STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

December 28, 2018

VIA USPS & E-Mail: FOIA_HQ@epa.gov
National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

Re: Freedom of Information Act Request re. Implementation of Regulatory Cost Allowances Under Executive Orders 13771 and 13777

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as amended, and its implementing regulations, the Office of the Attorney General of the State of New York (NYOAG) makes the following request for records to understand and educate the general public on how the Environmental Protection Agency (EPA) has worked with the Office of Management and Budget (OMB) to implement the regulatory policies and priorities established in Executive Order 13771: "Reducing Regulation and Controlling Regulatory Costs," 82 Fed. Reg. 9,339 (Jan. 30, 2017) and Executive Order 13777: "Enforcing the Regulatory Reform Agenda," 82 Fed. Reg. 12,285 (Mar. 1, 2017).

By way of additional background for this request, NYOAG seeks records related to a memorandum prepared for "Regulatory Reform Officers at Executive Departments and Agencies" dated September 7, 2017, concerning the subject "FY 2018 Regulatory Cost Allowances." In that memorandum, Neomi Rao, Administrator of the Office of Information and Regulatory Affairs (OIRA), explained that Executive Order 13771 requires the Director of OMB to identify a regulatory cost allowance for each agency for Fiscal Year (FY) 2018. Pursuant to that memorandum, "no regulations exceeding the agency's total incremental cost allowance will be permitted in that fiscal year, unless required by law or approved in writing by the Director." The memorandum requests each executive department and agency to prepare a proposed total incremental cost allowance. In the memorandum, Administrator Rao also requested that each department and agency explain how it developed its proposed cost allowance and how that proposed allowance is consistent with Executive Orders 13771 and 13777. The requests below seek records that contain information that will help NYOAG understand this regulatory process and educate the general public on EPA's the implementation of these Executive Orders for Fiscal Years, 2017, 2018, and 2019, in particular the identification of "deregulatory actions" and the methods used for calculating cost savings associated with such actions.

Requested Records

The Office of the Attorney General requests that EPA produce the following within twenty business days:

1. All records, such as emails, documents, analyses and other communications exchanged between OMB and EPA, as well as all information and analysis on these communications exchanged within EPA, regarding how the cost of "deregulatory actions" as that term is used in: Guidance Implementing EO 13771" (M-17-21) was calculated for FY 2017, FY 2018, and FY 2019 to comply with Executive Orders 13771 and 13777, including, but not limited to:
    a. How cost saving targets were developed, including all records showing accounting methods applied for quantitative and qualitative measures (cost or benefit of environment, public health and safety, and distributive effects).
        (1) Include all records showing the calculations for the FY 2017 Final Accounting - Annualized Cost Savings in the amount of $-21.5M, and Present Cost Savings value of $-306.9M as reflected in "Regulatory Reform: Two-for-One Status report and Regulatory Cost Caps, EO 13771: Final Accounting For Fiscal Year 2017 and Cost Caps for Fiscal Year 2018."
        (2) Include all records showing the calculations for the FY 2018 Caps for Annualized Cost Savings in the amount of $–40.0M, and Present Cost Savings Value of $-571.4M as reflected in "Regulatory Reform: Two-for-One Status report and Regulatory Cost Caps, EO 13771: Final Accounting For Fiscal Year 2017 and Cost Caps for Fiscal Year 2018"
        (3) Include all records showing the calculations for the FY 2018 Final Accounting - Present Cost Savings Value of $-1227.9M as reflected in "Regulatory Reform Under EO 13771: Final Accounting for Fiscal Year 2018."
        (4) Include all records showing the calculations for the FY 2019 Caps for Present Costs Savings Value of $-817.8M as reflected in "Regulatory Reform: Regulating Budget for Fiscal Year 2019."

    b. All records regarding how it was determined which programs or regulations to identify as EPA "deregulatory actions," including all records showing OMB/OIRA's review of EPA's proposed cost allowance and its determination of whether EPA's proposal and explanation was consistent with the administration's regulatory policy and priorities as described in Executive Orders 13771 and 13777.
        (1) Include all records showing how: the 16 EPA deregulatory actions were selected for FY 2017 as reflected in the OMB Report, "Regulatory Reform: Completed Actions for FY 2017," the 10 EPA deregulatory actions selected in in FY 2018 as reflected in the OMB Report, "Regulatory Reform: Completed Actions for FY 2018," and any projected EPA deregulatory actions for FY 2019 were selected.

2. All emails, documents, analyses, and other communications exchanged between OMB and EPA, as well as all information and analysis on these communications exchanged within OMB, concerning the September 7, 2017 Memorandum (M-17-31), including but not limited to the sentence: "Each agency should include along with its proposed FY 2018 cost allowance, an explanation of how the agency developed its proposed allowance and how that proposed allowance is consistent with the administration's regulatory policies and priorities established in Executive Order 13771, as well as Executive Order 13777 'Enforcing the Regulatory Reform Agenda' (82 FR 12285)."
    a. Include all records for EPA's proposed FY 2019 cost allowance and related explanation
    b. Include all records concerning the OMB/OIRA's review of EPA's proposal and explanation for FY 2018 and FY 2019

3. All information, such as emails, documents, analyses and other communications exchanged between OMB and EPA, as well as all information and analysis on these communications exchanged within OMB, regarding the costs and benefits of deregulatory actions in FY 2017, FY 2018, and FY 2019 to comply with Executive Order 13771 and 13777, and how the cost savings and projected cost savings were estimated for:
    (1) The Regulatory Reform: Two-for-One Status report and Regulatory Cost Caps – Final Accounting for Fiscal Year 2017 and Cost Caps for Fiscal Year 2018
        1. FY 2017 Final Accounting
        2. FY 2018 Caps
    (2) Regulatory Reform: completed Actions FY 2017
    (3) Regulatory Reform under EO 13771: FY 2018 Final Accounting
    (4) Regulatory Reform Report: Completed Actions for FY 2018
    (5) Regulatory Reform: Regulatory Budget for FY 2019, including FY 2019 Caps

Please provide all of the requested records on a rolling basis. If EPA deems that any of the information sought in this request to be exempt from production pursuant to one or more exemptions set forth at 5 U.S.C. § 552(b), then please provide an explanation for each such record or portion thereof, sufficient to identify the record and the particular exemption(s) claimed.

If it is your position that any portion of the requested records is exempt from disclosure notwithstanding the mandatory presumption of openness, we request that you provide an index of those records as required by *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). The *Vaughn* index should describe each document claimed as exempt with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA." *Founding Church of Scientology of Washington, D.C. v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

Fee Waiver Requested

The NYOAG is a noncommercial organization, which is not subject to review fees. In addition, NYOAG respectfully requests a waiver of search and copying fees.

Under FOIA, agencies must waive such fees where disclosure is likely to contribute to public understanding of the operations and activities of the government and disclosure is not primarily in the commercial interest of the requester. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(1)(1). EPA has incorporated this requirement in its regulations for responding to FOIA requests. 40 C.F.R. § 2.107.

First, disclosure of the records requested is "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." *See id.* The NYOAG has a long history of participating in federal environmental regulation and ensuring that such regulations are adequately carried out for the protection of New York citizens. For example, in 2007, New York joined a group of States in alleging that the EPA had abdicated its responsibility under the Clean Air Act to regulate the emissions of greenhouse gases, including carbon dioxide. *Massachusetts v. EPA*, 549 U.S. 497 (2007). Petitioners asked specifically whether EPA had the statutory authority to regulate greenhouse gases from new motor vehicles and if so, whether its stated reason for refusing to do so was consistent with statute. *Id.* As in *Massachusetts v. EPA*, in which New York was concerned about the health and environmental ramifications of an environmental regulatory agency failing to carry out a federal statutory duty, New York is concerned here that environmental deregulation under the Executive Orders could put New York residents, as well as all U.S. residents, at a greater risk of public health and environmental harm.

Second, this request is for non-commercial purposes. *See* 5 U.S.C. § 552(a)(4)(A)(iii). The NYOAG is a law enforcement agency with no commercial interest in the requested information. NYOAG intends to use the information obtained to better educate itself and the public about agency deregulatory actions, in particular how agencies are calculating the costs of such actions and using costs as a factor in decisions regarding regulatory priorities.

If this request for a fee waiver is denied, please contact us before incurring any costs in responding to this request. We ask that you provide your responses to this request electronically. Thank you for your attention to this matter. If you have any questions or wish to clarify any request, please do not hesitate to contact the undersigned attorneys below. We look forward to receiving your response to these requests within twenty business days, as required by FOIA.

Sincerely,

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