHAM URB. L.J. 1199 (2006).

can Railroads, the National Association of Manufacturers, and National Federation of Independent Business also filed an amicus brief in support of the Trump two-for-one deregulatory plan.<sup>11</sup>

Although the *Public Citizens v. Trump* suit was dismissed on February 26, 2018, for lack of standing,<sup>12</sup> plaintiffs filed a curative amended complaint on April 2, 2018, and established standing by specifying which regulatory initiatives critical to public health and the environment that either were, or are likely to be, weakened or scrapped because of E.O. 13771.<sup>13</sup> The amended complaint reiterated, “the Executive Order is blocking, delaying, or forcing the repeal of regulations needed to protect health, safety, and the environment, across a broad range of topics—from automobile safety, to occupational health, to air pollution.”<sup>14</sup>

This Article explores the Trump regulatory reform agenda and its potential impact on environmental determinants of health. The Article begins with a discussion of the Department of Commerce’s (DOC or Commerce) initial fact-finding investigation to evaluate the impact of federal regulations on domestic manufacturing. The Article next presents an overview of the Trump administration’s

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11. Brief of the Chamber of Commerce of the United States of America, et al. as Amici Curiae in Support of Defendants’ Motion to Dismiss Amended Complaint at 7, *Pub. Citizen v. Trump*, No. 17-253 (D.D.C. 2017) (“Executive Order 13771 seeks to address the problem of ever-growing government regulations by imposing a regulatory budget that directs federal agencies to eliminate outdated and ineffective regulations when issuing new regulations that impose significant compliance costs on regulated entities. In doing so, the Order merely builds on a long and bipartisan history of executive orders that direct agencies to carefully consider the costs of new regulations and to review the effectiveness of existing regulations. Critically, however, Executive Order 13771 takes the next logical step and creates an incentive for federal agencies to not only review, but also eliminate ineffective regulations.”).

12. *Order, Pub. Citizen v. Trump*, No. 17-253 (D.D.C. 2018) (“This is not to say that a plaintiff—or, indeed, that the present Plaintiffs—will never be able to establish standing to challenge the Executive Order. On the present record, however, the Court must conclude that it lacks jurisdiction.”).

13. *Complaint, Pub. Citizen v. Trump*, No. 17-253 (D.D.C. 2018). Other defendants were: Mick Mulvaney, Director of the Office of Management and Budget; Rick Perry, Secretary of Energy, U.S. Department of Energy (DOE); Elaine L. Chao, Secretary of Transportation, U.S. Department of Transportation (DOT); Heidi King, Deputy Administrator of the National Highway Traffic Safety Administration (NHTSA); Loren Sweatt, Acting Assistant Secretary of Labor for Occupational Safety and Health (OSHA), U.S. Department of Labor; R. Alexander Acosta, Secretary of Labor, U.S. Department of Labor (DOL); Ryan Zinke, Secretary of the Interior, U.S. Department of the Interior (DOI); Raymond Martinez, Administrator, Federal Motor Carrier Safety Administration (FMCSA); Jim Kurth, Deputy Director and Acting Director, U.S. Fish and Wildlife Service (FWS); Scott Pruitt, Administrator, U.S. Environmental Protection Agency (EPA); Howard “Skip” Elliot, Administrator, Pipeline and Hazardous Materials Safety Administration (PHMSA); Chris Oliver, Assistant Administrator for Fisheries, National Marine Fisheries Service (NMFS); David Zatezalo, Assistant Secretary for Mine Safety and Health Administration (MSHA), U.S. Department of Labor; and Ronald Batory, Administrator, Federal Railroad Administration (FRA). *See also* Juan Carlos Rodriguez, *Challengers Of Trump’s ‘two-for-one’ Order Seek To Revive Suit*, LAW360 (April 4, 2018), <https://www.law360.com/articles/1029645/challengers-of-trump-s-two-for-one-order-seek-to-revive-suit>.

14. *Complaint, Pub. Citizen v. Trump*, No. 17-253 (D.D.C. 2018).

regulatory reform formula as announced in E.O. 13771 and the interim guidance explaining E.O. 13771 and E.O. 13777 (the executive order announcing the Trump administration's plans to enforce the regulatory reform plan announced in E.O. 13771). The Article then examines the federal agency initiatives undertaken in response to the Trump directives, including both fact-finding dockets and regulatory action published in the federal register applying the executive orders. This Article concludes with concerns about the practical effects of the new policy on the future of environmental determinants of health and recommends that the policy be reevaluated after a year to understand the unintended effects of this means of deregulation.<sup>15</sup>

#### I. FACT-FINDING EFFORTS: DEPARTMENT OF COMMERCE DOCKET

On January 24, 2017, before drafting any regulatory reform executive orders, President Trump issued a memorandum entitled "Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing"<sup>16</sup> as one of his very first acts in office. The memorandum directed the Secretary of Commerce, in coordination with the Secretaries of Agriculture and Energy, the Administrator of the Environmental Protection Agency (EPA), the Director of the Office of Management and Budget (OMB), the Administrator of the Small Business Administration, and other agency heads, to conduct outreach to stakeholders concerning the impact of Federal regulations on domestic manufacturing.<sup>17</sup> It is unclear when the Department of Commerce began collecting data in response to President Trump's memorandum but, on March 7, 2017, Commerce established a docket to collect comments from industry leaders and other interested parties. Commerce set a very tight timetable. The due date for comments was March 31, 2017. Commerce asked for comments about:

- (1) industry's experience with federal permitting as it impacted the construction and expansion of domestic manufacturing facilities; and

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15. See Conclusion *infra*. Shell, Comment on Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs" (Feb. 10, 2017), <https://www.regulations.gov/document?D=OMB-2017-0002-0050>.

16. Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing, 82 Fed. Reg. 8,667 (Jan. 30, 2017).

17. *Id.*; see also Economic Analysis for the Proposed Definition of "Waters of the United States," EPA, <https://www.epa.gov/wotus-rule/economic-analysis-proposed-definition-waters-united-states-recodification-pre-existing> (analyzing the economic impact of the revised rule).

- (2) the general, non-permit related regulations that adversely impacted domestic manufacturers.<sup>18</sup>

To better understand the context of the comments, Commerce asked each commenter to describe their operations, including the North American Industry Classification System (NAICS) code(s),<sup>19</sup> items manufactured, location of facilities, number of employees, and approximate sales revenue. Next, DOC asked eight specific questions: five regarding manufacturing and three concerning regulatory compliance burdens.<sup>20</sup> Commerce's stated goal was to collect data from regulated industries concerning the potential to streamline federal construction permits for building and/or expanding domestic manufacturing facilities. Commerce also asked for thoughts on ways to reduce regulatory burdens for domestic manufacturers.<sup>21</sup> One-hundred and seventy comments were posted in the DOC docket in response to Commerce's fact-finding request.

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18. Impact of Federal Regulations on Domestic Manufacturing, 82 Fed. Reg. 12,786 (Mar. 7, 2017), <https://www.regulations.gov/document?D=DOC-2017-0001-0001>.

19. North American Industry Classification System (NAICS) codes are used by Federal statistical agencies to classify different types of business "for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy." See *Introduction to NAICS*, U.S. CENSUS BUREAU, <https://www.census.gov/eos/www/naics/> (last visited July 24, 2018).

20. *Id.* Regarding the permitting process, Commerce asked the following:

- "How many permits from a Federal agency are required to build, expand or operate your manufacturing facilities? Which Federal agencies require permits and how long does it take to obtain them?"
- "Do any of the Federal permits overlap with (or duplicate) other federal permits or those required by State or local agencies? If the answer is yes, how many permits? From which Federal agencies?"
- "Briefly describe the most onerous part of your permitting process."
- "If you could make one change to the Federal permitting process applicable to your manufacturing business or facilities, what would it be? How could the permitting process be modified to better suit your needs?"
- "Are there Federal, State, or local agencies that you have worked with on permitting whose practices should be widely implemented? What is it you like about those practices?"

Regarding regulatory compliance, Commerce requested the following:

- "Please list the top four regulations that you believe are most burdensome for your manufacturing business. Please identify the agency that issues each one. Specific citation of codes from the Code of Federal Regulations would be appreciated."
- "How could regulatory compliance be simplified within your industry or sector?"
- "Please provide any other specific recommendations, not addressed by the questions above, that you believe would help reduce unnecessary Federal agency regulation of your business."

21. *Id.*

This Article uses established principles of legal epidemiology to conduct review of the Commerce docket.<sup>22</sup> The comments in the docket were collected, copied, and indexed in a sortable spreadsheet using the docket identification number assigned by the agency on Regulations.gov. A sample set of comments was reviewed collectively in order for a team of coders to define terms and develop a consistent approach. Two coders divided all the indexed comments and coded half the materials. The coders then reviewed each other's findings. The coders used a spreadsheet to keep track of their results. The coders and supervising faculty held regular meetings to reconcile differences in coding and to evaluate search terms for reviewing the docket. A coder who was not part of the initial review and who did not participate in the first round of coding (naïve coder) was assigned to spot-check results to ensure consistency. The naïve coder selected random comments using an interval of ten percent of the total number of comments reviewed in the docket.<sup>23</sup> A Computer Assisted/Aided Qualitative Data Analysis

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22. For an explanation of how to conduct policy surveillance using principles of legal epidemiology see David Presley, et al., *Resources for Policy Surveillance: A Report Prepared for the Centers for Disease Control and Prevention Public Health Law Program*, SSRN 2567695 (2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2567695](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567695); David Presley, et al. *A Scan of Existing 50 State Survey and Policy Surveillance Resources*, SRN 2523011 (2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2523011](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2523011); David Presley, et al., *Creating Legal Data for Public Health Monitoring and Evaluation: Delphi Standards for Policy Surveillance*, 43 J.L., MED. & ETHICS 27, 27–31 (2015); Scott Burris, *A Technical Guide for Policy Surveillance*, Temple University Legal Studies Research Paper No. 2014-34 (2014); Sarah Happy, *Technical Standards for Policy Surveillance: Delphi Process and Technical Guide*, 142nd APHA Annual Meeting and Exposition (Nov. 15–Nov. 19, 2014), <https://apha.confex.com/apha/142am/webprogram/Paper309688.html>. For other applications, see Elizabeth Glass Geltman, et al., *Inquiry into the Impact of Bush's Executive Order 13211 on Environmental and Public Health Regulation*, 27 *FORDHAM ENVTL. L.J.* 200 (2016); Elizabeth Glass Geltman, et al., *Impact of Executive Order 13211 on Environmental Regulation: An Empirical Study*, *ENERGY POL'Y* 89 (2016): 302–310; Elizabeth Glass Geltman, *Regulation of Technologically Enhanced Naturally Occurring Radioactive Materials (TENORM) under State Law: How Effective Is it? What More Needs to Be Done?*, 143rd APHA Annual Meeting and Exposition (Oct. 31–Nov. 4, 2015); Elizabeth Glass Geltman, *21 Years Later: Has Executive Order 12898 (entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations) Worked?*, 143rd APHA Annual Meeting and Exposition (Oct. 31–Nov. 4, 2015); Elizabeth Glass Geltman, *Policy Surveillance on the Impact of Bush's Executive Order 13211 (Requiring Preparation of a Statement of Energy Effects as a Condition to Federal Action) on Environmental and Public Health Policy*, 143rd APHA Annual Meeting and Exposition (Oct. 31–Nov. 4, 2015).

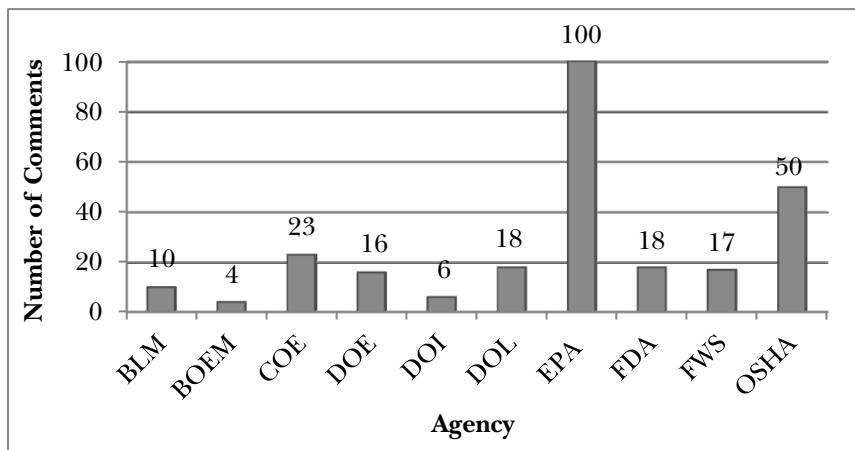
23. For an explanation of the methods used to develop codes and conduct coding, see David Presley, et al., *Creating Legal Data for Public Health Monitoring and Evaluation: Delphi Standards for Policy Surveillance*, 43 J.L., MED. & ETHICS 27 (2015); Scott Burris & Evan D. Anderson, *Legal Regulation of Health-Related Behavior: A Half-Century of Public Health Law Research*, *Annual Review of Law & Social Science*, *Forthcoming* (2013); Scott Burris, et al., *Moving from Intersection to Integration: Public Health Law Research and Public Health Systems and Services Research*, 90 *MILBANK Q.* 375 (2012); Evan D. Anderson, et al., *Measuring Statutory Law and Regulations for Empirical Research*, *PUB. HEALTH L. RES.* (Feb. 28, 2012); Jennifer K. Ibrahim, et al., *Public Health Law Research: Exploring Law in Public Health Systems*, 18 *J. PUB. HEALTH M. PRAC.* 499 (2012); Scott C. Burris & Evan D. Anderson, *Making the Case for Laws that Improve Health: The Work of the Public Health Law Research National Program Office*, 39 *J.L., MED. & ETHICS* 1, 15–20 (2011); Scott Burris, *Law in a Social Determinants Strategy: A*



Software (CAQDAS) allowed coders to cross-check for consistency using auto-coding of key words and synonyms. Then, the results were analyzed using descriptive statistics to determine patterns and themes.

Examination of the Commerce docket, DOC-2017-0001-0001, identified interesting patterns. More than half the comments (fifty-nine percent) stated the EPA permitting process was overly cumbersome and in need of reform. Nearly a third of commenters (twenty-nine percent) identified the Occupational Safety and Health Administration (OSHA) as a target for deregulation. Other agencies that received notable mention by industry as suitable targets for deregulation included the Army Corps of Engineers (the Corps or COE), the Department of Energy (DOE), various entities within the Department of Interior (DOI), and the Food and Drug Administration (FDA). The graph below summarizes the numbers of comments in the Commerce docket that raised concerns about the regulatory processes of various agencies.

GRAPH 1. AGENCIES THAT RAISED CONCERN:  
IMPACT OF FEDERAL REGULATIONS ON DOMESTIC MANUFACTURING  
DOC-2017-0001-0001 (N=170)



From a substantive perspective, over a third of comments (thirty-eight percent) indicated that permitting pursuant to the Clean Air Act needs to be reformed or deregulated. The coalition of compa-

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Public Health Law Research Perspective, PUBLIC HEALTH REPORTS, 126 Suppl. 3, 22 (2011). See also Evan D. Anderson & Scott Burris, EDUCATED GUESSING: GETTING RESEARCHERS AND RESEARCH KNOWLEDGE INTO POLICY INNOVATION, included in TANIA VOON, ET AL., REGULATING TOBACCO, ALCOHOL, AND UNHEALTHY FOODS: THE LEGAL ISSUES (Routledge, 2014).

nies disgruntled with EPA's air permitting included corporations that represent a sizable portion of the U.S. economy. For example, one comment that highlighted problems with the Clean Air Act's permitting process was written by Boeing, British Petroleum, Eli Lilly, Georgia-Pacific, Invista, Koch, Merck, Occidental Petroleum, Phillips 66, and Proctor and Gamble.<sup>24</sup> A second group that targeted Clean Air Act permitting included almost the entire petroleum industry.<sup>25</sup>

EPA has no organic statute granting general authority to the Agency to protect the environment.<sup>26</sup> Instead, Congress has stipulated EPA's powers through a series of specific pieces of legislation aimed to protect the environment by targeting different media: air, water, hazardous waste, and the like.<sup>27</sup> Numerous industry comments identified all EPA-administered statutes as targets for deregulation. The graph below depicts the number of comments discussing each of the major federal environmental statutes administered by EPA<sup>28</sup> that commenters contributing to the Commerce docket believed needed significant reform.

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24. Comment of BD (Becton, Dickinson and Company) on behalf of National Environmental Development Association's Clean Air Project (Mar. 31, 2017), <https://www.regulations.gov/document?D=DOC-2017-0001-0161>.

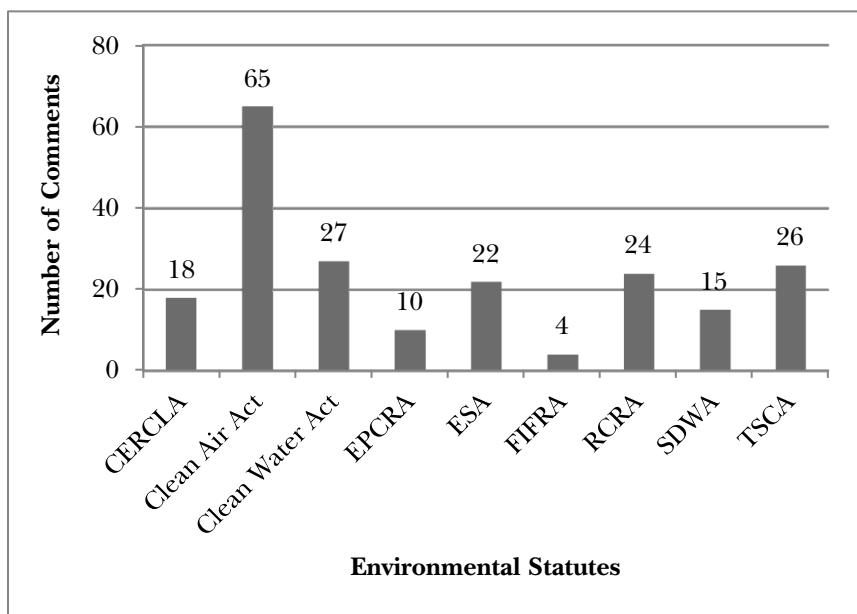
25. Comment of Lee Fuller (Mar. 31, 2017), <https://www.regulations.gov/document?D=DOC-2017-0001-0086>. The coalition included Independent Petroleum Association of America (IPAA), the American Association of Professional Landmen (AAPL), the Association of Energy Service Companies (AESC), the Domestic Energy Producers Alliance (DEPA), the International Association of Drilling Contractors (IADC), the International Association of Geophysical Contractors (IAGC), the National Stripper Well Association (NSWA), the Petroleum Equipment & Services Association (PESA), Arkansas Independent Producers and Royalty Owners Association, California Independent Petroleum Association, Coalbed Methane Association of Alabama, Colorado Oil & Gas Association, East Texas Producers & Royalty Owners Association, Eastern Kansas Oil & Gas Association, Florida Independent Petroleum Association, Idaho Petroleum Council, Illinois Oil & Gas Association, Independent Oil & Gas Association of New York, Independent Oil & Gas Association of West Virginia, Independent Oil Producers' Agency, Independent Oil Producers Association Tri-State, Independent Petroleum Association of New Mexico, Indiana Oil & Gas Association, Kansas Independent Oil & Gas Association, Kentucky Oil & Gas Association, Louisiana Oil & Gas Association, Michigan Oil & Gas Association, Mississippi Independent Producers & Royalty Association, Montana Petroleum Association, National Association of Royalty Owners, Nebraska Independent Oil & Gas Association, New Mexico Oil & Gas Association, New York State Oil Producers Association, North Dakota Petroleum Council, Northern Montana Oil and Gas Association, Ohio Oil & Gas Association, Oklahoma Independent Petroleum Association, Panhandle Producers & Royalty Owners Association, Pennsylvania Independent Oil & Gas Association, Permian Basin Petroleum Association, Petroleum Association of Wyoming, Southeastern Ohio Oil & Gas Association, Tennessee Oil & Gas Association, Texas Alliance of Energy Producers, Texas Oil and Gas Association, Texas Independent Producers and Royalty Owners Association, Utah Petroleum Association, Virginia Oil and Gas Association, West Slope Colorado Oil & Gas Association, West Virginia Oil and Natural Gas Association and Western Energy Alliance.

26. See generally Elizabeth Glass Geltman & Andrew E. Skroback, *Reinventing EPA to Conform with the New American Environmentalism*, 23 COLUM. J. ENV'T L.J. 1 (1998).

27. See generally *id.*

28. The laws examined were as follows:

GRAPH 2. LAWS THAT RAISED CONCERN:  
IMPACT OF FEDERAL REGULATIONS ON DOMESTIC MANUFACTURING  
DOC-2017-0001-0001 (N=170)



Although the Clean Power Plan, the Clean Water Act “Waters of The United States” (WOTUS),<sup>29</sup> and the Bureau of Land Management’s (BLM) fracking rule<sup>30</sup> were the subject of great debate during the 2016 election season<sup>31</sup> and were specifically singled out for

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), 42 U.S.C. §§ 9601–9675 (1980);
- The Clean Air Act, 42 U.S.C. §§ 7401–7671;
- The Clean Water Act, 33 U.S.C. §§ 1251–1388;
- Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986, 42 U.S.C. §§ 11001–11050;
- Endangered Species Act (ESA), 16 U.S.C. §§ 1531–1544;
- Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136;
- Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6992;
- Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f–300j; and
- Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601–2697.

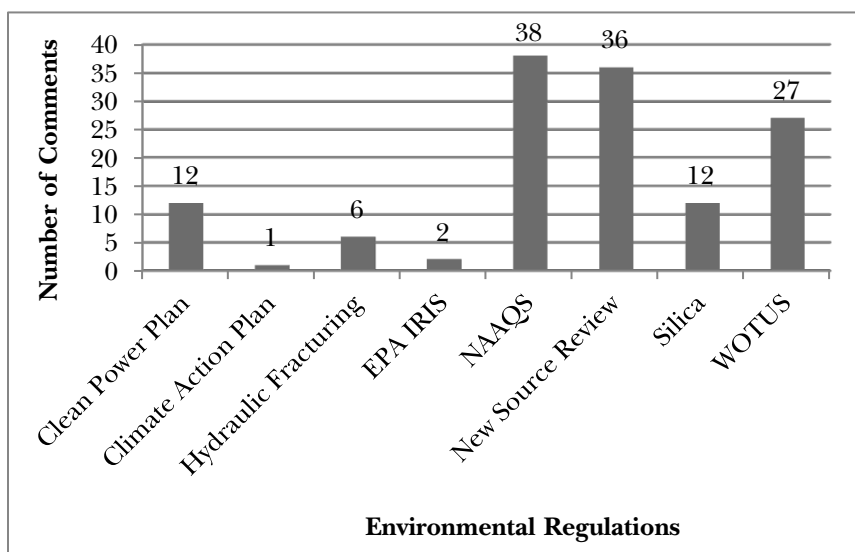
29. The scope of WOTUS has been debated for decades. For a historical discussion, see generally Elizabeth Ann Glass Geltman, *Regulation of Non-Adjacent Wetlands Under Section 404 of the Clean Water Act*, 23 NEW ENG. L. REV. 615 (1988).

30. For discussion of the BLM fracking rule, see generally Elizabeth Ann Glass Geltman, *Drilling for Common Ground: How Public Opinion Tracks Experts in the Debate over Federal Regulation of Shale Oil & Gas Extraction*, 35 VA. ENVTL. L.J. 59 (2016).

31. See generally Elizabeth Glass Geltman, *The New Anti-Federalism: Late Term Obama Environmental Regulations and the Rise of Trump*, 93 N.D. L. REV. 243 (2018).

review by President Trump in Executive Orders 13778<sup>32</sup> and 13783,<sup>33</sup> only twelve comments (seven percent) discussed the repeal of the Clean Power Plan, only six (three percent) addressed federal regulation of hydraulic fracking (on or off federal land), and only twenty-seven (fifteen percent) discussed the WOTUS Rule. More comments focused on pre-Obama environmental regulations under the Clean Air Act: thirty-eight comments (twenty-two percent) identified National Ambient Air Quality Standards (NAAQS)<sup>34</sup> permitting and thirty-six comments (twenty-one percent) discussed New Source Review (NSR).<sup>35</sup> The graph below lists the number of comments in the Commerce docket that discussed various provisions and programs required by statutes administered by EPA as in need of regulatory reform.

GRAPH 3. RULES THAT RAISED CONCERN:  
IMPACT OF FEDERAL REGULATIONS ON DOMESTIC MANUFACTURING  
DOC-2017-0001-0001 (N=170)



The Commerce docket was the Trump administration's first effort to gather data concerning regulatory reform.<sup>36</sup> The docket

32. Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the Waters of the United States Rule, 82 Fed. Reg. 12,497 (Mar. 3, 2017).

33. Exec. Order No. 13783, 82 Fed. Reg. 16,093 (Mar. 31, 2017).

34. See National Ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 61,144 (Oct. 17, 2006) (to be codified at 40 C.F.R. pt. 50).

35. See EPA, NEW SOURCE REVIEW (NSR) PERMITTING, <https://www.epa.gov/nsr>.

36. Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing, 82 Fed. Reg. 8,667 (Jan. 30, 2017).

sought information directly from industry and asked the commenters to provide detail about their operations with submitted comments.<sup>37</sup> Certain themes emerged. Industry resoundly echoed concerns candidate Trump identified on the campaign trail regarding the need for reform the environmental permitting processes—especially air permits. Classic NAAQS<sup>38</sup> and NSR<sup>39</sup> air programs were described by numerous commenters as overly time consuming and expensive. Recent Obama-era programs, such as the Clean Power Plan, WOTUS, and renewed efforts in EPA’s Integrated Risk Information System (IRIS) mandated by Obama-era revisions to the Toxic Substances Control Act (TSCA)<sup>40</sup> all received significantly less discussion.

## II. EXECUTIVE ORDER 13771

On January 30, 2017, President Trump signed Executive Order 13771 entitled *Reducing Regulation and Controlling Regulatory Costs*,<sup>41</sup> fulfilling his campaign promise to reform the regulatory process. By signing E.O. 13771, the Trump administration officially declared that regulatory reform was “essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations.”<sup>42</sup> E.O. 13771 established two critical components. First, E.O. 13771 required federal agencies to terminate two regulations for every one regulation newly implemented.<sup>43</sup> Second, E.O. 13771 mandated that the net cost of a new federal regulation must be zero dollars.<sup>44</sup> The mandate began immediately. As such, even in President Trump’s first calendar year in office, the total incremental costs of all new regulations for fiscal year 2017, including repealed regulations, were required to not exceed zero.<sup>45</sup> In calculating net regulatory costs, agencies were allowed to include regulations repealed by Congress under the Congressional Review Act.<sup>46</sup>

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37. *Id.*

38. *See* National Ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 61,144 (Oct. 17, 2006) (to be codified at 40 C.F.R. pt. 50).

39. *See* EPA, NEW SOURCE REVIEW (NSR) PERMITTING, <https://www.epa.gov/nsr>.

40. *See* EPA, INTEGRATED RISK INFORMATION SYSTEM, <https://www.epa.gov/iris>.

41. Exec. Order No. 13771, 82 Fed. Reg. 9,339 (Feb. 3, 2017).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *See also* 5 U.S.C. § 801(b)(2). The Congressional Review Act (CRA) was enacted as Subtitle E of the Republican Contract with America Advancement Act of 1996 (Pub. L. No. 104–121). It was signed into law by President Bill Clinton on March 29, 1996.

From a procedural standpoint, E.O. 13771 added new dictates for the Office of Budget Management (OMB). After E.O. 13771, OMB was required to identify annually the total amount of incremental costs that would be allowed for each federal agency when issuing new regulations and repealing regulations for the next fiscal year.<sup>47</sup> After OMB sets the incremental cost allowance, federal agencies cannot exceed that amount.<sup>48</sup>

Although new incremental costs associated with new regulations must be “offset by the elimination of existing costs associated with at least two prior regulations,”<sup>49</sup> federal agencies eliminating existing costs associated with prior regulations must do so in accordance with the Administrative Procedure Act and other applicable law.<sup>50</sup> Hence, both the proposed new regulation and the existing regulations to be repealed must go through public notice and comment. Overall, this component of E.O. 13771 makes it extremely difficult to promulgate new regulations. Rather than just evaluating and developing one set of regulations, any federal agency developing a new regulation must simultaneously detail and justify why the other two unrelated regulations must be removed. The agency must project and calculate costs to industry for all three regulations and ensure that there are no net costs to industry. Long and short-term health benefits to the public (including potential cost savings to Medicare and Medicaid through adverse health effects avoided)<sup>51</sup> are not considered in the economic calculation mandated by OMB pursuant to E.O. 13771.<sup>52</sup>

E.O. 13771 required the OMB Director to develop guidance for federal agencies that would:

- Standardize the measurement and estimation of regulatory costs;

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47. Exec. Order No. 13771, 82 Fed. Reg. 9,339, 9,340 (Feb. 3, 2017).

48. *Id.* For purposes offsetting cost allocation, the OMB Director has discretion to set the total incremental cost allowance in a manner that allows an increase or requires a reduction in total regulatory cost. Once OMB has set the total allowable incremental costs of regulations for each agency for the budget year, the head of each federal agency must identify regulations that increase incremental cost, the offsetting regulations, and the agency’s best approximation of the total costs or savings associated new or repealed regulations. 82 Fed. Reg. at 9,339.

49. *Id.*

50. *Id.*

51. For discussion of valuation of cost savings due to air pollution controls, see EPA, BENEFITS AND COSTS OF THE CLEAN AIR ACT 1990-2020, THE SECOND PROSPECTIVE STUDY (April 2011), <https://www.epa.gov/clean-air-act-overview/benefits-and-costs-clean-air-act-1990-020-second-prospective-study>. See also S. Scott Voorhees et al., *Cost-Benefit Analysis Methods for Assessing Air Pollution Control Programs in Urban Environments—A Review*, 6 ENVTL. HEALTH & PREVENTIVE MEDICINE 63 (2001); Ben H. Carpenter et al., *Health Costs of Air Pollution: a Study of Hospitalization Costs*, 69 AMERICAN J. PUB. HEALTH 1232 (1979).

52. Exec. Order No. 13771, 82 Fed. Reg. 9,339, 9,340 (Feb. 3, 2017).

- Create standards for determining
  - that which qualifies as new and offsetting regulations; and
  - the costs of existing regulations that are considered for elimination;
- Create processes for accounting for costs in different fiscal years;
- Develop methods to oversee the issuance of rules with costs offset by savings at different times or different agencies; and
- State what emergencies and other circumstances might justify individual waivers from the dictates of E.O. 13771.<sup>53</sup>

Trump's directive only carved out two general exceptions to the two-for-one dictate. First, E.O. 13771 would not apply if the new regulation was required by existing law.<sup>54</sup> Second, E.O. 13771 also would not apply if the OMB Director made an exception in writing.<sup>55</sup>

### III. INTERIM GUIDANCE IMPLEMENTING E.O. 13771

Three days after signing E.O. 13771, on February 2, 2017, President Trump signed an interim guidance that theoretically invited public comment, but in fact allowed the public only eight days to do so.<sup>56</sup> The guidance reiterated the overarching goal of reform was to identify and repeal outdated, ineffective, or unnecessary regulatory actions. The mandate that federal agencies issue two deregulatory actions for each significant new regulatory action that imposed costs was to ensure "the prudent management and control of regulatory costs imposed on society by agencies attempting to achieve regulatory benefits"<sup>57</sup> in a manner similar to fiscal spending caps.<sup>58</sup>

The interim guidance clarified that E.O. 13771's two-for-one requirement defined "significant" as it had been historically defined

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53. *Id.*

54. *Id.*

55. *Id.*

56. Memorandum for: Regulatory Policy Officers at Exec. Dep'ts and Agencies and Managing and Exec. Dirs. of Certain Agencies and Comm'ns (2017), <https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-30-2017>.

57. *Id.* ("The regulatory cost cap has no effect on the requirements of E.O. 12866 or the consideration of regulatory benefits in making regulatory decisions.")

58. *Id.*

beginning with President Bill Clinton in 1993 with E.O. 12866.<sup>59</sup> For purposes of effectuating E.O. 13771, savings from the two deregulatory actions must fully offset the costs of the new significant regulatory action.<sup>60</sup> Costs are measured as “the opportunity cost to society” as defined in OMB Circular A-4.<sup>61</sup> The E.O. 13777 mandate included advance notice of proposed rulemakings issued before President Trump took office.<sup>62</sup> The Trump administration dictated that the two-for-one requirement would begin on February 2, 2017, and apply to federal agencies planning significant regulatory actions on or before September 30, 2017.<sup>63</sup> For purposes of deregulation, however, the federal agencies were not limited to repealing “significant rules.” The emphasis was reducing cost to industry, regardless of whether the regulation was categorized as significant or not.<sup>64</sup> The implementing guidance explained that:

Any existing regulatory action that imposes costs and the repeal or revision of which will produce verifiable savings may qualify. Meaningful burden reduction through the repeal or streamlining of mandatory reporting, recordkeeping or disclosure requirements may also qualify.<sup>65</sup>

For example, in 2017, all fourteen Obama-era regulations overturned by Congress pursuant to the Congressional Review Act could be considered when calculating the offset to zero.<sup>66</sup>

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59. 58 Fed. Reg. 51,735 (Oct. 4, 1993).

60. *Cf.* MEMORANDUM: INTERIM GUIDANCE IMPLEMENTING SECTION 2 OF THE EXEC. ORDER OF JANUARY 30, 2017, TITLED “REDUCING REGULATION AND CONTROLLING REGULATORY COSTS” (2017), <https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-30-2017> (*citing* OMB Circular A-4).

61. *Id.* (*citing* OMB Circular A-4).

62. *Id.* For a discussion of Executive Order 12,866 see Elizabeth Glass Geltman et al., *Impact of Executive Order 13211 on Environmental Regulation: An Empirical Study*, 89 ENERGY POL’Y 302 (2016). See also Ted Gayer & W. Kip Viscusi, *Determining the Proper Scope of Climate Change Policy Benefits in US Regulatory Analyses: Domestic Versus Global Approaches*, 10 REV. ENV’T L. ECON. & POL’Y 245 (2016); Lisa A. Robinson et al., *Attention to Distribution in US Regulatory Analyses*, 10 REV. ENV’T L. ECON. & POL’Y 308 (2016); Cary Coglianese, *Optimizing Government for an Optimizing Economy*, (Univ. Pa. Law Sch. Inst. For Law & Econ. Research Paper No. 16-13), <https://ssrn.com/abstract=2789690>, reprinted in KAUFFMAN FOUNDATION, NEW ENTREPRENEURIAL GROWTH AGENDA (2016), <https://www.kauffman.org/neg/section-8#>.

63. MEMORANDUM FOR: REGULATORY POLICY OFFICERS AT EXEC. DEP’T’S AND AGENCIES AND MANAGING AND EXEC. DIRS. OF CERTAIN AGENCIES AND COMM’NS, (2017), [https://www.whitehouse.gov/sites/whitehouse.gov/files/briefing-room/presidential-actions/related-omb-material/eo\\_iterim\\_guidance\\_reducing\\_regulations\\_controlling\\_regulatory\\_costs.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/briefing-room/presidential-actions/related-omb-material/eo_iterim_guidance_reducing_regulations_controlling_regulatory_costs.pdf).

64. *See id.*

65. *Id.*

66. *Id.*; *cf. id.* at 5–6 (“In practice, many regulatory actions can both impose new requirements and remove or streamline existing requirements on the same regulated entities and within the same regulatory program. In this case, the agency must clearly identify the



Perhaps most significantly, federal agencies are required to confirm that they will continue to achieve their statutory missions even while undertaking massive deregulation<sup>67</sup> and massive cuts in funding.<sup>68</sup> The requirement to uphold environmental and health protection while reducing regulation (and maintain agency staff to enforce that which is left) strikes many as both arbitrary and unlikely.<sup>69</sup> Hence, the legal challenge alleging E.O. 13771 violates the U.S. Constitution's Take Care Clause requiring the President to "take care that the law shall be faithfully executed" as a core executive function.<sup>70</sup>

The interim guidance for E.O. 13771 set only one safety valve to ensure that regulatory reductions did not impede population health or adversely impact the environment. The guidance allowed federal agencies to proceed with the promulgation of regulations required to comply with an imminent statutory or judicial deadline even if the agency proposing the new regulations cannot identify offsetting regulatory actions.<sup>71</sup>

#### IV. OMB INTERIM GUIDANCE AND DOCKET REGARDING IMPLEMENTATION OF E.O. 13771

On February 2, 2017, OMB circulated the Office of Information and Regulatory Affairs' (OIRA's) interim guidance on implementing section 2 of E.O. 13771 to regulatory policy officers at federal

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specific provisions that are counted within the regulatory and deregulatory portion of the rules, and the costs and cost savings associated with each. The net cost impact (the difference between costs imposed and cost savings) of such rules will generally determine whether they are regulatory actions that need to be offset. Agencies, however, should avoid artificially bundling provisions that are not logically connected in a single regulatory action." ); *Cf. id.* at 6 ("Regulatory savings by a component in one agency can be used to offset a regulatory burden by a different component in that same agency."). For a discussion of the fourteen rules reversed pursuant to the CRA, see Eric Lipton & Jasmine C. Lee, *Which Obama-Era Rules Are Being Reversed in the Trump Era*, NY TIMES (May 18, 2017), <https://www.nytimes.com/interactive/2017/05/01/us/politics/trump-obama-regulations-reversed.html>.

67. See also MEMORANDUM FOR: REGULATORY POLICY OFFICERS AT EXEC. DEP'TS AND AGENCIES AND MANAGING AND EXEC. DIRS. OF CERTAIN AGENCIES AND COMM'NS, *supra* note 63, at 5-6.

68. For details on proposed budget cuts, see *President's Budget*, OFFICE OF MGMT. AND BUDGET, <https://www.whitehouse.gov/omb/budget/> (last visited Aug. 12, 2018).

69. *Cf. Public Citizen et al v. Trump*, No. 1:17-cv-00253, (D.D.C. Feb. 8, 2017), <http://www.citizen.org/documents/Complaint-Public-Citizen-NRDC-CWA-v-Donald-Trump.pdf> (accessed March 6, 2017).

70. *Id.*

71. INTERIM GUIDANCE IMPLEMENTING SECTION 2 OF THE EXECUTIVE ORDER OF JANUARY 30, 2017, TITLED "REDUCING REGULATION AND CONTROLLING REGULATORY COSTS (Feb. 02, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-30-2017> (accessed March 6, 2017).

agencies and commissions.<sup>72</sup> The initial circulated draft was never published in the Federal Register.<sup>73</sup>

A month later, on March 8, 2017, OMB opened a docket to post the draft guidance and the fifty-one comments OMB had received on that draft guidance.<sup>74</sup> The posted comments represented a sampling from academia, industry, and NGOs focusing on environmental, public health and regulatory affairs. The table below lists stakeholders that submitted comments to docket OMB-2017-0002.

TABLE 1. COMMENTERS FOR OMB-2017-0002

| Category                       | Number | Comment Writers   |
|--------------------------------|--------|---|
| Academia                       | 8      | Center for Regulatory Effectiveness<br>Mercatus Center at George Mason University<br>Yale School of Forestry & Environmental Studies<br>GW Regulatory Studies Center<br>Center for Food Safety<br>Yale University<br>Vassar College<br>American University  |
| Anonymous                      | 4      |   |
| Environmental and Occupational | 5      | Earthjustice<br>Ocean Conservancy<br>National Council for Occupational Safety and Health<br>Sierra Club Environmental Law Program<br>Environmental Defense Fund   |
| Industry                       | 15     | American Bakers Association<br>Agri-Pulse Communications<br>American Forest and Paper Association<br>Food Marketing Institute<br>American Petroleum Institute<br>National Rural Electric Cooperative Association<br>Policy Navigation Group<br>Pareto Policy Solutions<br>Air Permitting Forum<br>OFW Law<br>Technosoftdata.com<br>Shell Exploration & Production Company<br>Florida Municipal Electric Association |

72. Memorandum for: Regulatory Policy Officers at Exec. Dep'ts and Agencies and Managing and Exec. Dir. of Certain Agencies and Comm'ns (2017), <https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-30-2017>.

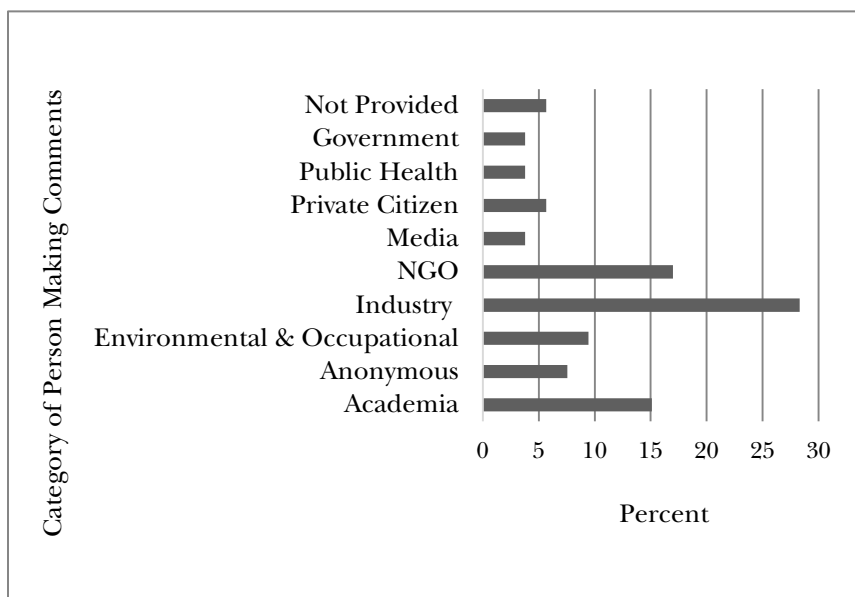
73. Docket ID: OMB-2017-0002, *Interim Guidance Implementing Section 2 of Executive Order 13771, Titled "Reducing Regulation and Controlling Regulatory Costs"* (Mar. 8, 2017), <https://www.regulations.gov/docket?D=OMB-2017-0002>. No instructions on how the public could contribute comments accompanied opening of the OMB docket.

74. *Id.*

|                 |   |  |
|-----------------|---|--|
|                 |   | National Association of Home Builders<br>Commercial Drone Alliance   |
| NGO             | 9 | Union of Concerned Scientists<br>National Low Income Housing Coalition<br>Institute of Policy Integrity<br>Sportsmen's Alliance Foundation<br>Regulatory Checkbook<br>American Council for an Energy-Efficient Economy<br>Public Citizen<br>Center for Progressive Reform<br>Sportsmen's Alliance Foundation |
| Media           | 2 | National Journal<br>CNN  |
| Private Citizen | 3 | US Inventor  |
| Public Health   | 2 | American Heart Association<br>Healthcare Distribution Alliance   |
| Government      | 2 | County of Santa Clara<br>Better Regulation Unit, Germany   |

While most comments came from industry, there was sizable representation from a wide variety of groups, such as media, public health organizations, environmental groups, and other NGOs. The chart below depicts the distribution of comments by type of group as of August 6, 2018:

GRAPH 4. WHO MADE COMMENTS TO OMB-2017-0002 DOCKET?



The guidance was greeted with skepticism from public health and environmental groups who feared that deregulation would jeopardize public health and safety. For example, Andrew Rosenberg of the Union of Concerned Scientists said,

OIRA's interim guidance attempts to find a way to implement an unlawful order from the Trump administration that will derail much of the important work being done at our federal agencies to protect the air we breathe, water we drink, food we eat, and environment we inhabit.<sup>75</sup>

According to Rosenberg, "the executive order also relies heavily on using cost-benefit analysis that favors the inclusion of costs to the regulated industry without a fair consideration of the social costs of removing a particular regulation."<sup>76</sup>

Environmental groups also objected to both the executive order and efforts to implement it. For example, the Sierra Club asserted that both the Executive Order and the Interim Guidance were unlawful and arbitrary and, hence, should be rescinded.<sup>77</sup> The Sierra Club argued that the President

lack[ed] the authority to overrule the will of Congress—as expressed in the numerous statutes directing agencies to engage in regulation—by directing agencies to repeal existing regulations every time an agency proposes to promulgate a new regulation."<sup>78</sup>

The Sierra Club further argued that the President "lack[ed] the authority to overrule the will of Congress by imposing a cost netting requirement across regulations that lacks any basis in statute."<sup>79</sup> Since the final guidance seeks to effectuate, as it argued, an

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75. Union of Concerned Scientists, Comment on Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs" at 4 (Feb. 10, 2017), <https://www.regulations.gov/document?D=OMB-2017-0002-0041>.

76. *Id.* at 3.

77. Sierra Club, Comment on Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs" at 4 (Feb. 10, 2017), <https://www.regulations.gov/document?D=OMB-2017-0002-0015>. ("Agency regulation is a cornerstone of modern society. Regulations improve the quality of our lives by promoting public safety, protecting public health, safeguarding consumer interests, and improving environment quality. They can be promulgated only where authorized by statute. They undergo rigorous public review and, where consistent with their legislative authorization, cost-consideration by OMB prior to promulgation, creating net positive benefits to society. The Executive Order ignores these realities, instead focusing exclusively and arbitrarily on the costs they impose.")

78. *Id.*

79. *Id.*

unlawful executive order, the Sierra Club concluded that the guidance was also unlawful and arbitrary and should be rescinded.<sup>80</sup>

Public health organizations largely echoed the concerns of environmental groups. For example, the American Heart Association, the American Lung Association, and the American Public Health Association submitted a joint comment stating that “improving the system is a commendable goal, but, unfortunately, the Executive Order misses that mark by a wide margin.”<sup>81</sup> The chief concern raised by public health groups was that federal agencies would be required to eliminate regulations, even if the regulations identified for repeal included ongoing lifesaving, disease-preventing public health protections.<sup>82</sup> The public health groups also worried that E.O. 13771 could prevent agencies from issuing important, new disease-preventing, lifesaving protections if agencies could not identify deregulatory actions that would fully offset costs to business.<sup>83</sup> Finally, the health groups indicated alarm that the executive order would add significant additional delays in the already lengthy and cumbersome regulatory process.<sup>84</sup> Thus, public health groups also urged the Trump administration to revoke both Executive Order 13771 and all implementing guidance.<sup>85</sup>

On the other hand, as indicated above, industry generally supported both E.O. 13771 and other deregulation efforts [by the

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80. *Id.*

81. American Heart Association, the American Lung Association and the American Public Health Association, Comment on Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled “Reducing Regulation and Controlling Regulatory Costs” at 1 (Feb. 10, 2017), <https://www.regulations.gov/document?D=OMB-2017-0002-0025>.

82. *Id.*

83. *Id.*

84. *Id.* The group explained:

An efficient and effective regulatory system remains critical to enforcing the laws the Congress put in place to safeguard health. These laws, including the Clean Air Act, the Clean Water Act and the Tobacco Control Act, must have regulations in place to ensure that the intentions of Congress to protect the nation’s health can be met . . . .

Our organizations are very troubled that this Executive Order ignores the public health and other benefits that come from federal rulemaking. Many of these regulations would eliminate or greatly reduce on-going costs to human health and society, including premature deaths, medical care, hospital stays, onset of diseases and days missed at work and school. These regulations provide very real, measurable economic benefits to our nation’s public health that historically far outweigh the costs . . . .

In addition, the Executive Order overlooks that major rules undergo a thorough cost-benefit analysis before they are finalized. Those are required under Executive Order 12866 and Executive Order 13563. Analyses from administrations of both political parties have consistently found far greater economic benefits from federal regulations than compliance costs.

85. *Id.*

Trump administration. Industry sentiment uniformly argued that, over the years, regulations had multiplied exponentially and that it was expensive and difficult to understand, let alone comply with, all the requirements necessary to stay in business.<sup>86</sup> Still, however, industry comments were not unbridled in support of the two-for-one plan. For example, Shell Exploration & Production Company began its comment by welcoming “the acknowledgement that the U.S. regulatory state has reached a point which requires attention.”<sup>87</sup> Shell stated that

While many regulations and regulatory structures are necessary and add value to the economy, these mechanisms can risk misuse and misapplication wherever administrative agencies impose major costs upon the economy without properly justifying such action or even considering the costs, burdens, and unintended consequences.”<sup>88</sup>

Shell pointed out that many American presidents had made efforts to simplify regulations and make regulations more user-friendly to industry.<sup>89</sup> Shell’s opinion was that prior efforts did not work because the government had not applied deregulatory dictates across all agencies.<sup>90</sup>

Notwithstanding the general tenor of approval, Shell stated certain concerns with E.O. 13771 as a directive. Shell advocated that E.O. 13771 should *not* include regulations, guidance, or policy statements clarifying, streamlining, or imposing *de minimis* or no direct and indirect costs on regulated industry because such “economically beneficial efforts must not be unintentionally frustrated.”<sup>91</sup> Shell went on to say “careful consideration must be given when deciding how and whether to apply the [E.O.] to ‘enabling’ regulation,”<sup>92</sup> which Shell defined as a regulatory action or interpretive document needed before industry can begin compliance.<sup>93</sup> The company explained that since the economic baseline for the activity is zero absent enabling regulations, “there will be cases where even though the regulation imposes costs, the net gains to society would necessarily eclipse those costs since the

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86. See, e.g., Shell, Comment on Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled “Reducing Regulation and Controlling Regulatory Costs” (Feb. 10, 2017), <https://www.regulations.gov/document?D=OMB-2017-0002-0050>.

87. *Id.*

88. *Id.*

89. *See id.*

90. *See id.*

91. *Id.*

92. *Id.*

93. *Id.*

enabling regulation would be the mechanism that allows the activity to occur.”<sup>94</sup> In such cases, Shell suggested that “enabling regulation should simply be subjected to Executive Order 12866 to ensure such net gains are realized, and, more importantly, to ensure the least burdensome and most narrowly tailored enabling regulatory action is selected.”<sup>95</sup>

Shell concluded its comment with the suggestion that OIRA should commit to a review of E.O. 13771 one year from implementation “to consider any unintended consequences and to seek comment from impacted and benefited entities.”<sup>96</sup> Shell charged that in its one year review of E.O. 13771, “OIRA should evaluate the relative efficacy and functionality, as intended versus applied, of the cost and burden reduction effort.”<sup>97</sup> The company suggested that the review “should allow OIRA to make refinements that guard against additional unintended consequences to improve the overall effectiveness of the effort to reduce regulatory burdens.”<sup>98</sup>

Shell’s suggestion to conduct a one year review of the unintended effects of E.O. 13771 is well founded. While there is general agreement amongst industry that regulations—and environmental regulations in particular—are overly complicated and that compliance can be unreasonably expensive, there was also general agreement amongst commenting individuals that environmental regulation by EPA is important to protect environmental determinants of health. Moreover, regulation provides a certain stability and uniform playing field for business. Without regulation, industry is more open to tort liability. Regulation can provide a “permit shield” from tort liability.<sup>99</sup> That shield is particularly beneficial to large industry who, by virtue of deep pockets, are more vulnerable to lawsuits. Regulation often levels the playing field by requiring all industry—

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94. *Id.*

95. *Id.* E.O. 12866, entitled “Regulatory Planning and Review,” was issued by President Clinton on September 30, 1993. 58 Fed. Reg. 51,785. The order:

- Established the process for OIRA to review agency draft and proposed final regulatory actions;
- Defined “significant regulatory actions;”
- Mandated that OIRA conduct a review before those took effect;
- Required an analysis of the costs and benefits of proposed rules; and
- Allowed action only when benefits justify the costs.

96. *See supra* note 77.

97. *Id.*

98. *Id.*

99. For a discussion of permit shields see Douglas Henderson et al., “*The Clean Water Act Permit Shield-Recent Battles*” 29 NAT. RESOURCES & ENV’T 56 (2014); Stephanie Rich, “*Troubled Water: An Examination of the NPDES Permit Shield*,” 33 PACE ENVTL. L. REV. 250 (2015).

whether large or small—to comply with basic environmental rules that protect both human health and the natural environment.

#### V. E.O.13777: TASK FORCES AND REGULATORY REFORM OFFICERS (RRO)

On February 24, 2017, Trump signed E.O. 13777, which explained the enforcement mechanism for E.O. 13771.<sup>100</sup> E.O. 13777 gave federal agencies sixty days to designate an agency official as its “Regulatory Reform Officer” (RRO) to oversee the implementation of President Trump’s regulatory reform initiatives.<sup>101</sup> The appointed RRO was required to make periodic reports on means to terminate agency programs and activities as a result of the regulatory review.<sup>102</sup>

Federal agencies were also directed to create a Regulatory Reform Task Force to be chaired by the agency RRO.<sup>103</sup> The Task Force had ninety days to evaluate and present a report on existing regulations, as well as make recommendations on regulations and programs to be repealed, replaced, or modified.<sup>104</sup> In particular, the Task Force was required to identify regulations that:

- Eliminate jobs or inhibit job creation;
- Are outdated, unnecessary, or ineffective;
- Impose costs that exceed benefits;
- Create a serious inconsistency or otherwise interfere with Trump administration regulatory reform initiatives and policies;
- Rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or
- Derive from or implement Executive Orders or other presidential directives that the Trump administration rescinded or substantially modified.<sup>105</sup>

Pursuant to E.O. 13777, the priority for each federal agency Task Force was identifying outdated, unnecessary, or ineffective

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100. Exec. Order No. 13777, 82 Fed. Reg. 12,285 (Feb. 24, 2017).

101. *Id.*

102. *Id.*

103. 82 Fed. Reg. at 12,285–86. The Director of OMB can waive provisions of E.O. 13776 as they apply to any federal agency but OMB must publish a list of waived agencies every three months. *Id.* at 12,286.

104. *Id.* at 12,286.

105. *Id.*



regulation.<sup>106</sup> Task Forces were directed to seek input and assistance from entities significantly affected by Federal regulations. Affected stakeholders were defined as including state, local, and tribal governments; small businesses; consumers; non-governmental organizations; and trade associations.<sup>107</sup>

In response to E.O. 13777, federal agencies established dockets seeking public comment of their respective regulatory reform task forces throughout 2017. The chart below depicts the activity in the respective agency dockets.

TABLE 2. DOCKETS ESTABLISHED FOR PUBLIC COMMENT IN 2017

| Date | Agency  | Docket                   | Comments Received | Comments Posted |
|------|---|--------------------------|-------------------|-----------------|
| 3/17 | Department of Commerce                          | DOC-2017-0001            | 176               | 171             |
| 5/17 | Environmental Protection Agency                 | EPA-HQ-OA-2017-0190      | 468,503           | 63,422          |
| 6/17 | Department of Interior                          | DOI-2017-0003            | 233               | 233             |
| 6/17 | U.S. Coast Guard                                | USCG-2017-0480-0001      | 222               | 152             |
| 6/17 | Department of Justice                           | DOJ-OLP-2017-0007-0001   | 31                | 31              |
| 6/17 | Department of Education                         | ED-2017-OS-0074-0001     | 16,489            | 16,464          |
| 6/17 | Federal Emergency Management Administration     | FEMA-2017-0023           | 25                | 24              |
| 7/17 | U.S. Department of Agriculture                  | USDA-2017-0002           | 288               | 284             |
| 7/17 | National Oceanic and Atmospheric Administration | NOAA-NMFS-2017-0067      | 7,800             | 168             |
| 7/17 | National Oceanic and Atmospheric Administration | NOAA-NMFS-2017-0054-0001 | 10                | 8               |
| 7/17 | Department of Energy                            | DOE-HQ-2017-0016         | 54                | 54              |
| 7/17 | Army Corps of Engineers                         | COE-2017-0004-0001       | 184               | 158             |
| 8/17 | U.S. Department of State                        | DOS-2017-0030-0001       | 9                 | 9               |
| 9/17 | United States Customs and Border Protection     | USCBP-2017-0035          | 74                | 64              |

106. *Id.*

107. *Id.*

|       |                                      |                        |       |       |
|-------|--------------------------------------|------------------------|-------|-------|
| 9/17  | Pension Benefit Guaranty Corporation | PBGC-2017-0009         | 40    | 40    |
| 10/17 | Department of Transportation         | DOT-OST-2017-0069-0001 | 2,836 | 2,838 |
| 10/17 | Department of Defense                | DOD-2017-OS-0059       | 65    | 58    |
| 11/17 | National Credit Union Administration | NCUA-2017-0032-0001    | 0     | 0     |
| 12/17 | General Services Administration      | GSA-GSA-2017-0002      | 264   | 255   |

While most dockets opened by federal agencies concerning the created Task Forces received between about 10 and 250 comments, public interest in efforts to deregulate the environment was greater than any other regulatory arena. EPA received dramatically more public comments concerning its Task Force than any other agency. EPA reported receiving 468,503 public comments, of which 63,422 were posted to the EPA RRO docket. The difference was attributable to mass mailing campaigns—mostly from environmental NGOs. The National Oceanic and Atmospheric Administration (NOAA), which among other things tracks evidence and the impact of climate change, was also the subject of mass mailing campaigns. NOAA received 7,800 comments, of which 168 were posted. The only other department receiving vigorous public participation was the Department of Education, receiving 16,489 public comments.

#### VI. E.O. 13778:

##### REPEAL AND REPLACEMENT OF WOTUS

There has been debate for many years over the extent to which EPA and the Army Corps of Engineers can regulate activities in wetlands pursuant to the Clean Water Act.<sup>108</sup> In 2015, the Obama administration sought to resolve the debate by promulgating the “Waters of the United States” Rule.<sup>109</sup> The WOTUS Rule was an important polarizing point of debate during the 2016 presidential campaign.<sup>110</sup>

108. For a historical discussion, see Elizabeth Ann Glass Geltman, *Regulation of Non-Adjacent Wetlands Under Section 404 of the Clean Water Act*, 23 NEW ENG. L. REV. 615 (1988).

109. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328, scattered parts of 40 C.F.R.).

110. See Elizabeth Glass Geltman, *The New Anti-Federalism: Late Term Obama Environmental Regulations and the Rise of Trump*, 93 N.D. L. Rev. 243 (2018).

On February 28, 2017, President Trump issued Executive Order 13778, entitled “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ (‘WOTUS’) Rule.”<sup>111</sup> In E.O. 13778, President Trump declared that

it is in the national interest to ensure that the Nation’s navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.<sup>112</sup>

Accordingly, the President dictated review of the final Obama-era WOTUS Rule<sup>113</sup> promulgated jointly by the U.S. Army Corps of Engineers and EPA. After review and consultation, the two agencies were instructed to publish a proposed rule either rescinding or revising the WOTUS rule.<sup>114</sup>

Following this directive, on March 6, 2017, EPA published a notice of intention to review and rescind or revise the Clean Water Rule (CWA) in the Federal Register,<sup>115</sup> consistent with President Trump’s executive orders E.O. 13771, E.O. 13777, and E.O. 13778.<sup>116</sup> The notice marked the beginning of a formal rulemaking proceeding because “[i]t is important that stakeholders and the public at large have certainty as to how the CWA applies to their activities.”<sup>117</sup>

From a legal point of view, E.O. 13778 and the accompanying EPA notice are significant since they carve out the principle that “[a]gencies have inherent authority to reconsider past decisions and to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation.”<sup>118</sup> The Trump administration explained that “a revised decision need not be based upon a change of facts or circumstances.”<sup>119</sup> Rather, revised rulemakings can be based “on a reevaluation of which policy would

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111. Exec. Order No. 13778, 82 Fed. Reg. 12,497 (Mar. 3, 2017).

112. *Id.*

113. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328 scattered parts of 40 C.F.R.).

114. Exec. Order No. 13778.

115. Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12,532 (Mar. 6, 2017) (to be codified at 33 C.F.R. pt. 328, scattered parts of 40 C.F.R.).

116. *Id.*

117. *Id.*

118. *Id.* (first citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); then citing *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)).

119. Notice of Intent, 82 Fed. Reg. at 12,532.

be better in light of the facts.”<sup>120</sup> Such revisions, the Trump administration asserted, were “well within an agency’s discretion.”<sup>121</sup> Moreover, the Trump administration’s WOTUS proposal posited that “[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”<sup>122</sup>

On June 27, 2017, the Army Corps of Engineers and EPA issued a pre-publication version of the new Trump administration version of the WOTUS Rule and established Docket No. EPA-HQ-OW-2017-0203 on Regulations.gov to collect public comments during a thirty-day comment period.<sup>123</sup> After objection, the initial thirty-day comment period was extended.<sup>124</sup> The WOTUS docket closed on September 27, 2017. On September 28, 2017, EPA reported that they received 206,473 comments, 9,703 of which were posted on the docket.<sup>125</sup> The difference was attributable to mass mailings with duplicative content. Most of the comments contained only a few lines or paragraphs, and almost none cited any legal or scientific authority for the commenters’ assertions.

EPA and the Army Corps of Engineers proposed a second WOTUS Rule on November 16, 2017, that would delay the effective date of the WOTUS Rule promulgated by the Obama Administration until at least 2020.<sup>126</sup> Although the initial Obama administration’s WOTUS Rule was meant to take effect on August 28, 2015, the rule was stayed in thirteen states by a North Dakota district court. A Sixth Circuit order expanded the stay wide.<sup>127</sup> Ten states (New York, Massachusetts, California, Hawaii,

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120. *Id.* (citing *National Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1038, 1043 (D.C. Cir. 2012)).

121. *Id.*

122. *Id.* (quoting *Home Builders*, 682 F.3d at 1043 (citing *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part))).

123. Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (proposed July 27, 2017) (to be codified at 33 C.F.R. pt. 328, scattered parts of 40 C.F.R.).

124. See Definition of “Waters of the United States” – Pre-Proposal Outreach Comments, REGULATIONS.GOV, <https://www.regulations.gov/docket?D=EPA-HQ-OW-2017-0480> (“Comment Period Closed Nov. 28, 2017 11:59 PM ET”).

125. The difference of 206,473 comments was attributed to duplicate content from sixty-one different mass mail campaigns. The agency does not report how many duplicates corresponded with which campaigns. Most of the comments found in the docket were from private citizens. Four thousand and eighty-seven comments were signed and another 5,179 were submitted anonymously.

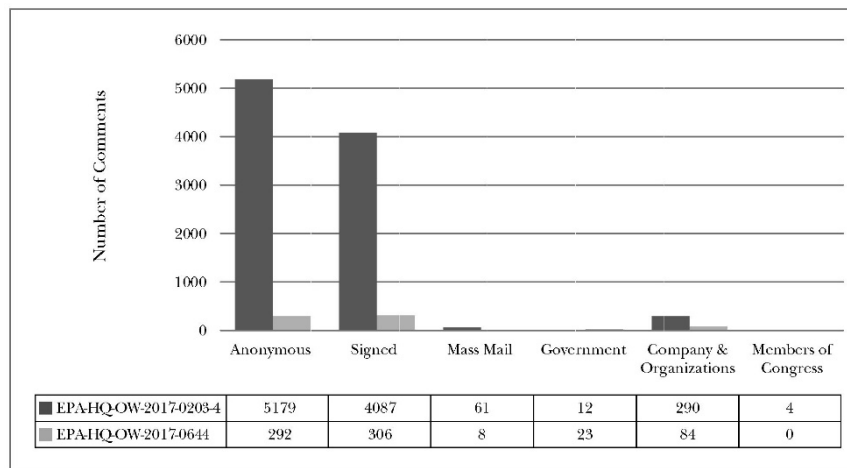
126. See Press Release, EPA, EPA and the Army Propose to Amend the Effective Date of the 2015 Rule Defining “Waters of the United States,” (Nov. 16, 2017), <https://www.epa.gov/newsreleases/epa-and-army-propose-amend-effective-date-2015-rule-defining-waters-united-states>.

127. Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 82 Fed. Reg. 55542 (proposed Nov. 22, 2017) (to be codified at 33

Maine, Maryland, Oregon, Rhode Island, Vermont, and Washington) and the District of Columbia objected to the proposed further delay in WOTUS implementation in comments during the 2017 comment period.<sup>128</sup>

Public participation in the second phase of the Trump administration's efforts to dismantle the WOTUS Rule was less robust than during the first announcement that the rule would be revised or rescinded. While about 9,703 comments were posted in phase one, only about 702 comments were posted in the second phase. Whereas sixty-one mass-mailing campaigns were organized in the first notice and comment period, only eight groups mobilized to address the second proposal: Brewers for Clean Water, 350 Connecticut et al., Physicians for Social Responsibility, Clean Water Action, and four anonymous groups. The chart below compares the level and distribution of public response to the two Trump administration proposals to revise or repeal WOTUS:

GRAPH 5. COMMENTS FILED DURING NOTICE AND COMMENT FOR THE PROPOSED WOTUS RULES



In January 2018, the Supreme Court held that challenges to the WOTUS Rule must be filed in federal district courts,<sup>129</sup> which fur-

C.F.R. pt. 328 scattered parts of 40 C.F.R.); *see generally Waters of the U.S. Rule*, AMERICAN BAR ASSOCIATION, [https://www.americanbar.org/groups/environment\\_energy\\_resources/resources/wotus/wotus-rule.html](https://www.americanbar.org/groups/environment_energy_resources/resources/wotus/wotus-rule.html) (last visited Mar. 28, 2018).

128. Eric T. Schneiderman, Attorney General, New York et al., Comment Letter on EPA Proposed Rule: Definition of Waters of the United States-Addition of Applicability Date to 2015 Clean Water Rule (Dec. 13, 2017), [https://ag.ny.gov/sites/default/files/2017\\_03\\_31\\_petition\\_and\\_rules\\_final.pdf](https://ag.ny.gov/sites/default/files/2017_03_31_petition_and_rules_final.pdf).

129. Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617 (2018).

ther confused the status of EPA regulation of wetlands—the subject of the WOTUS Rule. On February 6, 2018, the Trump administration added an applicability date to the Obama administration’s 2015 WOTUS Rule declaring that the WOTUS Rule will not be implemented until February 6, 2020.<sup>130</sup> Five months later, on July 12, 2018, the Trump administration announced intent to repeal the 2015 WOTUS Rule completely and restore the definition of “waters of the United States” that existed prior to August 25, 2015.<sup>131</sup> On July 27, 2018<sup>132</sup> EPA and the Army Corps of Engineers clarified that the proposed Trump administration definition of “waters of the United States” would exclude prior converted cropland and waste treatment systems.<sup>133</sup> The summer 2018 proposal also clarified that the proposed definition would not restrict “the ability of States to protect waters within their boundaries by defining the scope of waters regulated under State law more broadly than the federal law definition.”<sup>134</sup> The comment period closed on the latest proposal for the WOTUS Rule in docket EPA-HQ-OW-2017-0203-15104 and COE-2017-0005-0004 on August 13, 2018. On August 16, 2018, the U.S. District Court of South Carolina held that the Trump administration violated the Administrative Procedures Act when it suspended the effective date of WOTUS rule for two years.<sup>135</sup>

## VII. E.O.13783: PROMOTING ENERGY POLICY

President Trump issued E.O.13783, entitled “Promoting Energy Independence and Economic Growth,” on March 28, 2017.<sup>136</sup> Pursuant to E.O. 13783, EPA began reviewing the Clean Power Plan on April 4, 2017.<sup>137</sup> On October 16, 2017, EPA announced repeal of the Clean Power Plan on the grounds that the regulation ex-

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130. Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5,200 (Feb. 6, 2018) (to be codified at 33 C.F.R. pt. 328, scattered parts of 40 C.F.R.).

131. Definition of “Waters of the United States”—Recodification of Preexisting Rule, 83 Fed. Reg. 32,227 (July 12, 2018) (to be codified at 33 C.F.R. pt. 328, scattered parts of 40 C.F.R.).

132. Definition of “Waters of the United States”—Recodification of Preexisting Rules, 82 Fed. Reg. 34,899 (July 27, 2017) (to be codified at 33 C.F.R. 328, scattered parts of 40 C.F.R.).

133. *Id.* at 34,902.

134. *Id.*

135. *S.C. Coastal Conservation League v. Pruitt*, No. 2-18-cv-330-DCN (D.S.C. Aug. 16, 2018), <https://casetext.com/case/sc-coastal-conservation-league-v-pruitt>.

136. Proclamation No. 13783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

137. Announcement of Review, 82 Fed. Reg. 16,329 (Apr. 4, 2017).

ceeds the statutory authority of section 111 of the Clean Air Act.<sup>138</sup> EPA established docket EPA-HQ-OAR-2017-0355 to allow public comment on the repeal.<sup>139</sup> Comments were initially due on December 15, 2017, but the commenting period was extended twice following public request.

EPA reported that, as of April 10, 2018, there were 566,978 comments about the Clean Air Act repeal.<sup>140</sup> Of those, 547,676 were the product of about ninety-three mass mailing campaigns. The sources of these campaigns were not always identified to EPA, but organizers included the American Lung Association,<sup>141</sup> Care2,<sup>142</sup> Environmental Defense Fund (EDF),<sup>143</sup> Empower Kentucky,<sup>144</sup> Physicians for Social Responsibility, League of Conservation Voters (LCV),<sup>145</sup> National Parks Conservation Association (NPCA),<sup>146</sup> National Wildlife Federation (NWF),<sup>147</sup> World Wildlife Fund.<sup>148</sup> Each of these groups strongly opposed repealing the Clean Power Plan, expressed support for EPA efforts to regulate carbon emissions, and supported even stronger regulations to reduce the impact of climate change. Comments organized by television personality Samantha Bee echoed the concerns of the environmentalist and public health campaigns.<sup>149</sup>

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138. Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035 (Oct. 16, 2017).

139. *Id.*

140. Of those, 5,867 were posted. The balance of 149,988 reflected duplicate mailing that were the result of thirty mass mailing campaigns.

141. American Lung Association in California et al., Comments on the Proposed Repeal of the Clean Power Plan Hearing (Apr. 30, 2018), <http://www.lung.org/local-content/california/documents/comments-on-the-proposed.pdf>.

142. Care2, Sample Comment Letter on the EPA Proposed Rule to Repeal the Clean Power Plan (Nov. 27, 2017), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-3763>.

143. EDF, Sample Comment Letter on the EPA Proposed Rule to Repeal the Clean Power Plan, <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-4921> (Dec. 8, 2017); EDF, Sample Comment Letter on the EPA Proposed Rule to Repeal the Clean Power Plan (Dec. 8, 2017), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-4922>.

144. Empower Kentucky, Sample Comment Letter on Proposed Rule to Repeal the Clean Power Plan (Dec. 8, 2017), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-4931>.

145. LCV, Sample Comment Letter on Proposed Rule to Repeal the Clean Power Plan (Oct. 31, 2017), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-0173>.

146. NPCA, Sample Comment Letter on Proposed Rule to Repeal the Clean Power Plan (Dec. 8, 2017), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-4930>.

147. NWF, Sample Comment Letter on Proposed Rule to Repeal the Clean Power Plan (Nov. 29, 2017), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-3860>.

148. World Wildlife Fund, Sample Comment Letter on Proposed Rule to Repeal the Clean Power Plan (Dec. 8, 2017), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-4920>.

149. Samantha Bee provided a template that read:

On the other side, comments organized by the Koch-funded<sup>150</sup> Americans for Prosperity<sup>151</sup> approved of the repeal. For example, right-leaning comments posted in the docket read:

I strongly support Administrator Pruitt's new proposed rule, EPA-HQ-OAR-2017-0355, to effectively repeal the Clean Power Plan and help rein in federal overreach by the Obama administration in the energy sector.

The CPP is a costly, bureaucratic program that will kill jobs and cost Americans billions in energy expenses if left in place. Americans like me depend on affordable, reliable, [sic] energy. The CPP must be repealed as soon as possible.

Please consider this an official comment for EPA's records.<sup>152</sup>

Citizen interest in the Clean Power Plan remained robust at the behest of thirteen organizing groups. By August 6, 2018, the number of comments submitted to the Clean Power Plan docket had nearly tripled: 1,343,546 comments were submitted, of which 20,674 were posted. Fifty-eight percent of the 20,674 comments posted before August 6, 2018 were anonymous. Of the thirty-seven percent signed by individuals, most contained very brief statements that read more like a vote for or against the proposed regulation rather than a legal or scientific reason for the agency to act. Only

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I oppose the repeal of the Clean Power Plan, as well as any other measures that will loosen its restrictions on pollution. I respectfully request you hold a public hearing on the rule change regarding the CPP.

The CPP protects our environment by limiting pollution from power plants, and in order to live healthy lives, we all require clean air and temperatures that can sustain our diverse ecosystem.

Please preserve the CPP so we can maintain the natural resources necessary to our health and survival. It will not be possible for our nation to prosper without a healthy climate.

Letter from Matthew Downing to Scott Pruitt, Director, Environmental Protection Agency (Oct. 26, 2017), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-2689>; Samantha Bee, Sample Comment Letter on Proposed Rule to Repeal the Clean Power Plan (Nov. 15, 2017), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-2689>. See also *Full Frontal with Samantha Bee: Hi, Scott Pruitt, This is Our Official Request for a Hearing*, YOUTUBE (Oct. 27, 2017), <https://www.youtube.com/watch?v=d5UHQQQHhyc> (discussing the Clean Power Plan and requesting public participation).

150. Laurie Bennett, *Tracking Koch Money and Americans for Prosperity*, FORBES (Mar. 31, 2012, 10:35 AM), <https://www.forbes.com/sites/lauriebennett/2012/03/31/tracking-koch-money-and-americans-for-prosperity>.

151. Americans for Prosperity, Comment Letter on Proposed Rule: Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (Nov. 16, 2017), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-2822>.

152. Email from Nicholas Toth to A-AND-R-DOCKET (Nov. 6, 2017), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-2822>.



one percent (only 299) comments were signed by a company or organization; most contained detailed explanations justifying the position asserted by the agency. One million, three hundred-thousand, four hundred and twenty-seven comments were submitted by the general public as part of thirteen mass mail campaigns. EPA proposed the Affordable Clean Energy (ACE) rule on August 21, 2018.<sup>153</sup> ACE would replace the 2015 Clean Power Plan and establish emission guidelines for states to develop plans to address greenhouse gas emissions from existing coal-fired power plants.<sup>154</sup>

### VIII. OMB FINAL RRO GUIDANCE

On April 6, 2017, OMB posted the final guidance circulated to regulatory officers at federal departments, agencies, and commissions to implement E.O. 13771.<sup>155</sup> OMB defined “E.O. 13771 regulatory action” consistent with past definitions of used to designate regulation as “significant.”<sup>156</sup> OMB determined that it would continue using regulatory standards established by President Bill Clinton in E.O. 12866,<sup>157</sup> which established that guidance documents could be considered significant regulatory action<sup>158</sup> if the action would have an annual effect of \$100 million or more on the economy or a sector of the economy, create a se-

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153. Environmental Protection Agency, Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations, Revisions to New Source Review Program (proposed Aug. 20, 2018) (to be codified at 40 C.F.R. pts. 51, 52, 60), [https://www.epa.gov/sites/production/files/2018-08/documents/frn-ace-proposal\\_8.20.2018.pdf](https://www.epa.gov/sites/production/files/2018-08/documents/frn-ace-proposal_8.20.2018.pdf).

154. *Id.* See also Proposal: Affordable Clean Energy (ACE) Rule, EPA, <https://www.epa.gov/stationary-sources-air-pollution/proposal-affordable-clean-energy-ace-rule> (last visited Aug. 30, 2018).

155. DOMINIC J. MANCINI, GUIDANCE IMPLEMENTING EXECUTIVE ORDER 13771, TITLED “REDUCING REGULATION AND CONTROLLING REGULATORY COSTS” (2017), <https://www.regulations.gov/document?D=OMB-2017-0002-0053>.

156. *Id.* at 3.

157. *Id.* As a general rule, E.O. 13771 does not change the dictates of E.O. 12866. E.O. 12866 will remain the primary governing E.O. regarding regulatory review and planning. *Id.* OMB explained:

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

*Id.* at 4.

158. Proclamation No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993), <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>. For a general discussion of E.O. 12866, see Elizabeth Glass Geltman et al., *Impact of Executive Order 13211 on Environmental Regulation: An Empirical Study*, 89 ENERGY POL’Y 302 (2016).

rious interagency inconsistency, materially impact entitlement programs, or raise novel legal issues or policy.<sup>159</sup> But the primary criteria for the Trump administration was cost. Finalized rule-makings are significant pursuant to E.O. 13771 if they “impose total costs greater than zero.”<sup>160</sup>

Since the essence of the Trump administration’s two-for-one deregulation is costs, OMB defined an “[E.O.] 13771 deregulatory action” as a federal agency action that is cost-neutral to industry. OMB expanded the concept of deregulatory actions beyond that used by the Clinton, Bush, and Obama administrations in E.O. 12866 and OMB’s *Final Bulletin on Good Guidance Practice*.<sup>161</sup> Deregulatory actions are evaluated by the Trump administration both to satisfy the provision to remove at least two existing regulations for each regulation issued and to evaluate the degree to which the action meets the total incremental cost allowance as it applies to industry.<sup>162</sup>

Deregulatory actions can take any form as long as they reduce costs to the regulated industry. They can be informally or formally negotiated rulemaking, guidance documents, or information collection requests that repeal or streamline recordkeeping, reporting, or disclosure requirements.<sup>163</sup> OMB was clear that, in deciding which regulations to repeal, federal agencies should look to data collected from each agency’s Regulatory Reform Task Force.<sup>164</sup> Federal agencies should consider and prioritize suggestions raised by stakeholders—especially those significantly affected by Federal regulations.<sup>165</sup> The Trump administration explained that agencies should prioritize deregulating where regulations eliminate jobs, inhibit job creation, are outdated, unnecessary, ineffective, impose costs that exceed benefits, are inconsistent, interfere with regulatory reform initiatives and policies, are inconsistent with federal appropriations, or are based on past Presidential directives or executive orders that President Trump repealed or modified.<sup>166</sup> Moreover, the deregulatory plan demanded prioritizing deregulatory actions that affect the same industry or locality—especially where the costs are likely to be incurred disproportionately by a certain industry or locality.<sup>167</sup>

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159. *Id.*

160. MANCINI, *supra* note 155.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

Under the new Trump administration formula for cost-benefit analysis, costs would continue to be estimated using the methods and concepts in OMB Circular A-4.<sup>168</sup> So “if medical cost savings due to safety regulations have historically been categorized as benefits rather than reduced costs, they should continue to be categorized as benefits for [E.O.] 13771 regulatory actions.”<sup>169</sup> A special carveout was, thus, created for medical cost savings depending on whether they had historically been characterized as benefits to society or as reduced costs. Only in the case where medical cost savings had been calculated by OMB as a cost saving measure would such costs be included in the regulatory reform formula articulated by the Trump administration. When calculating cost savings, “only those impacts that have been traditionally estimated as costs when taking a regulatory action should be counted as cost savings when taking an [E.O.] 13771 deregulatory action.”<sup>170</sup> Federal agencies can, however, bank deregulatory actions and cost saving within a year.<sup>171</sup>

OMB determined that all the Obama-era rules that the Trump administration withdraws qualify as E.O. 13771 repeal actions. Withdrawal of Obama regulations would not, however, qualify for the cost savings component of E.O. 13771, because industry had not incurred any costs as a result of the new Obama-era regulations since the rules had not yet been implemented or become effective.<sup>172</sup> OIRA stated that it would consider whether Obama-era actions vacated by a court would qualify as an E.O. 13771 deregulatory action on a case-by-case basis.<sup>173</sup>

OMB confirmed that E.O. 13771 does not apply to independent regulatory agencies, but encouraged the independent bodies to comply with the spirit of E.O. 13771.<sup>174</sup> Other federal agencies must submit exemption requests to OIRA prior to submitting exempt regulatory action to OMB for E.O. 12866 review or prior to publication (if the action was not subject to E.O. 12866 review).<sup>175</sup>

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168. *Id.*

169. *Id.* The agency said, “Identifying cost savings, such as fuel savings associated with energy efficiency investments, as benefits is a common accounting convention followed in OIRA’s reports to Congress on the benefits and costs of Federal regulations.”

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* Exempt regulations include, but are not limited, to:

- expressly exempt actions;
- emergency actions;
- statutorily or judicially required actions; and
- *de minimis* actions.

OMB stated that, as a general rule, E.O. 13771 would not change the dictates of the Clinton administration's E.O. 12866, and E.O. 12866 would remain the primary mechanism governing OMB regulatory review and planning.<sup>176</sup> OMB clarified that federal agencies should use best efforts to monetize both the effects of regulatory actions and deregulatory actions.<sup>177</sup> The bottom line is that, pursuant to E.O. 13771, each year agencies should have issued at least twice the number of deregulatory actions as new regulations. Just as significantly, the cost to industry of new regulations should be offset by deregulation.<sup>178</sup> Since any new regulation would require two deregulatory actions, OIRA will have substantial additional work. Hence, OMB warned that agencies must leave sufficient time for OIRA to complete E.O. 12866 review when undertaking regulatory and deregulatory actions.<sup>179</sup>

#### IX. EPA REGULATORY REFORM DOCKET

The Trump campaign consistently cited EPA as a dramatic example of the need for regulatory reform during the 2016 election.<sup>180</sup> EPA, under Scott Pruitt, began the deregulatory process quickly. EPA created a regulatory reform task force pursuant to E.O. 13777,<sup>181</sup> and, on April 13, 2017, the Agency opened a docket allowing about a month for public comment on "regulations that may be appropriate for repeal, replacement, or modification."<sup>182</sup> Response to EPA's request was robust, despite the short time allowed to file a comment.

This Part again used established principles of legal epidemiology to conduct policy surveillance.<sup>183</sup> The docket was indexed using the

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176. *Id.*

177. *Id.*; see also OMB Circular A-4.

178. *Id.*

179. *Id.*

180. For a detailed discussion, see Elizabeth Glass Geltman, *The New Anti-Federalism: Late Term Obama Environmental Regulations and the Rise of Trump*, 93 N.D. L. REV. 243 (2018).

181. 82 Fed. Reg. 17,793 (April 13, 2017), <https://www.regulations.gov/docket?D=EPA-HQ-OA-2017-0190>; see also SCOTT PRUIT, MEMORANDUM ON EXECUTIVE ORDER: ENFORCING THE REGULATORY REFORM AGENDA (2017), <https://www.epa.gov/laws-regulations/memorandum-executive-order-13777-enforcing-regulatory-reform-agenda>.

182. 82 Fed. Reg. 17,793 (April 13, 2017), <https://www.regulations.gov/docket?D=EPA-HQ-OA-2017-0190>.

183. For an explanation of how to conduct policy surveillance using principles of legal epidemiology, see David Presley, Thomas Reinstein, & Scott Burris, Resources for Policy Surveillance: A Report Prepared for the Centers for Disease Control and Prevention Public Health Law Program, SSRN 2567695 (2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2567695](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567695); David Presley & Scott Burris, A Scan of Existing 50 State Survey and Policy Surveillance Resources, SSRN 2523011 (2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2523011](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2523011); David Presley, et al., Creating Legal Data for Public Health

docket identification number assigned on Regulations.gov. Coders divided and evaluated the docket and then reviewed each other's work. The naïve coder selected random comments to be sure of agreement.<sup>184</sup> CAQDAS allowed auto-coding of key words and synonyms as a crosscheck. Once complete, the results were analyzed to identify patterns and themes.

As of June 10, 2017, the EPA docket had received 381,204 comments, 46,084 of which were posted publicly. The difference reflected duplicate or near-duplicate filings from mass mail campaigns. The table below provides a breakdown of who filed comments in EPA regulatory reform docket.

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Monitoring and Evaluation: Delphi Standards for Policy Surveillance, *J. OF L., MEDICINE & ETHICS*, 2015, at 27–31; Scott Burris, A Technical Guide for Policy Surveillance, Temple University Legal Studies Research Paper, 2014-34 (2014); Sarah Happy, Technical Standards for Policy Surveillance: Delphi Process and Technical Guide, 142nd APHA Annual Meeting and Exposition (Nov. 15–19, 2014), <https://apha.confex.com/apha/142am/webprogram/Paper309688.html>.

For other applications, see Elizabeth Glass Geltman, Shipping Fracking Wastes on the Ohio River: A Case Study in Effective Public Advocacy and How Citizen Groups Can Do Even Better, *10(5) Env'tl. Justice* 137-153 (2017); Elizabeth Glass Geltman, et al., Inquiry into the Impact of Bush's Executive Order 13211 on Environmental and Public Health Regulation, *28 FORDHAM ENVTL. L. J.* 200 (2016); Elizabeth Glass Geltman, Gunwant Gill, & Miriam Jovanovic, Impact of Executive Order 13211 on Environmental Regulation: An Empirical Study, *Energy Policy*, 2016, at 302–310; Elizabeth Glass Geltman, Gunwant Gill, and Miriam Jovanovic., Beyond baby steps: An empirical study of the impact of environmental justice executive order 12898. *39(3) Family & community health* 143-150 (2016); Elizabeth Glass Geltman, Regulation of Technologically Enhanced Naturally Occurring Radioactive Materials (TENORM) under State Law: How Effective Is it? What More Needs to Be Done?, 143rd APHA Annual Meeting and Exposition (October 31–November 4, 2015); Elizabeth Glass Geltman, 21 Years Later: Has Executive Order 12898 (entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations) Worked?, 143rd APHA Annual Meeting and Exposition (October 31–November 4, 2015); Elizabeth Glass Geltman, Policy Surveillance on the Impact of Bush's Executive Order 13211 (Requiring Preparation of a Statement of Energy Effects as a Condition to Federal Action) on Environmental and Public Health Policy, 143rd APHA Annual Meeting and Exposition (October 31–November 4, 2015).

184. For an explanation of the methods used to develop codes and conduct coding, see David Presley, et al., *Creating Legal Data for Public Health Monitoring and Evaluation: Delphi Standards for Policy Surveillance*, 43 *J. OF L., MEDICINE & ETHICS* 27 (2015); Scott C. Burris & Evan D. Anderson, *Legal Regulation of Health-Related Behavior: A Half-Century of Public Health Law Research*, *ANN. REV. L. & SOC. SCIENCE* no. 2013-19 (2013); Scott C. Burris, et al., *Moving from Intersection to Integration: Public Health Law Research and Public Health Systems and Services Research*, 90 *MILBANK Q.* 375 (2012); Evan D. Anderson, et al., *Measuring Statutory Law and Regulations for Empirical Research*, *PUBLIC HEALTH LAW* 28 (2012); Jennifer K. Ibrahim, et al., *Public Health Law Research: Exploring Law in Public Health Systems*, 18 *J. OF PUB. HEALTH MGMT. AND PRAC.* 409 (2012); Scott C. Burris & Evan D. Anderson, *Making the Case for Laws that Improve Health: The Work of the Public Health Law Research National Program Office*, 39 *J. OF L., MED. & ETHICS* 15 (2011); Scott C. Burris, *Law in a Social Determinants Strategy: A Public Health Law Research Perspective*, 126 *PUB. HEALTH REPS.* 22 (2011). See also Evan D. Anderson & Scott C. Burris., *Educated Guessing: Getting Researchers and Research Knowledge into Policy Innovation*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2412499](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412499) in *REGULATING TOBACCO, ALCOHOL AND UNHEALTHY FOODS* 36 (Tania Voon et al. eds., 1st ed. 2014).

TABLE 3. COMMENTERS ON EPA-HQ-OA-2017-0190

| <b>EPA-HQ-OA-2017-0190</b>        |  |
|-----------------------------------|--|
| <b>Comment Writers</b>            | <b>Number of Comments</b>                            |
| Mass Mail Campaign                | 54 comments filed with 335,120 signatures/duplicates |
| Company/Organization              | 646  |
| Tribal Government                 | 29   |
| Federal Government                | 11   |
| State Government                  | 33   |
| Anonymous Public Comments         | 38,587   |
| Signed Individual Public Comments | 5,723  |

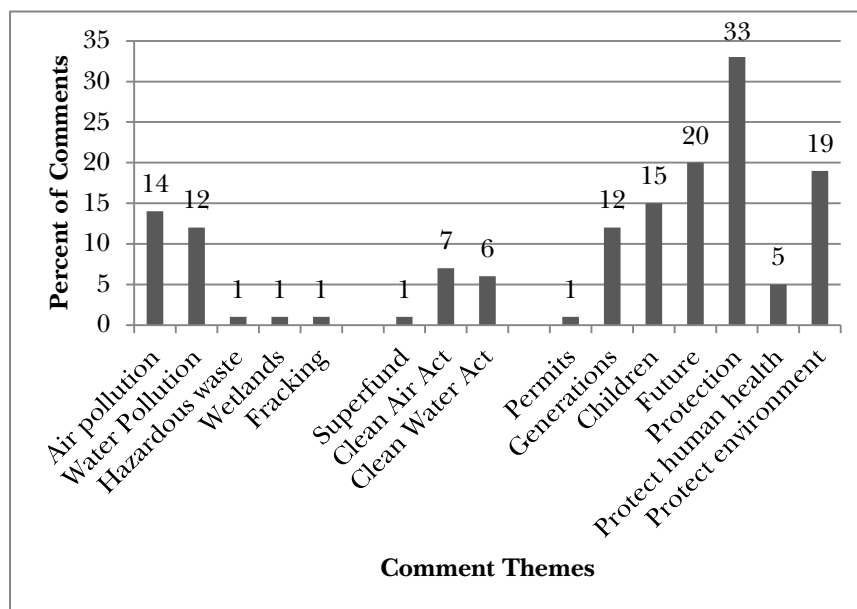
Certain themes were consistent in the comments. Over a third of the comments discussed the need to continue to protect public health and the environment and were concerned that deregulation efforts in EPA-administered programs might put both in jeopardy. Fifteen percent of commenters couched this concern in terms of protecting children, and twelve percent raised concerns about protecting future generations. From a substantive standpoint, fourteen percent of the comments addressed concerns about regulating air pollution, and twelve percent flagged protection from water pollution as a priority.

One percent of the comments, mostly from industry, discussed issues of permitting. The most common candidate for proposed deregulation was the Clean Air Act (seven percent), followed by the Clean Water Act (six percent). Although not a permit program but a cleanup program, Superfund<sup>185</sup> was the next most-cited EPA program that was identified as in need of simplification (one percent). The graph below identifies the most prominent themes reflected in the public comments concerning EPA regulatory reform.

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185. Comprehensive Environmental Response, Compensation, and Liability Act, 42 USC §§ 9601–9675 (1980).

GRAPH 6. PUBLIC COMMENT THEMES IN  
EPA-HQ-OA-2017-0190-2



Interest in the EPA reform efforts in docket EPA-HQ-OA-2017-0190 remained robust beyond the comments period. A tad over a year later, as of August 7, 2018, the docket had received 468,503 comments (up from 381,204), of which 63,422 comments (up from 46,084) had been posted. The themes arising from the EPA RRO docket, however, looked different than some of the earlier comments. While industry still heavily focused on environmental permitting as a problem, they constituted only one percent of all the comments submitted. Dramatically more citizens submitting comments to EPA were concerned about reducing air and water pollution and protecting human health and the environment both now and for generations to come.

#### X. DEPARTMENT OF INTERIOR REGULATORY REFORM DOCKET

On June 22, 2017, the Department of Interior posted a parallel docket requesting public input on regulatory reform needed for DOI-administered rules and regulation.<sup>186</sup> The DOI docket gave

186. 82 Fed. Reg. 28,429 (June 22, 2017). *See also* Secretary's Order No. 3349, AMERICAN ENERGY INDEPENDENCE (Mar. 29, 2017), [https://www.doi.gov/sites/doi.gov/files/uploads/so\\_3349-american\\_energy\\_independence.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/so_3349-american_energy_independence.pdf).

the public the first formal opportunity to comment on Secretary of the Interior Ryan Zinke's March 29, 2017, Order No. 3349.<sup>187</sup> In that Order, Secretary Zinke asked for review of mitigation policies, climate change policies, the BLM fracking rule,<sup>188</sup> the BLM flaring rule,<sup>189</sup> the National Park Service rule regulating fracking in national parks,<sup>190</sup> and the Fish and Wildlife Service rule regulating fracking in national wildlife refuges.<sup>191</sup> Secretary Zinke also asked for a report identifying any rules that "potentially burdened [a term defined in the March 28, 2017, E.O.] . . . the development or utilization of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear resources."<sup>192</sup>

Unlike the vast response to the EPA docket, DOI reported that, as of December 14, 2017, only 213 comments were submitted to docket number DOI-2017-0003. All were posted.<sup>193</sup> Rather than a general docket, as EPA had used, DOI requested that the public direct comments concerning regulatory reform to specific offices within the Agency.<sup>194</sup> The breakdown of offices within DOI that received comments can be found in the chart below.

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187. Secretary's Order No. 3349, AMERICAN ENERGY INDEPENDENCE (Mar. 29, 2017), [https://www.doi.gov/sites/doi.gov/files/uploads/so\\_3349-american\\_energy\\_independence.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/so_3349-american_energy_independence.pdf).

188. Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16,128 (Mar. 26, 2015) (to be codified at 43 C.F.R. pt. 3160). For discussion of the BLM fracking rule, see generally Elizabeth Ann Glass Geltman, *Drilling for Common Ground: How Public Opinion Tracks Experts in the Debate over Federal Regulation of Shale Oil & Gas Extraction*, 35 VA. ENV'T L. L.J. 59 (2016).

189. Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008 (Jan. 17, 2017) (to be codified at 43 C.F.R. pts. 3100, 3160, 3170).

190. General Provisions and Non-Federal Oil and Gas Rights, 81 Fed. Reg. 77,972 (Nov. 4, 2016) (to be codified at 36 C.F.R. pts. 1, 9). For commentary on this rule, see Elizabeth Ann Glass Geltman, *Oil & Gas Drilling in National Parks*, 56 Nat. Resources J. 145 (2016).

191. Management of Non-Federal Oil and Gas Rights, 81 Fed. Reg. 79,948 (Nov. 14, 2016) (to be codified at 50 C.F.R. pts. 28, 29).

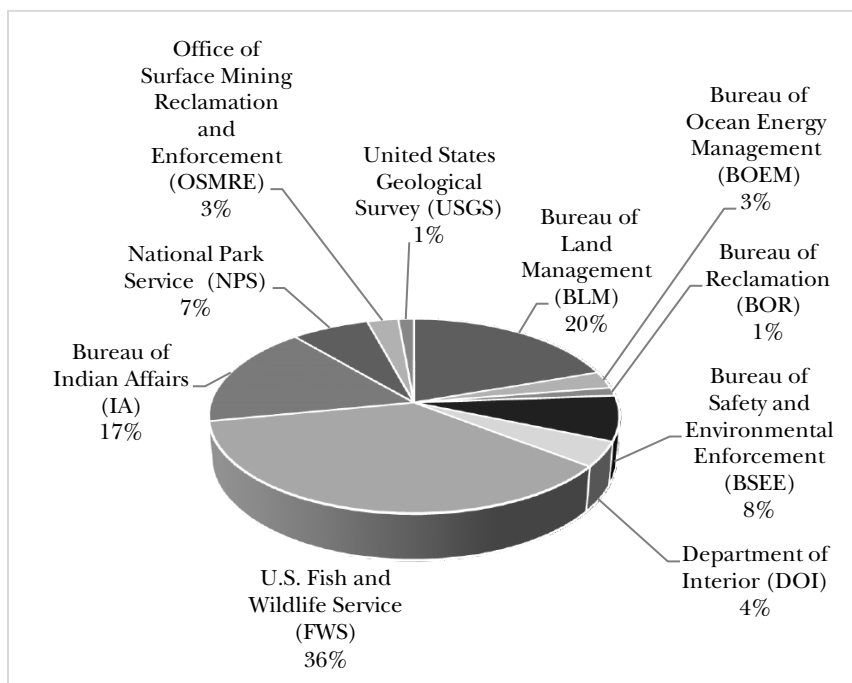
192. Secretary's Order No. 3349, AMERICAN ENERGY INDEPENDENCE (Mar. 29, 2017), [https://www.doi.gov/sites/doi.gov/files/uploads/so\\_3349-american\\_energy\\_independence.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/so_3349-american_energy_independence.pdf).

193. Regulatory Reform Executive Order 13777, REGULATIONS.GOV, <https://www.regulations.gov/docket?D=DOI-2017-0003>. By August 7, 2018, the number of comments submitted to DOI-2017-0003 docket increased to 246. All were posted.

194. 82 Fed. Reg. 28,431.



GRAPH 7. BREAKDOWN OF PUBLIC COMMENTS  
SUBMITTED TO DOI-2017-0003 (N=213)



Industry used the request for regulatory review to address specific regulations the business community deemed especially cumbersome.<sup>195</sup> For example, ConocoPhillips, the nation's largest independent oil and gas exploration and production company, said it was "committed to sustainability, and . . . very proud of [its] work to help protect ecosystems, foster wildlife habitats, and support the communities in which [it] operate[s]."<sup>196</sup> The energy behemoth also said it "recognize[d] the need for regulation and . . . support[ed] a stable, consistent regulatory regime based on sound science and economics."<sup>197</sup> As such, the company said it "d[id] not advocate for reducing environmental stewardship; however, [it] believe[d] there [wa]s value in eliminating excessive, duplicative,

195. See, e.g., Letter from Kathleen M. Sgamma, Pres., Western Energy Alliance, to Hon. Ryan Zinke, Secretary, U.S. Dep't of the Interior (Aug. 10, 2017), <https://www.regulations.gov/document?D=DOI-2017-0003-0098>; see also Letter from Don Harp and Joe Marushack, Pres., ConocoPhillips, to Mark Lawyer, U.S. Dep't of the Interior (Oct. 30, 2017), <https://www.regulations.gov/document?D=DOI-2017-0003-0212>.

196. Letter from Don Harp and Joe Marushack, Pres., ConocoPhillips, to Mark Lawyer, U.S. Dep't of the Interior (Oct. 30, 2017), <https://www.regulations.gov/document?D=DOI-2017-0003-0212>.

197. *Id.*

and impractical regulations that have a poor benefit-cost value for the environment and stakeholders.”<sup>198</sup> In supporting DOI’s regulatory reform efforts, ConocoPhillips submitted an appendix with a table containing a laundry list of regulations the company deemed overly confusing, time consuming, or difficult, along with a proposed fix for each.<sup>199</sup>

Environmental groups raised both substantive and procedural objections to the Trump administration’s effort at regulatory reform.<sup>200</sup> For example, the Wilderness Society raised questions about the transparency with which the Trump administration made changes to rules governing public lands.<sup>201</sup> The environmental group said,

We are united in our grave concern that any decision taken under these orders to rescind or revise regulations, policies and other actions not result in the potential degradation of our lands, waters and air, or the enjoyment of our irreplaceable natural heritage. It has been made clear in recent weeks that management of energy development on America’s public lands is this administration’s primary concern.<sup>202</sup>

Moreover, the Wilderness Society argued that the Trump administration was forging a significant change in public land use because it sought to “create a regulatory framework that establishes energy development as the ‘dominant’ use of public lands.”<sup>203</sup> Environmental groups argued that Congress directed the DOI to “implement management actions in furtherance of the public interest, not just the economic interest of extractive industries.”<sup>204</sup> The organic statutes for the Bureau of Land Management (BLM), National Park Service (NPS), United States Fish and Wildlife Service (FWS), and the United States Forest Service (USFS) require the agencies to govern the management of public lands and balance energy development with preservation of lands for future generations. No statute allows management “exclusively or primarily for energy development.” Actions that did not carefully balance energy and land preservation would “not only violate applicable law and

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198. *Id.*

199. *Id.*

200. *See* Letter from Nada Culver, Senior Counsel and Senior Dir., The Wilderness Soc’y, et al., to Hon. Ryan Zinke, Secretary, Dep’t of the Interior (July 20, 2017), <https://www.regulations.gov/document?D=DOI-2017-0003-0042>.

201. *Id.*

202. *Id.*

203. *Id.*

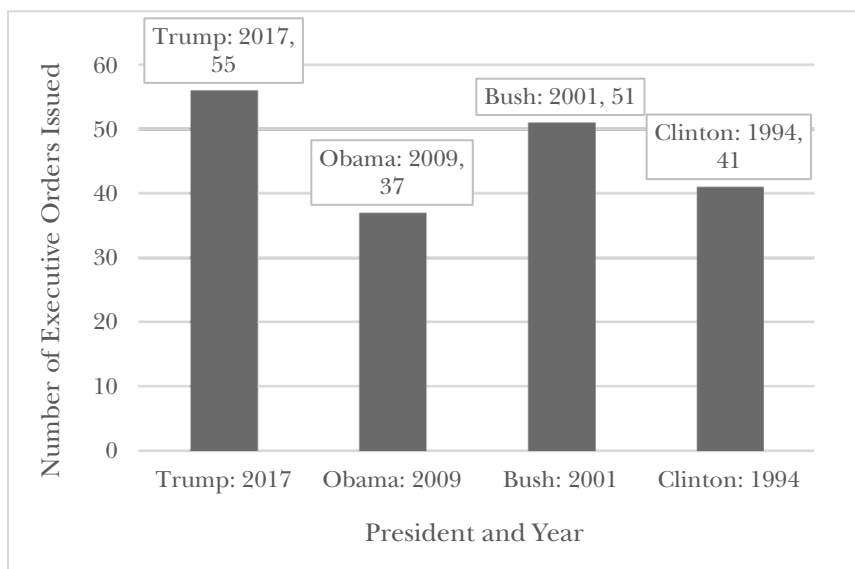
204. *Id.*

policy, but also contravene [DOI] collective responsibilities to the American people as stewards of their shared heritage.”<sup>205</sup>

## XI. EXECUTIVE ORDERS AND THE IMPERIAL PRESIDENCY

President Trump ran for office on a platform of regulatory reform promising to “drain the swamp.” President Trump argued that President Obama had exceeded executive authority and acted as an imperial president.<sup>206</sup> Yet in his first year in office, President Trump signed more executive orders than any other recent president, Democrat or Republican. In 2017, Donald Trump signed fifty-five executive orders.<sup>207</sup> The graph below depicts the relative number of executive orders signed by the last four presidents.

GRAPH 8. EXECUTIVE ORDERS ISSUED IN THE FIRST YER IN OFFICE



<sup>205</sup>. *Id.*

<sup>206</sup>. See, e.g., Dave Boyer, *Trump Dismantles Obama’s ‘Imperial’ Presidency, Rescinds Dubious Orders*, WASHINGTON TIMES (Oct. 16, 2017) <https://www.washingtontimes.com/news/2017/oct/16/donald-trump-reverses-obamas-legally-dubious-execu/>; see also Veronique de Rugy, *Obama’s Imperial Presidency*, NATIONAL REVIEW (Jan. 12, 2017), <http://www.nationalreview.com/corner/443799/obamas-imperial-presidency>, for an application of the term “imperial presidency,” which was first coined by Arthur M. Schlesinger, Jr. in his 1973 book titled, *THE IMPERIAL PRESIDENCY*.

<sup>207</sup>. *Executive Orders*, FEDERAL REGISTER, <https://www.federalregister.gov/executive-orders> (last visited March 3, 2018).

By President Trump's 100th day in office, EPA had rolled back twenty-three Obama-era policies,<sup>208</sup> including numerous executive orders naming specific regulations President Trump targeted during his campaign, such as the Clean Power Plan, WOTUS, and rules governing methane capture in oil and gas production.<sup>209</sup> The table below depicts regulatory reform enacted during the first year of the Trump administration that directly or indirectly impacts the environment:

TABLE 4. EXECUTIVE ORDERS PERTAINING TO REGULATORY REFORM AND THE ENVIRONMENT

| Executive Order Number | Title  | Publication Date | Date Signed | Citation    |
|------------------------|--|------------------|-------------|-------------|
| 13766                  | Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects                       | 1/30/17          | 1/24/17     | 82 FR 8657  |
| 13771                  | Reducing Regulation and Controlling Regulatory Costs   | 2/3/17           | 1/30/17     | 82 FR 9339  |
| 13777                  | Enforcing the Regulatory Reform Agenda   | 3/1/17           | 2/24/17     | 82 FR 12285 |
| 13778                  | Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule | 3/3/17           | 2/28/17     | 82 FR 12497 |
| 13783                  | Promoting Energy Independence and Economic Growth  | 3/31/17          | 3/28/17     | 82 FR 16093 |
| 13795                  | Implementing an America-First Offshore Energy  | 5/3/17           | 4/28/17     | 82 FR 20815 |

208. Nadja Popovich & Tatiana Schlossberg, *23 Environmental Rules Rolled Back in Trump's First 100 Days*, NY Times (May 2, 2017), <https://www.nytimes.com/interactive/2017/05/02/climate/environmental-rules-reversed-trump-100-days.html>.

209. See Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16,093 (Mar. 31, 2017); Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States," Rule, 82 Fed. Reg. 12,497 (Mar. 3, 2017); Enforcing the Regulatory Reform Agenda, 82 Fed. Reg. 12,285 (Mar. 1, 2017); Reducing Regulation and Controlling Regulatory Costs, 82 Fed. Reg. 9,339 (Feb. 3, 2017).

|              |  |         |         |             |
|--------------|--|---------|---------|-------------|
|              | Strategy   |         |         |             |
| <b>13805</b> | Establishing a Presidential Advisory Council on Infrastructure   | 7/25/17 | 7/19/17 | 82 FR 34383 |
| <b>13806</b> | Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency of the United States | 7/26/17 | 7/21/17 | 82 FR 34597 |
| <b>13807</b> | Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects  | 8/24/17 | 8/15/17 | 82 FR 40463 |
| <b>13812</b> | Revocation of Executive Order Creating Labor-Management Forums   | 10/4/17 | 9/29/17 | 82 FR 46367 |

### CONCLUSION

Regulations are in place for agencies to fulfill their statutory missions set by Congress and to best protect the public from a myriad of threats to public health, safety, and the environment. E.O. 13778 and the accompanying EPA WOTUS notice are significant since they carve out a new principle that the federal government has an “inherent authority to reconsider past decisions and to revise, replace or repeal a decision”<sup>210</sup> just by giving a “a reasoned explanation.”<sup>211</sup>

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210. Exec. Order 13778, Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule, 82 Fed. Reg. 12,497 (Mar. 3, 2017); Executive Order 13783, Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16,093 (Mar. 31, 2018) (first citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); then citing *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)).

211. Exec. Order 13778, Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule, 82 Fed. Reg. 12,497 (Mar. 3, 2017); Executive Order 13783, Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16,093 (Mar. 31, 2018).

Until the Trump presidency, new presidents recognized that the Administrative Procedure Act and the Take Care Clause of the U.S. Constitution precluded new administrations from removing federal regulations just because the new president does not like the regulations—regardless of political promises or pressure. Under the well-established *State Farm* doctrine set by the Supreme Court, a new administration must go through the very same administrative process requiring notice and comment in order to remove a regulation already on the books.<sup>212</sup> Furthermore, the new administration must show a valid legal, scientific, or economic reason (or a combination of reasons) that necessitates repudiation of the existing promulgated standard.

Requiring the withdrawal of two promulgated rules for every new one created is a radical concept that dramatically increases agency workloads.<sup>213</sup> The net effect of implementing President Trump's two-for-one executive order is that a federal agency must now undertake not one, but three simultaneous administrative proceedings in order to implement congressional dictates. The practical effect of E.O. 13771 and E.O. 13777 is to bring gridlock to the federal administrative process. The mandate of President Trump's two-for-one executive order prevents discretionary agency rulemaking efforts and adds a significant layer of complexity and analysis to federal rulemaking beyond already significant existing substantive and procedural requirements.<sup>214</sup>

Moreover, the two-for-one system is arbitrary on its face. The White House mandate considers the monetized costs to business interests but neglects to consider public benefits gained as a result of regulations.<sup>215</sup> Environmental regulations are designed to protect human health and prevent adverse health impacts, such as asthma, cancer, and endocrine disruption by reducing human chemical exposure. Preventing illness through effective environmental regulation reduces health care costs and relieves pressure on the overloaded Medicare and Medicaid system. The Trump administration's two-for-one program does not allow for consideration of costs avoided due to illnesses prevented. Moreover, the two-

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212. See *Motor Vehicle Mfr. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. at 41.

213. Letter from Andrew A. Rosenberg, Dir., Ctr. for Sci. and Democracy, to Dominic J. Mancini, Acting Adm'r, Office of Management and Budget, (Feb. 10, 2017), <https://www.regulations.gov/document?D=OMB-2017-0002-0041>.

214. *Trump Administration Acts to Reduce Regulations and Control Regulatory Costs*, V&E ENVTL. L. UPDATE E-COMMUNICATION (Feb. 8, 2017), [http://www.velaw.com/Insights/Trump-Administration-Acts-to-Reduce-Regulations-and-Control-Regulatory-Costs/?utm\\_source=email&utm\\_medium=email&utm\\_campaign=es%20digest%20-%202017-14-2017](http://www.velaw.com/Insights/Trump-Administration-Acts-to-Reduce-Regulations-and-Control-Regulatory-Costs/?utm_source=email&utm_medium=email&utm_campaign=es%20digest%20-%202017-14-2017).

215. See Letter from Andrew A. Rosenberg to Dominic J. Mancini, *supra* note 213.

for-one program, which was created as a campaign promise, has no economic theory or study to support it.

Regulations, including environmental regulation, can be cumbersome, difficult to understand, and, at times, quite costly. There are well-documented cases of specific regulators taking unreasonable positions, with some even acting “greener than thou.” As such, regulatory reform has been a consistent theme through numerous presidencies. Even industry, however, acknowledges that the two-for-one solution offered by President Trump should be reevaluated to be sure it is not causing more harm than good.<sup>216</sup>

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216. See, e.g., Shell, Comment on Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled “Reducing Regulation and Controlling Regulatory Costs” (Feb. 10, 2017), <https://www.regulations.gov/document?D=OMB-2017-0002-0050>.