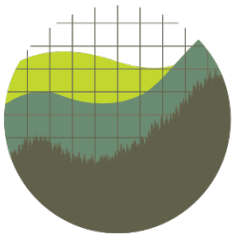

Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

September 15, 2020

Dr. Thomas Armitage, Designated Federal Officer, EPA Science Advisory Board
armitage.thomas@epa.gov

Subject: Comments on the SAB Draft Report on the Scientific and Technical Basis of EPA's Proposed Rule titled "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process"

The Institute for Policy Integrity at New York University School of Law[1] submits these comments as a supplement to our prior written comments on the Science Advisory Board's review of EPA's proposed rule on the development and presentation of cost-benefit analysis for significant rulemakings conducted under the Clean Air Act. Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

These comments make the following points:

- The SAB should strengthen its important critiques of the proposed rule's approach to less-than-certain impacts and unquantified benefits.
- The SAB should explain that the proposed rule breaks from best practices by drawing biased distinctions between direct and indirect benefits, and by holding benefits analysis to a higher standard than cost analysis. More generally, the SAB should also note that the proposed rule fails to offer evidence of need or a rational justification grounded in evidence.
- The SAB should remove its references to "domestic" interests, which at best will create confusion and at worst could send EPA toward an approach to cost-benefit analysis that courts have found to be arbitrary.

Strengthening the SAB's Recommendations on Less-Than-Certain Impacts and Unquantified Benefits

The SAB's draft report identifies several flaws, biases, and shortcoming in EPA's proposed rule. In one essential recommendation, the draft report points out that the proposed rule "appears to exclude" from consideration the possibility of less-causally-certain but still potentially substantial health impacts, in contravention of best practices for balanced and complete analysis.[2] Similarly, the draft report also rightly notes that "focus[ing] too heavily on the expected value of a policy" may obscure "low-probability, high-consequence hazards," which may be "very important."[3] Policy Integrity made similar points in our prior written and oral comments.

The SAB should strengthen its conclusion in its final report by correcting a contrary statement on page 5 of the draft report. On page 5, the SAB writes that it "is reasonable" for Section 83.3(a)(7) of the

[1] This document does not purport to present New York University School of Law's views, if any.

[2] SAB Draft Report at 3, 7 (Sept. 9, 2020).

[3] *Id.* at 15.

proposed rule to have called for "selection of endpoints for which there is scientific evidence of a clear causal (or likely causal) relationship between exposure and effect."[4] In fact, as the SAB observes on page 3, it is *not reasonable* to exclude from consideration relationships that "may be less certain (e.g., possibly causal), but the impact would be substantial."[5] The SAB should correct the statement on page 5.

A second essential recommendation made in the draft report concerns how the proposed rule has "depart[ed] from best practices" by emphasizing expected values and other quantitative data while minimizing "significant unquantified benefits or costs."[6] Policy Integrity made similar points in our prior written and oral comments. The SAB should strengthen its conclusion on unquantified effects by giving it its own section in the discussion and its own separate recommendation, rather than just tying it together with a broader discussion of expected value and uncertainty analysis.[7]

Addressing Additional Flaws and Biases in the Proposed Rule

Policy Integrity repeats our prior calls for the SAB to identify other ways in which the proposed rule breaks severely from longstanding best practices for economic analysis. In particular, the proposed rule would require analysts to draw an arbitrary distinction between direct and indirect benefits that will often be unworkable and that will undermine giving indirect benefits the weight they deserve. The proposed rule also repeatedly sets higher bars for benefits than costs, such as establishing a higher burden of proof and giving less weight to co-benefits than indirect costs. Such an imbalanced analysis would violate both executive guidance and judicial precedent requiring agencies to treat costs and benefits consistently and not place a thumb on the scale.

More broadly, the proposed rule ironically fails its own standards for regulatory analysis. It fails to offer any concrete details for even a single example to demonstrate its own need. It does not assess the significance of the problem it alleges, does not assess how likely the proposed changes are to address the alleged problem, and ignores evidence already submitted by commenters during the Advance Notice on the *lack* of need. The rule never explains why a codification of best practices is necessary when EPA's *Guidelines for Preparing Economic Analyses* already exist and are being updated and undergoing SAB review. The few past rulemakings the agency obliquely cited during the Advance Notice as evidence of need in fact provide no evidence of need, as they followed EPA's *Guidelines* consistently and transparently and even clearly indicated which effects were co-benefits.

The proposed rule also fails its own standards for assessing costs and benefits. EPA claims the rule will not have "an economic impact on regulated entities"[8]—but this ignores all the other important categories of costs and benefits: the very likely increased administrative burdens of a rule that seeks to expand the practice of and criteria for cost-benefit analysis; some quantitative or qualitative assessment of the rule's alleged transparency benefits to the public; an honest assessment of the informational costs and losses to regulatory efficiency of obscuring or delegitimizing ancillary benefits from co-

[4] *Id.* at 5.

[5] *Id.* at 3; *see also id.* at 7. Note that while these pages refer to modifying the language in "Section 82(a)(7)," there does not appear to be such a provision in the proposed rule; we assume that the SAB meant to refer to Section 83.3(a)(7). Regardless, the point remains the same, even if multiple different provisions of the proposed rule were implicated: it is not reasonable to exclude entirely less-than-certain effects when they may be significant. *See* McGartland et al., 2017.

[6] SAB Draft Report at 15.

[7] Policy Integrity also agrees with the SAB's recommendation to clarify that formal probabilistic uncertainty analysis is only required if both feasible and appropriate. *Id.* at 15.

[8] 85 Fed. Reg. at 35,624.

pollutants; and a meaningful review of the environmental justice effects of undermining the consideration of co-benefits.

The proposed rule lacks any rational justification grounded in evidence, and the SAB should say so.

Removing a Misleading and Arbitrary Reference to "Domestic" Valuations

Finally, the SAB should strike from its report a confusing reference to "domestic" interests that could lead EPA down a path toward an arbitrary economic analysis. The draft report recommends that EPA expand its proposed definition of cost-benefit analysis by saying "that benefits should be derived from willingness-to-pay estimates from domestic individuals (as opposed to international interests)."[9] The draft report later formulates this as "opportunity costs and benefits [should] represent the willingness-to-pay for a policy outcome valued by United States individuals."[10]

There are multiple problems with these two formulations. To begin, they are not the same. The second applies a single standard to both costs and benefits, while the first singles out only benefits as being limited to "domestic" willingness-to-pay. Singling out benefits as distinct from costs in that way is already problematic. As Policy Integrity has explained to both EPA and the SAB in multiple prior comments (see attached comments),[11] because a regulated firms' compliance costs ultimately fall to that firm's owners, employees, and/or customers, and because many domestically-located regulated firms have significant numbers of foreign shareholders and customers, regulatory costs are at least as likely as regulatory benefits to fall at least partly outside strict U.S. geographic borders. Suggesting that all opportunity costs should be valued while only "domestic" benefits are valued, as the SAB's first formulation does, arbitrarily holds benefits to a different standard than costs.

Furthermore, the two formulations are different in that one references "domestic individuals" while the other references "United States individuals." Those are not the same, as recently observed by the U.S. District Court for the Northern District of California when it struck down as arbitrary the Department of the Interior's reliance on a "domestic-only" social cost of methane in part for its failure to consider "impacts on 8 million United States citizens living abroad, including thousands of United States military personnel," as well as "billions of dollars of physical assets owned by United States companies abroad."[12] The reference to "domestic" is therefore minimally confusing for agency analysts, and potentially could lead to legal problems.

Similarly, the Northern District of California also explained how it was arbitrary for a federal agency to ignore how foreign effects can spill back on to U.S. interests, such as through internationally interconnected markets (i.e., "United States companies impacted by their trading partners and suppliers abroad") and by internationally interconnected health and security systems (i.e., "global migration and geopolitical security").[13] Under the Administrative Procedure Act, such considerations will often be "important aspects of the problem," and failure to consider them will be deemed arbitrary by courts.[14]

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[9] SAB Draft Report at 2.

[10] *Id.*

[11] *See* Policy Integrity's First Batch of Additional Comments to the SAB Economic Guidelines Review Panel at 7-8 (May 12, 2020); *see also* Policy Integrity et al., Comments on Quantifying and Monetizing Greenhouse Gas Emissions in the Safer Affordable Fuel-Efficient Vehicles Proposed Rule at 6-13 (Oct. 26, 2018), https://policyintegrity.org/documents/Emissions_Standards_PRIA_SCC_Comments_Oct2018.pdf.

[12] California v. Bernhardt, No. 4:18-cv-05712-YGR (N.D. Cal. July 15, 2020).

[13] *Id.*

[14] *Id.*

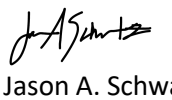
More specifically, under the Clean Air Act, certain provisions even require an international perspective on environmental outcomes.[15] And notably, neither *Circular A-4* nor EPA's *Guidelines* require a domestic-only perspective on costs and benefits.[16]

In short, because international effects and interests may ultimately bear on U.S. interest and willingness-to-pay, the distinction between "domestic individuals" versus "international interests" that the SAB draft report seeks to draw is—from both an economic and a legal perspective—oversimplified in a way that is misleading and could result in a legally deficient regulatory analysis.

Even the formulation of "willingness-to-pay for a policy outcome valued by United States individuals"[17] raises potentially thorny questions about the proper valuation of outcomes in the face of behavioral market failures and internalities, such when consumers' *ex ante* willingness to pay for energy efficiency savings may appear to diverge from their *ex post* valuation of the savings actually achieved[18]—thorny questions on which the SAB has not been fully briefed in connection to this proceeding, and on which the SAB should therefore not yet comment.

Given all these complexities, the SAB should not make recommendations for refining EPA's definition of cost-benefit analysis along these lines, and should remove any reference to "domestic"-only valuations from its report. To the extent that the SAB feels the current definition of cost-benefit analysis in the proposed rule lacks important nuances, that is yet another reason why the SAB should conclude that the proper repository for best practices for cost-benefit analysis is EPA's *Guidelines for Preparing Economic Analysis*, and why the proposed rule is therefore, in fact, unnecessary and inappropriate.

Respectfully,



Jason A. Schwartz, Legal Director
Institute for Policy Integrity

Attached:

Policy Integrity et al., Comments to EPA on Notice of Proposed Rulemaking for "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process"

Policy Integrity's First Batch of Additional Comments to the SAB Economic Guidelines Review Panel at 7-8 (May 12, 2020)

Policy Integrity et al., Comments on Quantifying and Monetizing Greenhouse Gas Emissions in the Safer Affordable Fuel-Efficient Vehicles Proposed Rule at 6-13 (Oct. 26, 2018)

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[15] E.g., 42 U.S.C. § 7415.

[16] E.g., OMB, *Circular A-4* at 15 (allowing analysts to consider effects beyond the border); *id.* at 3 ("Different regulations may call for different emphases in the analysis, depending on the nature and complexity of the regulatory issues."); *id.* at 38 (acknowledging that while analyses may be "conducted from the United States perspective," implicitly sometimes analyses may be conducted from a global perspective).

[17] SAB Draft Report at 2.

[18] *See generally* Policy Integrity, Shortchanged: How the Trump Administration's Rollback of the Clean Car Standards Deprives Consumers of Fuel Savings (2020), https://policyintegrity.org/publications/detail/shortchanged-the-trump-administrations-rollback-of-the-clean-car-standards (describing the behavioral market failures connected to the energy efficiency paradox, and explaining why full valuation of fuel savings is essential and consistent with best practices).