



# Impact of Executive Order 13211 on environmental regulation: An empirical study



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## HIGHLIGHTS

- We examined the impact of Executive Order 13211 on US environmental and conservation regulations.
- EO 13211 had little effect on environmental and conservation actions during federal rulemaking.
- Most agencies found no “significant energy action” and no need for detailed regulatory review.

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## ABSTRACT

A great deal has been written about the Energy Policy Act of 2005 exempting oil and gas operations using hydraulic fracturing from the purview of certain federal environmental laws. Far less attention has been paid to George W. Bush's Executive Order 13211 (EO 13211), entitled “Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution or Use.” The Executive Order requires federal agencies to evaluate the impact of federal regulations on “supply, distribution and use of energy.”

This study examined the impact of EO 13211 on United States environmental and conservation regulations proposed and promulgated by federal agencies. The study found that during rule making proceedings, EO 13211 had almost no effect on environmental and conservation actions taken by federal agencies. Most federal agency rules, both proposed and final, evaluating energy impacts pursuant to EO 13211 found no “significant energy action” and accordingly did not necessitate further regulatory review. In most cases, energy evaluation was routine, did not alter environmental or health policy and was reflected in brief, boilerplate language.

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## 1. Introduction

In the interim period between the time when President Obama was elected and he took office his transition team asked for policy suggestions as to what the administration could accomplish in the historically significant “first 100 days.” Many groups submitted suggestions. The Center for Progressive Reform, a group of law professors, suggested that the new Obama administration could “protect public health with the stroke of a Presidential pen” (Bratspies et al., 2008). Among the priorities the group urged the Obama Administration was to revoke George W. Bush's Executive Order 13211 (EO 13211) entitled “Actions Concerning Regulations

That Significantly Affect Energy Supply, Distribution, or Use” (Bratspies et al., 2008). EO 13211 requires all federal agencies to prepare Statements of Energy Effects (SEE) whenever a federal action may have a “significant adverse effect” on energy supplies, distribution, or use (Bush, 2001). President Obama declined to revoke EO 13211 and the mandates of the order continued throughout the Obama administration.

While a great deal of scholarly and public attention focuses on the Halliburton loophole of the Energy Policy Act of 2005 that excludes the oil and gas industry from certain environmental regulations including Safe Drinking Water Act, (EPA, 2005) the lesser-known EO 13211 warrants closer analysis for its potential impact in support of shale oil and gas extraction and development (Bratspies et al., 2008; Heinzerling, 2014). EO 13211 was the target of environmental group consternation both when promulgated by President Bush and again when President Obama took office (Van Natta and Banerjee, 2002) and decided not to reverse the directive

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to evaluate energy impacts of proposed federal policy (Bratspies et al., 2008). This study sought to evaluate whether the concern was warranted.

EO 13211's application hinges on whether a federal regulation will have a "significant adverse effect" on energy. EO 13211 does not explicitly set out what constitutes a "significant adverse effect" and in turn when a SEE is required. Most agencies, however, adopt the definition in Executive Order 12866 (EO 12866), which deems a regulatory action significant if the action will have an annual effect on the US economy of \$100 million or more (Clinton, 1993). Further guidance of EO 13211's application was provided by the U. S. Office of Management and Budget (OMB). In a 2001 memorandum, OMB outlined when a significant energy affect may arise under EO 13211. Specifically, OMB sets out nine outcomes that may constitute "a significant adverse effect" when compared to not undertaking the regulatory action in question. These criteria include could include reductions in (1) crude oil supply in excess of 10,000 barrels per day; (2) fuel production in excess of 4000 barrels per day; (3) coal production in excess of 5 million tons per year; (4) natural gas production in excess of 25 million mcf per year; (5) electricity production in excess of 1 billion kilowatt-hours per year or in excess of 500 MW of installed capacity; (6) energy use required by the regulatory action that exceed any of the thresholds above; (7) the cost of energy production in excess of one percent; (8) the cost of energy distribution in excess of one percent; or (9) other similarly adverse outcomes. (U.S. OMB, 2001) In the past fourteen years, federal agencies used each of these nine criteria in varying degrees to evaluate potential energy effects.

When triggered, federal agencies must submit the SEE to the OMB Office of Information and Regulatory Affairs (OIRA), the so-called "regulatory czar" (Sunstein, 2012). A summation of the SEE must be included in the federal agency's notice of proposed and final rulemaking. The purpose of preparing a SEE is to ensure that federal agencies "appropriately weigh and consider the effects of federal rulemaking on the supply, distribution, and use of energy" (Bush, 2001). If applicable, the SEE must include:

- 1) information on any adverse effects on energy supply, distribution, or use;
- 2) reasonable alternatives to the federal action; and
- 3) the expected effects of such alternatives on energy supply, distribution, or use.

Once submitted, OIRA acts as an "information aggregator." OIRA takes the SEE material prepared by the federal agency and synthesizes it with other materials that may include diverse points of view. OIRA's goal is ensuring that the public is able to provide meaningful comment on matters pertaining to the proposed rulemaking, including potential adverse energy impact, during the rulemaking process (Sunstein, 2012; Heinzerling, 2014).

This study used quantitative policy surveillance methods to examine how frequently federal agencies made energy impact analyses pursuant to EO 13211 (Presley et al., 2015; Geltman et al., 2015; Wagenaar and Burris, 2013). The study sought to examine whether, as feared by environmental groups, EO 13211 was being used by federal agencies to thwart environmental, natural resource conservation and other public health efforts as reflected in rulemaking reported in the federal register (Heinzerling, 2014; Bratspies et al., 2008).

The project began by collecting data from Lexis/Nexis and from dockets on Regulations.gov to determine how many federal regulations referenced EO 13211 and how many federal regulations included SEEs pursuant to EO 13211. The collected data was sorted to determine outlines using standard coding. The data was finally compared to the results of a literature review.

The study found no evidence that EO 13211 was invoked by

federal agencies to prevent critical habitat designation or other environmental or public health protection. Both cross sectional and longitudinal review demonstrated that if EO 13211 has had any impact on federal environmental, natural resource conservation and public health actions the influence was prior to rule making. The vast majority of published federal agency rules evaluating energy impacts pursuant to EO 13211 determined that the proposed action would not be a "significant energy action" and hence did not require OMB review. Contrary to fear of environmental groups, we found little evidence that EO 13211 negatively impacted regulation of the environment, natural resources or health.

## 2. Methods

We began our study with a literature review to determine if any scholars had previously evaluated the impact of EO 13211 on environmental, public health and natural resource conservation rulemaking proceedings. To date, scholarly analysis of EO 13211 was minimal. Most studies merely mentioned the Executive Order briefly in the context of a larger environmental or energy discussion (Austin and Phoenix, 2005; Klopff et al., 2007; Johnson, 2008; Arbuckle, 2009; Shapiro, 2011).

We found only one study with a detailed analysis of EO 13211. The Kalen article applauded EO 13211, highlighting the order for its multidisciplinary approach to energy policy. In the 2005 study, the author portended that EO 13211's coordination amongst federal agencies would be instrumental in balancing energy and environmental concerns (Kalen, 2005). Ten years later, we sought to reevaluate and review the Kalen findings and predictions against the concerns raised by the Center for Progressive Reform (Bratspies et al., 2008).

### 2.1. Coding

We developed a preliminary set of questions for coding the regulations based on the results of the literature review. The questions developed for coding were evaluated and refined by our team of three in a series of discussions taking place a week a part. We used Computer Assisted Qualitative Data Analysis (CAQDAS) for coding (Chowdhury, 2015; Nind et al., 2015; Kaefer et al., 2015). Most questions were binary and mutually exclusive, requiring coders to answer "yes" or "no" to the CAQDAS prompt (Presley et al., 2015; Burris, 2014; Chriqui et al., 2011).

The first question asked what federal agency proposed the rule or regulation. This question was designed merely to identify the target agency engaging in rulemaking and was the only question that was not binary and mutually exclusive.

The second question inquired whether the express language of the proposed rulemaking as it appeared in the federal register and on Regulations.gov stated that EO13211 was applicable. The purpose of this question was to determine whether or not the agency included EO13211 in its regulatory review process submitted to OIRA (Heinzerling, 2014; Sunstein, 2012).

The third question used in coding asked whether the agency completed a statement of energy effects. This question sought to discover whether, after determining that an evaluation under EO13211 was needed, the agency conducted the review required to produce a SEE.

The fourth coded question asked whether or not the agency determined that the proposed rulemaking would be considered "a significant energy action" under EO13211. This question did not ask why the agency made that determination or what, if any, OMB criteria the agency considered important in making the judgment. The question only asked if the regulatory action was considered "a

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