



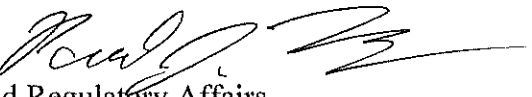
EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

January 13, 2021

M-21-12

MEMORANDUM FOR GENERAL COUNSELS AND REGULATORY POLICY OFFICERS
AT EXECUTIVE DEPARTMENTS AND AGENCIES AND EXECUTIVE DIRECTORS OF
CERTAIN AGENCIES AND COMMISSIONS

FROM: Paul Ray, Administrator 
Office of Information and Regulatory Affairs

SUBJECT: Furthering Compliance with Executive Order 13211, Titled “Actions Concerning
Regulations That Significantly Affect Energy Supply, Distribution, or Use”

Consistent with section 6 of the President’s Memorandum of October 31, 2020, *Protecting Jobs, Economic Opportunities, and National Security for All Americans*, 88 Fed. Reg. 70,039 (Nov. 4, 2020), this memorandum is intended to enhance agencies’ compliance with Executive Order 13211 of May 18, 2001, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*, 66 Fed. Reg. 28,355 (May 22, 2001). This memorandum reminds agencies, as defined in section 4(c) of Executive Order 13211¹, to consult longstanding Office of Information and Regulatory Affairs (OIRA) guidance in complying with the order and directs agencies to accurately describe the order in their rulemaking documents.

Background. Executive Order 13211 provides that agencies “shall prepare” detailed Statements of Energy Effects for “significant energy actions,” which must be submitted to the OIRA Administrator for review during the rulemaking process.² The order provides that an action can

¹ The order does not apply to independent regulatory agencies, but the Office of Management and Budget encourages such agencies to comply voluntarily with the order. *See* OMB Memorandum 01-27, Guidance for Implementing E.O. 13211 (July 13, 2001) (M-01-27).

² A Statement of Energy Effects must describe “(i) any adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, and increased use of foreign supplies) should the proposal be implemented, and (ii) reasonable alternatives to the action with adverse energy effects and the expected effects of such alternatives on energy supply, distribution, and use.” For each rulemaking, the Statement of Energy Effects must be presented to OIRA at the time when “the related submission under Executive Order 12866” (or any successor order) is presented to OIRA. In addition, the statement, “or a summary thereof,” must be published “in each related Notice of Proposed Rulemaking and in any resulting Final Rule.” M-01-27 provides that when an agency publishes only a summary of a Statement of Energy Effects, the agency shall also make the statement available through an agency website (and include the website address in the proposed or final rule).

be a “significant energy action” if it satisfies one of two tests or prongs. Section 4(b) of the order defines “significant energy action” as either

- (1) a “significant regulatory action” under Executive Order 12866 of September 30, 1993, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (October 4, 1993)³, or any successor order, that is likely to “have a significant adverse effect on the supply, distribution, or use of energy”; *or*
- (2) an action that the Administrator of OIRA has designated as a significant energy action.

This two-pronged definition makes clear that Executive Order 13211 does not give an agency sole authority to conclude that because its action is not a significant energy action, the agency does not need to prepare a Statement of Energy Effects. In circumstances in which an agency concludes that its action does not meet the first prong of the definition, the OIRA Administrator may independently apply the second prong and determine that the action is a significant energy action, thus requiring the agency to provide a detailed Statement of Energy Effects. In making this determination, OIRA is not limited to considering the elements of the first prong (nor is OIRA limited by individual agencies’ proposed determinations or views with respect to those considerations). To be sure, OIRA will generally consider those elements in making its own determination under the second prong as to whether an action is a significant energy action.

Applying longstanding OIRA guidance. OIRA has longstanding guidance that explains the meaning of the phrase “significant adverse effect” as applied to energy supply, distribution, or use. See OMB Memorandum 01-27, *Guidance for Implementing E.O. 13211* (July 13, 2001) (M-01-27).⁴ M-01-27 identifies examples of several qualifying “adverse effects” of regulatory actions. This memorandum amends M-01-27 to reflect changes in market conditions since 2001. In light of these changes, adverse effects could include any of the following outcomes compared to a world without the regulatory action under consideration:

- reductions in energy supply and production (including reductions in crude oil supply, in excess of 20 million barrels per year⁵; in fuel production, in excess of 5 million

³E.O. 12866 separately establishes broadly applicable conditions for when OIRA determines what constitutes a significant regulatory action. Under those metrics, significant energy actions would likely qualify as significant under Section 3(f) of E.O. 12866.

⁴ Perhaps because it emphasizes OIRA’s role in determining whether an action is a significant energy action, section 3 of M-01-27 does not clearly explain that section 4(b) of Executive Order 13211 has two separate tests or prongs for determining whether an action is a significant energy action. This memorandum clarifies that the two prongs are separate and independent. Section 3 of M-01-27 does not contradict this conclusion; instead, section 3 of M-01-27 simply provides (correctly) that agencies should discuss with OIRA whether the first prong applies.

⁵ The Energy Information Administration (EIA) reports annual national crude oil supply and disposition in units of thousand barrels and thousand barrels per day; for 2019, these quantities were respectively 7,109,840 thousand barrels (or 7.1 billion barrels) and 19,479 thousand barrels per day (or 19.5 million barrels per day). Thus, an annual impact equal to one day’s supply is the

barrels per year⁶; in coal production, in excess of 4 million tons per year; in natural gas production, in excess of 40 mcf per year; or in electricity production, in excess of 10 million megawatt hours (MWh) per year or in excess of 500 megawatts of installed capacity);

- increases in energy use that would be required by the regulatory action, if such increases exceed any of the same thresholds;
- increases in the cost of energy production or distribution in excess of one percent;
- material adverse impacts on productivity, competition, or prices in the energy sector; and
- material adverse impacts on productivity, competition, or prices within a region.

Agencies should continue to utilize M-01-27, as amended by the foregoing list, in applying Executive Order 13211.

Correctly describing Executive Order 13211 in agency rulemaking documents. Many agency rulemaking documents, including proposed and final agency rules, contain sections that discuss the application of Executive Order 13211 to those rules. In the past, such discussions have sometimes mistakenly implied that a Statement of Energy Effects is not required whenever an action is not a significant regulatory action that is likely to have a significant adverse effect on the supply, distribution, or use of energy. Such suggestions would be inaccurate, because they ignore the second prong of the definition of the term “significant energy action.” Relatedly, agency discussions of Executive Order 13211 sometimes ignore OIRA’s role in determining whether a Statement of Energy Effects is required. Agencies should revise their discussions of the executive order to acknowledge the two prongs of the definition, including OIRA’s independent role in determining whether to require a Statement of Energy Effects consistent with the following model:

This proposed rule does not require a Statement of Energy Effects as provided in Executive Order 13211, because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy and has not otherwise been designated by the Administrator of OIRA as a “significant energy action.”

It is important that all agencies understand and correctly describe the two-pronged analysis contemplated by Executive Order 13211. As the executive order notes, the Federal Government can significantly affect the supply, distribution, and use of energy. Yet there is often too little information regarding the effects that governmental regulatory action can have on

annual production as reported in per day units with a “per year” qualifier instead of “per day” (and expressed in a round number of units).

⁶ EIA also reports annual finished motor gasoline production in units of thousand barrels and thousand barrels per day; for 2019, these quantities were respectively 3,686,208 thousand barrels (or 3.7 billion barrels) and 10,099 thousand barrels per day (or 10.1 million barrels per day). In more recent years, domestic production also includes Renewable Fuels & Oxygenate Plant Net Production. Thus an annual impact equivalent to a half day’s supply is half of the annual production as reported in per day units with a “per year” qualifier instead of “per day” (and expressed in a round number of units).

energy. The order was intended to help redress this problem. The order requires Statements of Energy Effects to provide more useful energy-related information and to improve the quality of agency decisionmaking by increasing the likelihood that the Executive Branch will appropriately weigh and consider the effects of the Federal Government's regulations on the supply, distribution, and use of energy. The order furthers these goals by giving OIRA an independent role in determining whether to require agencies to prepare Statements of Energy Effects.

Conclusion. Agencies should diligently comply with Executive Order 13211, consistent with OIRA guidance. If your staff believes that a specific action contemplated by your agency, or another agency, may warrant consideration by OIRA as a "significant energy action," or if your staff otherwise has questions concerning how Executive Order 13211 may apply to a specific action, please consult the OIRA desk officer who has been assigned to the matter.

cc: The Assistant to the President for Economic Policy
The Director of the Office of Management and Budget