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Memoranda 01-27 (Guidance for Implementing E.O. 13211)

July 13, 2001

M-01-27**MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, AND INDEPENDENT REGULATORY AGENCIES**

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| FROM: | Mitchell E. Daniels, Jr. Director |
| SUBJECT: | Guidance for Implementing E.O. 13211 |

President Bush issued Executive Order No. 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," on May 18, 2001 (66 Fed. Reg. 28355 (May 22, 2001)). In order to ensure that agencies "appropriately weigh and consider the effects of the Federal Government's regulations on the supply, distribution, and use of energy," the President has directed agencies to prepare and submit to OMB's Office of Information and Regulatory Affairs (OIRA) a "Statement of Energy Effects" for their "significant energy actions." This memorandum provides guidance on the implementation of this Order.

1. What is the basic purpose for having an agency prepare a Statement of Energy Effects?

The basic purpose for having an agency prepare a Statement of Energy Effects is to ensure that agencies "appropriately weigh and consider the effects of the Federal Government's regulations on the supply, distribution, and use of energy." As President Bush stated in E.O. 13211:

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 energy (Sec. 1).

2. What agencies does the Order cover?

E.O. 13211 applies to all Federal agencies, except for the independent regulatory agencies (Sec. 4(c)). We encourage independent regulatory agencies to comply voluntarily with the provisions of this Order, particularly Section 3(b).

3. When does an agency prepare a Statement of Energy Effects?

To the extent permitted by law, an agency is obligated to prepare a Statement of Energy Effects for those matters identified as a significant energy actions. According to E.O. 13211, "significant energy action" means "any action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notice of inquiry, advance notice of proposed rulemaking, and notice of proposed rulemaking:

"(1)(i) that is a significant regulatory action under Executive Order 12866 or any successor order, and

"(ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy ..." (Sec. 4(b))⁽¹⁾

Based on this definition, an agency should discuss with OIRA whether a regulatory action is significant, and "is likely to have a significant adverse effect on the supply, distribution or use of energy." If OIRA determines that the regulatory action is a significant energy action, OIRA will inform the agency, which shall then prepare a Statement of Energy Effects (Sec. 4(b)(2)).

4. What is meant by "a significant adverse effect?"

Adverse effects could include any of the following outcomes compared to a world without the regulatory action under consideration:

1. Reductions in crude oil supply in excess of 10,000 barrels per day;
2. Reductions in fuel production in excess of 4,000 barrels per day;
3. Reductions in coal production in excess of 5 million tons per year;
4. Reductions in natural gas production in excess of 25 million mcf per year;
5. Reductions in electricity production in excess of 1 billion kilowatt-hours per year or in excess of 500 megawatts of installed capacity;
6. Increases in energy use required by the regulatory action that exceed any of the thresholds above;
7. Increases in the cost of energy production in excess of one percent;
8. Increases in the cost of energy distribution in excess of one percent; or
9. Other similarly adverse outcomes.

A regulatory action could also have significant adverse effects if it:

1. Adversely affects in a material way the productivity, competition, or prices in the energy sector;
2. Adversely affects in a material way productivity, competition or prices within a region;
3. Creates a serious inconsistency or otherwise interfere with an action taken or planned by another agency regarding energy; or
4. Raises novel legal or policy issues adversely affecting the supply, distribution or use of energy arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order Nos 12866 and 13211.

5. What does an agency do with this Statement of Energy Effects?

First, and most important, agencies are to utilize, to the extent permitted by law, the Statement of Energy Effects in their decisionmaking to improve the quality of agency actions affecting energy supply, distribution, or use.

Second, agencies are to submit a Statement of Energy Effects to the Administrator of the Office of Information and Regulatory Affairs (OIRA) whenever they present a significant energy action for OIRA review under E.O. 12866 (Sec. 3(a)).

Third, agencies are to publish their Statements of Energy Effects, or a summary thereof, in each related Notice of Proposed Rulemaking (NPRM) and in any resulting Final Rule (Sec. 3(b)). On those occasions when an agency publishes only a summary of a Statement of Energy Effects, the agency shall also make the Statement of Energy Effects available through an agency web site (and include the web site address in the NPRM and/or Final Rule) and provide the public with notice of whom to telephone to request, without cost, a paper copy of the Statement of Energy Effects.

6. What is a Statement of Energy Effects?

According to E.O. 13211, "A Statement of Energy Effects shall consist of a detailed statement by the agency responsible for the significant energy action relating to:

"(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" (Sec. 2(b)).

In preparing a Statement of Energy Effects, agencies must follow the "Guidelines to Standardize Measures of Costs and Benefits and the Format of Accounting Statements" (OMB Memorandum M-00-08, March 22, 2000)(<http://www.whitehouse.gov/omb/memoranda/m00-08.pdf>).

7. What is meant by "reasonable alternatives?"

Alternatives that rely on incentives and offer increased flexibility are often more cost-effective than more prescriptive approaches. Reasonable alternatives may include any of the following.

1. Informational Measures;
2. Market-Based Approaches;
3. Performance-Based Standards;
4. Different Requirements for Different Segments of the Regulated Population;
5. Alternative Levels of Stringency;
6. Alternative Effective Dates of Compliance; or
7. Alternative Methods of Ensuring Compliance.

Within a command-and-control regulatory program, performance-based standards may offer advantages over standards specifying design, behavior, or manner of compliance.

8. How detailed should the Statement of Energy Effects be?

As a general matter, the Statement of Energy Effects should be prepared at the level of detail appropriate and practicable for reasoned decisionmaking on the matter involved, taking into consideration uncertainties, the significance and complexity of the decision, and the need to adequately inform the public. For example, if the significant energy action has an economic impact that would require the agency to prepare a Regulatory Impact Analysis (RIA) under Sections 3(f)(1) and 6(a)(3)(C) of E.O. 12866, then the Statement of Energy Effects should be prepared at the level of detail and analytic effort commensurate with the RIA. If the significant energy action has less economic impact, then the level of detail and analytic effort should be commensurate therewith.

9. What happens in emergency situations or in situations with short-term deadlines?

In emergency situations, or when an agency is obligated by law to act more quickly than normal rulemaking procedures allow, the agency shall notify OIRA as soon as possible, and, to the extent practicable, comply with E.O. 13211. For those regulatory actions that are governed by a statutory or court-imposed deadline, the agency shall, to the extent practicable, schedule rulemaking proceedings so as to permit sufficient time to prepare any applicable Statement of Energy Effects and to permit OIRA to conduct its regulatory review.

10. When did the Order take effect?

E.O. 13211 became effective on May 18, 2001. It applies to any significant energy action initiated by an agency after May 18, 2001. If an agency has already published a Notice of Proposed Rulemaking that constitutes a significant energy action, the agency shall prepare the Statement of Energy Effects and submit it to OIRA as soon as practicable, but no later than the agency submits the Final Rule to OIRA under E.O. 12866.

11. With whom should we consult when we have questions concerning E.O. 13211?

If your staff have questions concerning this Order, please contact Richard Theroux in OIRA (202/395-3089 and <mailto:rtheroux@omb.eop.gov>).

¹. "Regulation" and "rule" have the same meaning as they do in Executive Order 12866 or any successor order (Sec. 4(a)).

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