August 3, 2020

Docket ID No. EPA-HQ-OAR-2020-00044

Subject: Comments on Notice of Proposed Rulemaking for "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process"[1]

Submitted by: Center for Biological Diversity, Environmental Defense Fund, Food & Water Watch, Institute for Policy Integrity at New York University School of Law,[2] Montana Environmental Information Center, Union of Concerned Scientists, Western Environmental Law Center[3]

These comments contain two main sections, plus a third section responding to the requests for additional comments:

- First, the proposed rule is unnecessary, unjustified, and unsupported by any evidence of need, and so should not be adopted.
- Second, the proposed rule breaks from the best practices for cost-benefit analysis of regulations in several significant ways—in particular by undermining the balanced consideration of co-benefits, and by setting more stringent standards for benefit estimates than cost estimates—and so if the proposed rule were adopted despite being unnecessary and unjustified, it would also be biased and arbitrary.
- Third, many of the requests for additional comments would send EPA down a dangerous path and should not be pursued. As one example, EPA should never "determine that a future significant CAA regulation be promulgated only when monetized benefits exceed the costs of action,"[4] as doing so would wrongly treat unmonetized benefits as worthless.

I. The Proposed Rule Is Unnecessary and Unjustified

The proposed rule ironically fails to satisfy its own standards for adequately explaining the need for a new regulation.[5] But because the proposed rule's standards are unnecessary, unjustified, and arbitrarily biased in significant ways, the proposed rule should not actually be used as the benchmark for measuring the reasonableness of any regulation. Thus, it is much more relevant and condemnatory that the proposed rule fails to satisfy the standards set by statute, executive orders, and longstanding guidance for adequately explaining the need for a new regulation.

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[1] 85 Fed. Reg. 35,612 (June 11, 2020).

[2] No part of this document purports to present New York University School of Law's views, if any.

[3] Our organizations may separately submit additional comments on the proposed rule.

[4] 85 Fed. Reg. at 35,623.

[5] *Id.* at 35,618 ("The key elements of a rigorous regulatory BCA include: (1) A statement of need. . . . Each regulatory BCA should include a statement of need that provides (1) a clear description of the problem being addressed, (2) the reasons for and significance of any failure of private markets or public institutions causing this problem, and (3) the compelling need for federal government intervention.")

A. Regulations Should Present for Public Comment an Adequate Explanation of Need

Multiple legal authorities together require that EPA adequately explain the purpose of its proposed regulation. EPA's stated source of statutory authority, 42 U.S.C. § 7601(a)(1), authorizes regulations only if they are "necessary" to EPA's functions.[6] The Administrative Procedure Act further prohibits arbitrary rules,[7] including rules that fail to consider an important aspect of the problem, or for which the explanation of decision "runs counter to the evidence before the agency."[8] As explained below, here EPA has failed to offer any evidence of need for the proposed rule and, to the contrary, has ignored evidence already presented by commenters that such a rule is unnecessary and unjustified.[9]

Presidential orders and guidance further elaborate on the requirement to explain the need for regulations. Executive Order 12,866 specifies that "agencies should promulgate *only* such regulations as are required by law, are necessary to interpret the law, or are made *necessary by compelling public need*."[10] To that end, Executive Order 12,866 requires agencies to "identify the problem that it intends to address . . . as well as the significance of that problem."[11] Agencies also must avoid "duplicative" regulations.[12]

In implementing Executive Order 12,866, OMB's *Circular A-4* clarifies that when a regulation is based on an objective like "improving governmental processes," agencies still must "provide a demonstration of compelling social purpose and the likelihood of effective action."[13] Those OMB guidelines continue to explain that even if certain "intangible rationales" cannot be quantified, "the analysis should present and evaluate the strengths and limitations of the relevant arguments for these intangible values."[14] Furthermore, for regulations that seek to "make government operate more efficiently," agencies should have "clearly identified measure[s]" and must examine whether those measures are "both effective and cost-effective."[15] And, in this same vein, EPA's own *Guidelines for Preparing Economic Analyses* reiterate that both the "need" for regulation and the "significance of the problem" must be assessed.[16]

As the following subsections explore, the proposed rule provides nothing beyond a few vague examples in a failed attempt to demonstrate need, does not assess the significance of the alleged problem, does not demonstrate a compelling social purpose, does not avoid unnecessary duplication, does not assess how likely the proposed changes are to address the alleged problem, and does not assess the strengths or limitations of the scant evidence of need. In short, the proposed rule does not present for public comment an adequate statement of need consistent with requirements of statute and executive orders.

The lack of an adequate statement of need is, perhaps, not surprising, because the proposed rule is unnecessary, as discussed in detail below. Without such a statement, the proposed rule is unjustified and, therefore, should not be finalized.

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[6] *Id.* at 35,613.
[7] 5 U.S.C. § 706(2)(A).
[8] Motor Vehicle Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29, 43 (1983).
[9] *See, e.g.*, Policy Integrity, Comments on Advance Notice of Proposed Rulemaking for "Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process" (Aug. 13, 2018), https://policyintegrity.org/documents/EPA_CBA_ANPR_Comments.pdf.
[10] Exec. Order 12,866 § 1(a).
[11] *Id.* at § 1(b)(1).
[12] *Id.* at § 1(b)(10).
[13] OMB, *Circular A-4* at 4 (2003).
[14] *Id.*
[15] *Id.* at 5.
[16] EPA, *Guidelines for Preparing Economic Analyses* 3-2 (chapter 3 last updated 2010).

If EPA were to attempt to subsequently fabricate a more detailed statement of need, any such explanation of the need for this rulemaking should be re-presented in a new public notice with a new and adequate opportunity for public comment. While EPA claims that this rulemaking is exempt from any requirement to provide an adequate opportunity for public comment,[17] by its own terms the proposed rule's purported goal is "to provide consistency and transparency *to the public*,"[18] and so it is not at all clear that the rule would qualify as the kind of procedural rule "directed toward improving the efficient and effective operations *of an agency*" that may fall within the Administrative Procedure Act's narrow exemption to notice-and-comment rulemaking.[19] Moreover, the fact that EPA has submitted the rule to OMB review as well as to this initial round of public comments[20] demonstrates that there are no great costs to allowing proper public review of this rulemaking, while the classification of the proposed rule as "significant"[21] indicates a policy importance and novelty that warrants public review[22]—and as such, according to the criteria set out by the Administrative Conference of the United States, EPA "should" allow for public comment on all aspects of this rulemaking.[23] Thus, should EPA attempt to craft a statement of need, the agency should re-propose the rule. In its current form, without any adequate statement of need, the proposed rule is unjustified and must not be adopted.

B. EPA Fails to Present Any Adequate Examples or Justification of Need

The proposed rule's preamble asserts that EPA merely "seeks to codify" existing practices for cost-benefit analysis.[24] The proposed rule defines that those existing best practices are reflected in OMB's *Circular A-4* and related OMB guidance, and in EPA's *Guidelines for Preparing Economic Analyses* (though the proposed rule lists only the 2010 version of the *Guidelines*, seemingly ignoring that various chapters were updated in 2014, 2015, and 2016,[25] and that the *Guidelines* are currently undergoing revision and review by EPA's Science Advisory Board[26]).

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[17] 85 Fed. Reg. at 35,613

[18] *Id.* (emphasis added); *see also id.* ("The agency believes that the information provided as a result . . . would provide the public with additional information."). Moreover, to the extent that the proposed rule will change regulatory analysis in ways that will alter regulatory outcomes, the proposed rule will bear directly on the interests of the public. As the preamble itself acknowledges, the thoroughness and carefulness of economic analysis bears directly on "the effectiveness of environmental policy decisions." *Id.*

[19] AFLCIO v. NLRB, 2020 WL 3041384 at *14 (D.C. Cir., June 7, 2020) (emphasis added); *see also id.* at *13 (explaining that the APA "establishes that an agency rule is essentially *presumed* to be substantive for the purpose of the notice-and-comment requirement, and that notice-and-comment rulemaking is thus generally required *unless* a rule satisfies one of the listed exceptions"); *id.* at *15 ("[I]f the agency cannot show that the default assumptions of the APA have been properly displaced because the rule at issue is, in fact, directed at the agency's internal processes despite the incidental effect on the parties, then the rule cannot be characterized as fitting within the APA's narrow procedural exemption, and notice-and-comment is required.").

[20] 85 Fed. Reg. at 35,624.

[21] *Id*.

[22] *See id.* at 35,617 (explaining that rules that are "notably novel or significant for other policy reasons, would benefit from rigorous analysis to inform the public").

[23] ACUS Recommendation 92-1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements* § 2 (1992) ("For rules falling within the 'procedure or practice' exception in 5 U.S.C. 553(b)(A), agencies should use notice-and-comment procedures voluntarily except in situations in which the costs of such procedures will outweigh the benefits of having public input and information on the scope and impact of the rules, and of the enhanced public acceptance of the rules that would derive from public comment.").

[24] 85 Fed. Reg. at 35,617.

[25] EPA, *Guidelines for Preparing Economic Analysis*, https://www.epa.gov/environmental-economics/guidelines-preparing-economic-analyses.

[26] *See, e.g.*, Policy Integrity, Comments to EPA Science Advisory Board Economic Guidelines Review Panel, https://policyintegrity.org/projects/update/initial-comments-to-epa-science-advisory-board-on-economic-analysis-guidelines.

As explained below in Section II of these comments, the proposed rule does not merely codify these existing documents but, in fact, distorts and biases existing best practices in several significant ways. But even if EPA were correct in characterizing the proposed rule as merely seeking to codify existing practices, such codification is unnecessary. Through 2016, EPA had consistently and transparently conducted its cost-benefit analyses under the guidance of *Circular A-4* and its own *Guidelines*.[27] EPA now fails to offer any concrete examples or justification for why those existing guidelines are not still sufficient.

The proposed rule vaguely alleges that there has been "inadequate adherence to existing EPA and OMB guidance."[28] EPA cites to "recent . . . examples," but list no concrete example.[29] EPA offers "one example" of alleged double-counting, but does not provide so much as the name of that rulemaking.[30] Nor does EPA explain how this "one example" of alleged double-counting, if real, would justify any of the proposed rule's myriad provisions other than on the issue of defining the baseline. And, in fact, double-counting historically has not been a problem, as major EPA rules like the Mercury and Air Toxics Standards did not double-count pollution-reduction benefits vis-à-vis the National Ambient Air Quality Standards.[31]

Similarly, on the issue of indirect benefits, the proposed rule refers only vaguely to the allegations of "commenters" and to the "reports" they cite.[32] The proposed rule provides no concrete examples of when or how frequently there has been an issue with regulatory analyses not transparently communicating which benefits were either indirect or related to reductions of co-pollutants.

The Advance Notice that preceded this proposed rule did list two rules as examples of when industry groups have complained about the regulatory analysis—the Mercury and Air Toxics Standards (MATS) and the Oil and Gas New Source Performance Standards (NSPS)[33]—and EPA's summary of the comments received on the Advance Notice lists one additional rule—the Clean Power Plan.[34] However, none of those rules provides an example of analysis lacking in consistency or transparency.

For example, industry has complained that EPA issued the MATS rule even though the "monetized benefits from one of the pollutants being directly regulated (i.e., mercury) were significantly lower than the estimated costs of the rule," and that the rule's total monetized benefits outweighed costs only because the agency considered the ancillary benefits from the reduction of a co-pollutant.[35] As the Advance Notice's presentation of this example made clear, industry's complaints with the MATS rule were (1) that the rule was justified by the highly significant but nevertheless largely unquantified

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[27] Note that, in holding up *Circular A-4* and EPA's *Guidelines* as much more suitable repositories for the best practices for cost-benefit analysis, these comments do not imply that those existing guidance documents are not in need of updates or refinements. However, the solution would be to update those documents through a transparent process of public input and peer review, not to supplant those documents with a regulation.

[28] 85 Fed. Reg. at 35,617.

[29] *Id*.

[30] *Id.* EPA does not even really explain whether it agrees with the commenter that the suggested rule was a case of double-counting, instead just vaguely agreeing there could be a generic risk of double counting if baselines are not carefully set, without detailing whether and when that has ever been the case. *Id.*

[31] *See* Kimberly M. Castle & Richard L. Revesz, *Environmental Standards, Thresholds, and the Next Battleground of Climate Change Regulations*, 103 Minn. L. Rev. 1349, 1415-1416 (2019); Policy Integrity, Comments to EPA on the MATS Supplemental Finding at 5-6 (Jan. 15, 2016), http://policyintegrity.org/projects/update/comments-on-supplemental-finding-for-epa-mercury-rule.

[32] 85 Fed. Reg. at 35,622.

[33] 83 Fed. Reg. 27,524, 27,526 (June 13,2018).

[34] EPA, *ANPRM Overview of Public Comments* (Apr. 22, 2020), https://www.regulations.gov/document?D=EPA-HQ-OAR-2020-0044-0031.

[35] 83 Fed. Reg. at 27,526 (characterizing the MATS rule's justification).

benefits of reducing mercury and other toxic pollutants, and (2) that the rule's massive net monetized benefits included co-benefits. Neither an alleged lack of consistency nor transparency is part of this complaint from regulated industry. In fact, EPA's consideration of unquantified and ancillary benefits was fully consistent with longstanding regulatory precedent and best practices, and was conducted transparently, especially with respect to setting the baseline and addressing uncertainty.[36] Tellingly, the MATS rule's summary table of costs and benefits was very explicit in labeling exactly which of the total monetized benefits came from the partial estimate of mercury-related benefits, versus the "$PM_{2.5}$-related Co-Benefits" or the "Climate-related Co-Benefits."[37]

Similarly, with the Oil and Gas NSPS, industry again wishes that EPA had not counted co-benefit or unquantified benefits, or possibly wishes that EPA had manipulated its valuation of the social cost of methane to falsely lower the rule's benefits.[38] But industry's complaints about the Oil and Gas NSPS have nothing to do with consistency or transparency. Like the MATS rule, the original Oil and Gas NSPS regulation was massively net beneficial and supported by a consistent, transparent, and rigorous regulatory impact analysis.[39] Again, the rule's summary table was clear about how monetized benefits were derived from estimates of the social cost of methane, while non-monetized benefits included health effects from reductions in VOCs, particulate matter, and ozone, as well as other important non-monetized benefits.[40]

The same is true of the Clean Power Plan, which also distinguished between climate benefits and "air pollution health co-benefits" in its summary table.[41] While such distinctions may, in fact, not always be appropriate or necessary to present in a summary accounting table (see below, Section II.A.),[42] the only three rules that EPA has in the past put forward as possible evidence of a need to improve "consistency and transparency" reveal none of the alleged issues that the proposed rule seeks to rectify. This is unsurprising, because all three of those rules followed OMB's *Circular A-4* and EPA's *Guidelines for Preparing Economic Analysis*, which are quite clear and detailed on the treatment of co-benefits, unquantified benefits, baselines, uncertainty, and other issues.

As such, EPA fails to offer any evidence of the need for the proposed rule. The lack of evidence of need is true for the entire proposed rule, but in particular, the few, vague examples EPA has offered in the past (like MATS and the Oil and Gas NSPS) provide no evidence of any historical problems with transparency or consistency in the presentation of co-benefits. Furthermore, EPA fails to explain how a regulatory requirement for an "additional presentation" featuring only a subset of benefits while excluding co-benefits would reduce "public confusion."[43] Quite the opposite, having two separate presentations—one that reflects all costs and benefits while the other includes only a subset but excludes co-benefits—could create confusion and cast doubt on the legitimacy of the costs and benefits not included in the second summary. (See Section II.A. below for more details on this problem.) EPA

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[36] *See, e.g.*, Policy Integrity, Comments to EPA on the MATS Supplemental Finding (submitted Jan. 15, 2016), http://policyintegrity.org/projects/update/comments-on-supplemental-finding-for-epa-mercury-rule; *Amicus* Brief of Policy Integrity, *Michigan v. EPA*, Nos. 14-46, 14-47, 14-49 (submitted Mar. 4, 2015), http://policyintegrity.org/documents/SCOTUS_brief_MATS_March2015.pdf.

[37] 77 Fed. Reg. 9304, 9306 (Feb. 16, 2012).

[38] 83 Fed. Reg. at 27,526 (characterizing the Oil and Gas NSPS rule).

[39] *See, e.g.*, Policy Integrity, Comments to EPA on the Proposed Oil and Gas NSPS (submitted Dec. 4, 2015), http://policyintegrity.org/documents/Oil_Gas_Comments_Dec2015.pdf

[40] 81 Fed. Reg. 35,824, 35,890 (June 3, 2016).

[41] 80 Fed. Reg. 64,662, 64,680 (Oct. 23, 2015).

[42] And for this reason, EPA should not, as it suggests in a section seeking additional comments, "require a detailed disaggregation of both benefit and cost categories within the table that summarizes the overall results of the BCA in the preamble of future significant CAA rulemakings." 85 Fed. Reg. at 35,624.

[43] *Id.* at 35,622.

should abandon its proposal for this unjustified, unnecessary, and misleading approach to cost-benefit analysis.

C. EPA Fails to Conduct Any Analysis of the Costs, Benefits, or Distributive Impacts of *This* Proposed Rule

The proposed rule states as its goal to require EPA "to provide analysis to the public that will present *all* of the benefits and costs in a consistent manner for *all* significant CAA rulemakings."[44] By its own classification, the proposed rule is a "significant regulatory action"[45] taken under the Clean Air Act.[46] Yet EPA has seemingly not conducted any analysis of the costs or benefits of this proposed, significant rule, in violation of the proposed rule's own standards as well as, more importantly, Executive Order 12,866.

Instead of conducting any meaningful analysis, in the preamble's section on regulatory analysis under Executive Orders 12,866 and 13,563, EPA writes that "EPA does not anticipate that this rulemaking will have *an economic impact on regulated entities*."[47] Whether or not this rulemaking will have a specifically "economic" impact particularly on "regulated entities" alone—a questionable conclusion given the proposed rule's potential impacts on regulatory analyses and outcomes—by its own terms the proposed rule would have purported costs and benefits to EPA and the public. Indeed, EPA hopes that the rule will somehow increase "transparency *to the public*."[48] And to the extent EPA is correct that the proposed rule would change how the agency conducts its own regulatory analyses, then the rulemaking would likely entail "administrative costs [or] savings."[49] Both effects, to the extent they would actually transpire as EPA assumes, would be cognizable costs and benefits of a significant regulatory proposal and, as such, warrant analysis. Though these effects (if they were real) might perhaps be hard to monetize, that does not excuse EPA from its obligation to assess the effects quantitatively or qualitatively to the extent feasible. EPA must therefore answer such questions as:

- How many rulemakings would these proposed changes likely affect each year? To answer this question, EPA should begin by identifying which historical regulatory analyses the agency believes these proposed changes would have affected, and in what specific ways. As noted above, none of the examples that have been cursorily mentioned in the advance notice or proposal provides any actual evidence of need for this proposed rule. If EPA cannot concretely identify any historical regulatory analyses for which "consistency and transparency" would have actually improved under these proposed changes, EPA should reconsider the need for the proposed rule.
- Do the assumed benefits to "consistency and transparency" actually outweigh the potential costs to obscuring or delegitimizing certain important categories of regulatory effects, such as ancillary benefits from co-pollutants, or the additional administrative burdens and potential regulatory delays or litigation risks that might result from the proposed rule? Because the proposed rule actually departs from existing best practices for cost-benefit analysis in several significant ways, as discussed below in Section II, those departures entail costs—both informational costs and costs to regulatory efficiency and net social welfare for any future rules based on distorted analysis—and those costs must be assessed.

[44] *Id.* at 35,613 (emphases added).
[45] *Id.* at 35,624.
[46] *Id.* at 35,613 (citing Clean Air Act § 301(a)(1) as authority).
[47] *Id.* at 35,624 (emphasis added).
[48] *Id.* at 35,613.
[49] OMB, *Circular A-4* at 37 (2003).

If, in the alternative, EPA really believes the rule will have no costs and benefits, then EPA has thoroughly undermined any case for the need for such a rule, for why would a rule with no costs and no benefits that is not required by statute need to be promulgated?

Furthermore, Executive Order 12,866 requires agencies to consider the "distributive impacts" of their rules,[50] and Executive Order 12,898 requires agencies, "[t]o the greatest extent practicable," to address any "disproportionately high and adverse human health or environmental effects" that policies may have "on minority populations and low-income populations."[51] Yet the proposed rule refuses to consider its environmental justice impacts, inexplicably claiming an exemption because "it does not establish an environmental health or safety standard."[52] Had the proposed rule undertaken the required analysis of distributive impacts and environmental justice, it would have revealed that many of the proposed rule's distortions of standard cost-benefit analysis will obscure how future regulations may disproportionately burden communities of color and low-income communities. As discussed below, the proposed rule undermines the consideration of co-benefits (Section II.A.) and sets overly stringent standards for certainty before assessing health endpoints (Sections II.B-C.). Because co-pollutants like particulate matter disproportionately affect communities of color and low-income communities,[53] and because the role of race, ethnicity, and socioeconomic factors in influencing the causal and correlative links between pollution and health has been understudied,[54] the changes contemplated by the proposed rule will further obscure the environmental justice effects of future regulations. By ignoring the proposed rule's own costs, benefits, and distributive impacts, EPA has arbitrarily failed to consider important aspects of the rulemaking.

II. The Proposed Rule Arbitrarily Breaks from the Best Practices for Cost-Benefit Analysis

As explained in the first section, the proposed rule is unnecessary and unjustified and so should not be adopted. But even if a codification of existing practices could somehow be justified in the abstract, the specific requirements of the proposed rule break from the best practices for cost-benefit analysis of regulations in several significant ways that render the proposal biased and arbitrary.

A. Arbitrarily Devaluing Indirect Benefits

The proposed rule seeks to have analysts "clearly distinguish between the social benefits attributable to the specific pollution reductions or other environmental quality goals that are targeted by the statutory provision" versus "other welfare effects."[55] The proposed rule insists that doing so will enhance transparency and reduce confusion.[56] However, to the contrary, the proposed rule's standard would increase confusion if implemented, by requiring analysts to engage in controversial line-drawing exercises around statutory objectives, and by casting doubt on whether co-benefits deserve the balanced treatment and due consideration they are entitled to. Indeed, the intent of this proposed exercise seemingly is to undermine the consideration of co-benefits. Though the proposed rule does not explicitly say so, Administrator Wheeler has publicly interpreted the proposed rule as barring EPA from

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[50] Exec. Order 12,866 § 1(a); *see also* Exec. Order 13,563 § 1(c).

[51] Exec. Order 12,898 § 1-101 (Feb. 11, 1994).

[52] 85 Fed. Reg. at 35,625.

[53] *See, e.g.*, Jason Schwartz, *Weakening Our Defenses: How the Trump Administration's Deregulatory Push Has Exacerbated the Covid-19 Pandemic* 7 (Policy Integrity Report, 2020) (summarizing environmental justice impacts of various pollutants), https://policyintegrity.org/files/publications/Weakening_Our_Defenses_Covid_Deregulation_Report.pdf.

[54] *See, e.g.*, EPA, *Integrated Science Assessment for Ozone and Related Photochemcial Oxidants* 8-28 to 8-29 (2013), https://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=247492 (noting the lack of studies examining the possible higher mortality effects to Black Americans from ozone exposure).

[55] 85 Fed. Reg. at 35,622.

[56] *Id.*

considering co-benefits in designing and selecting regulatory standards.[57] The proposed rule is therefore deeply problematic for multiple reasons.

To begin, distinguishing between benefits "targeted by the statutory provision" versus "other welfare effects" can be a complex, controversial, and ultimately fruitless endeavor. A regulation can have multiple statutory authorities. A statute can also have multiple objectives. Legislative objectives may not always be clear. A specific statutory provision's objectives may be informed by the broader objectives of the entire act. Analysts should not assume, absent explicit statutory language, that any statute has the objective of barring consideration of important indirect effects. For example, any broad statutory language, like "reasonable" or "appropriate," should be read broadly to authorize consideration of all important effects, whether direct or indirect. In interpreting the phrase "appropriate and necessary" under Section 112 of the Clean Air Act, the Supreme Court noted that it would not be appropriate to ignore indirect costs to human health.[58] Similarly, distinguishing between direct and indirect effects may turn on thorny questions of law and science. Take once again, for example, the benefits that come from reducing particulate matter when regulating mercury and other toxic pollutants under Section 112 of the Clean Air Act: though particulate matter certainly can also be regulated through other statutory provisions, the benefits from particulate matter reductions are directly relevant to the evaluation of whether it is "appropriate and necessary" under Section 112 to regulate power plants, and some components of particular matter also meet the definition of hazardous air pollutants.[59]

Second, even if it were possible to always distinguish between pollutants that are the "statutory objective" and those that are "other," doing so could lead to an inappropriate belittlement of key effects. If done carefully and with context—as EPA did in the MATS rule and the Clean Power Plan—it may at times be possible to distinguish between direct and indirect effects in the text or tables of a preamble or regulatory impact analysis. However, always drawing such distinctions in a summary table without providing sufficient context, or requiring an additional presentation to highlight only a subset of effects deemed to be within the "statutory objective," could lead to the "other welfare effects" being discounted.

By belittling key co-benefits, the proposed rule would break from longstanding best practices for the consideration of indirect effects. Executive Order 12,866 makes no distinction between direct and indirect effects, instead instructing agencies to "assess all costs and benefits."[60] *Circular A-4* instructs agencies to apply "[t]he same standards of information and analysis quality" to both direct and indirect effects,[61] and notes that important indirect effects should carry enough weight that, just like direct effects, they can "change the rank ordering of the main alternatives in the analysis."[62] *Circular A-4* further suggests that it is appropriate to put ancillary benefits together with direct benefits on the same side of the ledger in a cost-benefit analysis,[63] and also notes that in a cost-effectiveness analysis, the

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[57] *See* Sean Reilly, *EPA Limits Future Regs with Cost-Benefit Overhaul*, E&E News PM, June 4, 2020.

[58] *Michigan v. EPA*, 135 S.Ct. 2699, 2707 (2015) (after noting it would be irrational to ignore whether compliance technologies imposed countervailing risks to human health that more than offset the benefits of emissions reductions, concluding that "[n]o regulation is 'appropriate' if it does significantly more harm than good").

[59] *See* Policy Integrity, Comments to SAB on Scientific and Technical Basis of EPA's Proposed Mercury and Air Toxics Standards for Power Plants Residual Risk and Technology Review and Cost Review at 3 (Jan. 10, 2020), https://policyintegrity.org/documents/J_Lienke_-_written_statement_for_SAB_re_MATS_Reconsideration_-_January_2020_%28signed%29.pdf.

[60] Exec. Order 12,866 § 1(a).

[61] *Circular A-4* at 26.

[62] *Id*.

[63] *Id.* (suggesting agencies might first subtract countervailing disbenefits from ancillary benefits before "put[ting] both of these effects on the benefits side"); *see also id.* at 3 ("Identify the expected undesirable side-effects and ancillary benefits of the

ancillary benefits should be compared against direct costs and other effects.[64] In its guide to presenting costs and benefits in an accounting statement, *Circular A-4* distinguishes categories of costs and benefits only by whether they are monetized or quantified or not—with no distinction between direct and indirect effects.[65] EPA's *Guidelines* similarly advise to present "all identifiable costs and benefits" together, including "directly intended effects and associated costs, as well as ancillary (or co-) benefits and costs."[66] EPA should continue to rely on these existing guidelines, and not the proposed rule, in considering and presenting co-benefits.

Finally, the proposed rule also suggests that, in any rulemaking with co-benefits, EPA should "explore whether there may be more efficient, lawful and defensible, or otherwise appropriate ways of obtaining ancillary benefits."[67] This suggestion is problematic for multiple reasons. To start, undertaking multiple regulations, each focused on individual pollutants rather than a unified, multi-pollutant regulatory strategy, may carry additional costs: administrative costs from designing and issuing multiple regulations; paperwork costs from implementing and complying with multiple regulations; and any lost efficiencies that a multi-pollutant compliance strategy may achieve that distinct pollutant-specific rulemakings might preclude. Additionally, any analysis of a regulatory alternative that requires a separate rulemaking would have to consider the realistic probability of whether such alternate or separate rulemakings could actually occur, as well as the forgone benefits during any delay in waiting for the additional rulemakings. Such an analysis could prove vexing if not impossible for an administration, especially when different authorities span across different agencies or different offices within an agency, each with their own rulemaking and enforcement capacities. Moreover, as courts have repeatedly reminded agencies, the existence of overlapping authorities does not excuse an agency from rationally implementing all of its statutory mandates: "The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations"[68]; and "Just as EPA lacks authority to refuse to regulate on the grounds of [the existence of another] statutory authority, EPA cannot defer regulation on that basis."[69] As EPA's *Guidelines* already acknowledge, the rational implementation of rulemaking authorities requires the consideration of net social benefits, including from reductions of other environmental co-contaminants. EPA should not depart from existing best practices on the consideration of co-benefits.

B. Failing to Treat Costs and Benefits Consistently

The proposed rule repeatedly sets higher bars for benefits than for costs. For example, "EPA proposes to select the endpoints for which the scientific evidence indicates there is (a) a clear causal or likely causal relationship between pollutant exposure and effect . . . ."[70] Not only is that an inappropriately high bar for calculating benefits (as discussed below, Section II.C.), but it is an inconsistently high bar as compared to costs. For compliance costs, EPA seems to suggest that the standard is merely whether

proposed regulatory action and the alternatives. These *should be added to the direct benefits and costs* as appropriate.") (emphasis added).

[64] *Id.* at 12 ("When you can estimate the monetary value of *some* but not all of the ancillary benefits of a regulation, but cannot assign a monetary value to the primary measure of effectiveness, you should subtract the monetary estimate of the ancillary benefits from the gross cost estimate to yield an estimated net cost.").

[65] *Id.* at 45, 47.

[66] EPA, *Guidelines* at 11-2.

[67] 85 Fed. Reg. at 35,622.

[68] *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).

[69] *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102, 127 (D.C. Cir. 2012).

[70] 85 Fed. Reg. at 35,620.

estimates are "relatively precise" and "reasonable"[71]—or even just "adequate[ ]"[72]—a much more lax standard that "clear causal."

Similarly, for quantifying health endpoints, the proposed rule emphasizes the need to "match" location and population characteristics,[73] to consider whether the "age" of the data "affect[s] the suitability of the study or model,"[74] to never use "upper-bound" estimates unless paired with lower-bound and central estimates,[75] and to apply a host of other criteria. None of these criteria, or comparable equivalents, are applied by the proposed rule to the consideration of compliance cost estimates, even though the age of data,[76] the location matching,[77] and other similar considerations often should be weighed in determining the relevance of cost estimates. Note, however, that the solution to this problem of the proposed rule treating costs and benefits differently is not to "apply" similar "requirements . . . to all risk assessments," as EPA suggests in a section on additional considerations.[78] That would only exacerbate the problem of unnecessarily issuing a new proposed regulation that at best duplicates—and at worst distorts—existing best practices for cost-benefit analysis. Rather, the solution to the proposed rule's problem of treating costs and benefits differently is simply to withdraw the proposed rule and revert to relying on existing guidance, like *Circular A-4* and EPA's *Guidelines*, which already offer a more balanced treatment to both costs and benefits.

EPA also misleadingly implies in the proposed rule that health benefits are more likely than costs to be uncertain, by calling out specifically the need to "report probability distributions for each health benefit" without similarly highlighting the best analytical tools for disclosing the uncertainty around cost estimates.[79] By repeatedly setting more stringent standards for benefit estimates than for cost estimates, the proposed rule reveals itself to be an arbitrary distortion of existing guidelines and not a mere codification.

Finally, while the proposed rule would require that analysts "must" engage in questionable line-drawing exercises in every rulemaking to exclude co-benefits from an additional required presentation, the proposed rule only requires similar treatment of indirect costs "to the extent possible" and when the statute provides a specific listing of costs.[80] When the statute silently allows the general consideration of costs, or when the differentiation of direct versus indirect costs is deemed not "possible," the proposed rule would seemingly allow the continued grouping of all costs together even as it requires an arbitrary different treatment of direct versus indirect benefits (see above, Section II.A.). Giving relatively less weight to indirect benefits while giving full weight to indirect costs is yet another way of arbitrarily treating costs and benefits differently. In reality, indirect benefits "are simply mirror images" of indirect

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[71] 85 Fed. Reg. at 35,619.

[72] *Id.* ("In this case, a general equilibrium approach may be more appropriate to more adequately estimate social cost.").

[73] *Id.* at 35,621.

[74] *Id.*

[75] *Id.*

[76] *See, e.g.*, Jason Schwartz & Jeffrey Shrader, *Muddying the Waters: How the Trump Administration Is Obscuring the Value of Wetlands Protection from the Clean Water Rule* 3-4 (2017), https://policyintegrity.org/files/publications/Muddying_the_Waters.pdf (explaining EPA's arbitrary exclusion of benefit estimates deemed too old even while the agency inconsistently used similarly old cost estimates, despite recent changes that likely affected compliance costs).

[77] *See, e.g.*, Policy Integrity, Comments on the Revised Definition of "Waters of the United States" at p.31, Apr. 15, 2019, https://policyintegrity.org/documents/Clean_Water_Rule_Revisions_Comment_2019.4.15-final.pdf (explaining how EPA had—without adequate justification—substituted cost estimates based on district-level data for individual states with instead estimates based on an average of neighboring states' costs).

[78] 85 Fed. Reg. at 35,623.

[79] *Id.* at 35,621.

[80] *Id.* at 35,627.

costs.[81] This becomes especially apparent when deregulating: the benefits of the original action become the costs of the rollback. More generally, agencies are required by the courts to treat costs and benefits alike and consider each with comparable analysis, and may not "put a thumb on the scale by undervaluing the benefits and overvaluing the costs."[82] The proposed rule puts several thumbs on the scale, and so is arbitrary.

C. Distorting Evidentiary Standards and Underemphasizing Sensitivity Analysis

The proposed rule calls for estimates of public health and environmental benefits to be based on "a clear causal or likely causal relationship between pollutant exposure and effect."[83] In other words, the proposed rule would exclude the consideration of important categories of benefits if the causal relationship is still somewhat uncertain or if the evidence, though compelling, is perhaps too new to have been fully integrated into more formal consensus reviews.[84] This high evidentiary bar breaks from existing best practices and would distort regulatory analyses. (It is also inconsistent with the evidentiary standards set by the proposed rule for compliance cost estimates, as noted above, Section II.B.)

Executive Order 12,866 calls for the assessment of all "anticipated" benefits,[85] not only those benefits that are certain to occur. While *Circular A-4* allows for the exclusion of some "highly speculative or minor consequences,"[86] it otherwise calls on agencies to "monetize quantitative estimates whenever possible," provided that assumptions are disclosed and defensible, and that the "likelihood of such effects" is made clear.[87] In providing specific recommendations on assessing environmental effects when the science remains uncertain, *Circular A-4* advises "present[ing] results from a range of plausible scenarios, together with any available information that might help in qualitatively determining which scenario is most likely to occur."[88] When possible, *Circular A-4* recommends using quantitative methods such as presenting probability distributions[89] and, minimally, conducting sensitivity analyses to determine whether including a more uncertain parameter would change the sign of the net benefits calculation.[90]

EPA's *Guidelines* similarly call for analysts to "characterize the full uncertainty distribution associated with risk estimates. Not only does this contribute to a better understanding of potential regulatory

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[81] Samuel J. Rascoff & Richard L. Revesz, *The Biases of Risk Tradeoff Analysis: Towards Parity in Environmental and Health-and-Safety Regulation*, 69 U. Chi. L. Rev. 1763, 1793 (2002).

[82] Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1198 (9th Cir. 2008); *see also* Bus. Roundtable v. SEC, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) (chastising the agency for "inconsistently and opportunistically fram[ing] the costs and benefits of the rule"); Sierra Club v. Sigler, 695 F.2d 957, 979 (5th Cir. 1983) (holding that if an agency "trumpet[s]" economic benefits, it must also disclose costs); Mont. Envtl. Info. Ctr. v. Office of Surface Mining, 274 F. Supp. 3d 1074, 1098 (D. Mont. 2017) (finding it "arbitrary and capricious" to "quantify socioeconomic benefits while failing to quantify costs").

[83] 85 Fed. Reg. at 35,620.

[84] The language of "casual or likely causal" seems intended to evoke the terminology used in EPA's *Integrated Science Assessments* for various pollutants like ozone, *see* EPA, *Integrated Science Assessment for Ozone and Related Photochemical Oxidants* lxxi (2020) [hereinafter "Ozone ISA"], https://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=348522 (defining "causal" and "likely to be causal"), which may go years between updates and also use an older cutoff date for the inclusion of literature, *see id.* at lxxii (explaining that the 2020 ISA for Ozone only reflects literature through March 2018, and before that the 2013 ISA had only included literature through June 2011).

[85] Exec. Order 12,866 § 6(a)(3)(C)(i); *see also* Exec. Order 13,563 § 1(c) ("[E]ach agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible").

[86] *Circular A-4* at 26.

[87] *Id.* at 27.

[88] *Id.* at 39.

[89] *Id.* at 40.

[90] *Id.* at 41-42.

outcomes, it also enables economists to incorporate risk assessment uncertainty into a broader analysis of uncertainty."[91]

In short, the proposed rule would raise the bar and exclude any health or environmental endpoints that are slightly uncertain even if, despite the uncertainty, they might prove highly significant to the cost-benefit analysis. This proposal is especially problematic given the controversial nature of some recent assessments of causality. For example, EPA's recent *Integrated Science Assessment of Ozone* downgraded the relationship between short-term ozone exposure and total mortality from "likely to be causal" (as determined in 2013) to just "suggestive of . . . a causal relationship."[92] This very recent downgrading was controversial and strongly opposed by scientific groups like the American Thoracic Society, which had provided to EPA "overwhelming evidence" of the causal relationship between ozone and mortality.[93]

Rather than excluding any benefit that falls slightly short of any particular determination of conclusive causality, EPA should continue—as instructed by *Circular A-4* and its own *Guidelines*—to consider all important categories of costs and benefits, characterizing their likelihood when some uncertainty exists, and testing the sensitivity of the cost-benefit analysis to the inclusion, exclusion, or alteration of key assumptions around such estimates.

At the same time that the proposed rule seeks to raise the bar on evidence of causality, the proposed rule also seeks to alter the standard for studies that suggest alternate concentration-response functions. On the one hand, the proposed rule may set the bar too high by perhaps requiring a degree of "match[ing]" for location and population that may be hard to achieve and that may exclude otherwise relevant studies. Compare the proposed rule with, for example, the EPA *Guidelines*' warning that a perfect "match" should not be the standard for benefit transfer analysis.[94] EPA's *Guidelines* instead advise analysts to identify for benefit transfer those "suitable" case studies—including relevant studies of sufficient quality from the gray literature—that are similar enough to "inform" the policy decision.[95]

On the other hand, the proposed rule's specific references to "studies that do not find a significant concentration-response relationship" and to the use of "alternative" and "multiple" concentration-response functions[96] raises the prospect of sanctioning the use of studies that break from the consensus scientific understanding that many key pollutants have no clear threshold for safe exposure.[97] On this issue, note, for example, the warning in EPA's *Guidelines* that focusing too much on outlier and tail-end risk estimates can lead to biased benefits estimates.[98] It is certainly important to consider and disclose uncertainty in the underlying risk assessments, to appropriately weigh emerging scientific understandings, and to test the sensitivity of calculations to changes in key assumptions. But the proposed rule incongruently seems willing to give weight to individual studies that break from consensus to find a lack of a concentration-response relationship, even as the proposed rule simultaneously raises the bar to demand scientific consensus on causality before considering benefit endpoints. In this way, the proposed rule departs from the best practices for economic analysis, which instead direct analysts to consider all important categories of effects while using sensitivity analysis and

[91] EPA, *Guidelines* at 7-5.
[92] Ozone ISA at ES-6.
[93] Am. Thoracic Society, EPA Proposal to Change How It Evaluates Environmental Policy Ignores Science, Newswise (June 5, 2020), https://perma.cc/J59K2DZE.
[94] EPA, *Guidelines* at 7-45 to 7-46.
[95] *Id.* at 7-45 to 7-46.
[96] 85 Fed. Reg. at 35,621.
[97] Castle & Revesz, *supra*, 103 Minn. L. Rev. at 1392 (explaining that EPA has consistently found benefits from reducing exposure below the NAAQS for ozone, carbon monoxide, nitrogen dioxide, sulfur dioxide, and particulate matter).
[98] EPA, *Guidelines* at 7-5.

other tools to properly disclose and weigh uncertainty. *Circular A-4* and EPA's existing *Guidelines* provide better advice on these matters, and EPA has developed extensive guidance specifically on the assessment of the health effects of pollution:[99] these existing documents should not be supplanted by the proposed rule.

D. Failing to Provide Sufficient Nuance

EPA is correct in quoting *Circular A-4* that "good regulatory analysis cannot be developed according to a formula. Conducting high-quality analysis requires competent professional judgment."[100] For that very reason, not only is it inadvisable to ossify requirements for cost-benefit analysis in the Code of Federal Regulations, but attempting to summarize complex issues in regulatory analysis within a few sentences or paragraphs of a rulemaking preamble is problematic. For example, the proposed rule's preamble spends just two paragraphs on the choice of partial equilibrium versus general equilibrium approaches.[101] By contrast, EPA's recent draft update to its *Guidelines for Preparing Economic Analyses* spends ten pages on the factors in choosing between such models,[102] and that chapter of the *Guidelines* is currently being reviewed both by the public and EPA's Science Advisory Board.[103] Because the methodology for cost-benefit analysis is sophisticated and nuanced, and because good analysis requires flexibility and professional judgment, the existing guidelines and their future updates are the appropriate repositories of the best practices for cost-benefit analysis, and a regulation like the proposed rule is inadvisable.

E. Insufficiently Protecting Personally Identifiable Information and Other Data

The proposed rule explains that "*[i]f the data and models are proprietary*," then EPA will protect confidential business information, personally identifiable information, and other privileged information from disclosure.[104] However, the proposed rule does not make clear whether personally identifiable information will also be appropriately protected if the data are not specifically "proprietary" but are still privileged or otherwise in need of protection, nor does the proposed rule explain the consequences if underlying data is simply infeasible to disclose. Many organizations and academics have raised significant concerns with EPA's so-called "Strengthening Transparency in Regulatory Science" (STRS) rule,[105] and those same concerns apply to this proposal as well. These comments hereby incorporate relevant comments on the STRS rule.[106] Those incorporated comments are also responsive to the proposed rule's request for additional comments on whether additional study selection criteria are

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[99] *See, e.g.*, EPA, *Preamble to the Integrated Science Assessments* (2015); EPA, *Framework for Human Health Risk Assessment to Inform Decision Making* (2014).

[100] 85 Fed. Reg. at 35,619.

[101] *Id.* at 35,619-20.

[102] EPA, *Guidelines for Preparing Economic Analyses: Review Copy Prepared for EPA's Science Advisory Board's Economic Guidelines Review Panel* 8-16 to 8-26 (2020), https://yosemite.epa.gov/sab/sabproduct.nsf/RSSRecentHappeningsBOARD/30D5E59E8DC91C2285258403006EEE00/$File/GuidelinesReviewDraft.pdf.

[103] *See, e.g.*, Policy Integrity, Second Batch of Additional Comments to the Science Advisory Board Economic Guidelines Review Panel, Covering Chapters 9-10, at pp. 4-5 (May 20, 2020), https://policyintegrity.org/documents/SAB_Econ_Guidelines_Review_Panel_Addn_Comments_Batch_2_2020.05.20-signed_.pdf (calling for EPA to set standards for transparency around usage of CGE models).

[104] 85 Fed. Reg. at 35,622.

[105] *See, e.g.*, Madison E. Condon, Michael A. Livermore & Jeffrey G. Shrader, *Assessing the Rationale for the U.S. EPA's Proposed "Strengthening Transparency in Regulatory Science" Rule*, 14 Rev. Envtl. Econ. & Pol'y 131 (2019), https://academic.oup.com/reep/article/14/1/131/5681775?guestAccessKey=ecb48664-e1fd-42b0-b4f1-19093b8f923d.

[106] *See, e.g.*, Policy Integrity, Comments on Strengthening Transparency in Regulatory Science, Supplemental Notice, May 14, 2020, https://www.regulations.gov/document?D=EPA-HQ-OA-2018-0259-11911.

appropriate,[107] as EPA should abandon this proposed rule and the proposed STRS rule, both of which would lead to biased results. Instead, EPA should return to relying on existing guidance.

III. Comments on Additional Requests

Again, as shown repeatedly above, the proposed rule is unnecessary, unjustified, and arbitrarily biased, and so should not be finalized or adopted. Nevertheless, we include responses below to some of EPA's additional requests for comments.

First, as to all the various requests for comments about whether EPA should codify additional requirements, such as on technological change or weight-of-evidence frameworks,[108] the response is: no, EPA should not, for the same reasons given above on why the proposed rule is unnecessary. Existing guidance, including *Circular A-4* and EPA's *Guidelines* (and any updates or supplements to those documents that have gone through an appropriate review process), provide sufficient instruction for analysts on these matters.

EPA asks for comments on how it should "take into consideration the results of a BCA in future rulemakings under specific provisions of the CAA."[109] But EPA does not need to adopt a new regulation to direct its decisionmakers on that question. Where there is a relevant statutory provision, caselaw will already provide guidance on such questions; otherwise, Executive Order 12,866 already instructs that "to the extent permitted by law," agencies should "adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."[110] Furthermore, under the Administrative Procedure Act, rulemakings must be supported by non-arbitrary justifications, including the assessment of all important aspects of the problem under consideration.

EPA asks for comments on whether it "should determine that a future significant CAA regulation be promulgated only when the monetized benefits exceed the costs of the action."[111] The agency absolutely should not do so. Treating unmonetized benefits as worthless violates Executive Orders, longstanding agency practices, and caselaw.[112]

EPA asks for comment on whether to inflate the $100 million threshold for "economically significant" rulemakings from a base year of 1995.[113] Doing so would create a confusing and unhelpful divergence between EPA's definition of "economically significant" versus OMB's definition, as used by every other agency, under Executive Order 12,866 and *Circular A-4*. OMB has continued to use the $100 million threshold even under President Trump's recent executive orders as well,[114] and a review by the Regulatory Studies Center at the George Washington University found that inflating the threshold would not meaningfully change the classification of any recent economically significant regulations.[115]

EPA asks for comment on "whether non-domestic benefits and costs of regulations, when examined, should be reported separately from domestic benefits and costs of such regulations."[116] This issue

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[107] 85 Fed. Reg. at 35,623.
[108] *Id.*
[109] *Id.*
[110] Exec. Order 12,866 § 1(b)(6).
[111] 85 Fed. Reg. at 35,623.
[112] *See, e.g.*, Policy Integrity Comments on MATS, *supra* note 36, at 2-3; Policy Integrity *Amicus* Brief, *supra* note 36, at 12-15 (summarizing regulatory history and literature).
[113] 85 Fed. Reg. at 35,623.
[114] *See, e.g.*, Dominic J. Mancini, Acting Admin. OIRA, *Guidance Implementing Executive Order 13771* at 3 (Apr. 5, 2017).
[115] Daniel R. Perez, *A Useful Measure of Regulatory Output*, https://regulatorystudies.columbian.gwu.edu/useful-measure-regulatory-output (Jan. 11, 2017).
[116] 85 Fed. Reg. at 35,623.

comes up most frequently in the context of climate change and the valuation of the social cost of greenhouse gases. We have provided EPA with extensive comments in the past on why either abandoning the global values estimated in 2016 by the Interagency Working Group on the Social Cost of Greenhouse Gases in favor of a so-called "domestic only" calculation of climate damages, or else relegating consideration of global effects to an appendix or sensitivity analysis, arbitrarily excludes or devalues climate damages that directly and indirectly affect the United States and its citizens and residents. We hereby incorporate such recent comments,[117] and we also direct EPA's attention to the recent decision of the U.S. District Court for the Northern District of California that found the Bureau of Land Management's use of a domestic-only social cost of methane estimate to be arbitrary.[118]

EPA asks for comments on alternate forms of presenting disaggregated costs and benefits, such as within a table that either separates those effects deemed to "pertain to the specific statutory objective" from "other welfare effects," or else that separates effects by listed statutory factors.[119] For all the reasons given above on why separating out certain effects from others is not only unnecessary, but may also create more confusion, may delegitimize the consideration of certain effects, and so may break from existing best practices on cost-benefit analysis, EPA should not adopt any of these alternative modes of categorizing certain effects in ways that highlight some effects at the expense of others.

EPA asks for comments on possible requirements for retrospective analysis.[120] Any such potential requirements should be concretely proposed in a separate notice that fully explains the need specifically for a rule-based solution to this matter (as opposed to relying on existing or new guidance on retrospective review) and that allows a new and adequate opportunity for public comment.

EPA asks for comments on how the "sequencing of rules might affect the estimation of benefits and costs."[121] If EPA follows existing guidelines for transparently defining the baseline for analysis, including the proper consideration of other rules simultaneously under development, then the sequencing of rules often will not affect the estimation of benefits and costs, and, as such, the proposed rule is unnecessary. Notably, though, on the issue of the costs and benefits of sequential rules: as compared to sequential rulemakings that each individually address a single pollutant, addressing multiple pollutants through a single rulemaking may reduce administrative and paperwork costs and may create cost-minimizing opportunities for multi-pollutant and novel compliance strategies, and these considerations counsel in favor of fully weighing important indirect benefits from the reduction of co-pollutants.

EPA asks for comments on whether to extend its proposed requirement for the disclosure of data to block the use of third-party models when the model and assumptions cannot be made publicly available.[122] Though the use of black box models can be problematic, and though sometimes the public's interest in transparency may outweigh either the third party's interest in confidentiality or the model's informative value, there may also be circumstances when certain data or models must remain more protected. As with the proposed criteria for disclosure of all data, a blanket one-size-fits-all approach that only allows for the binary choice of either full disclosure or prohibition is likely not the proper solution to this issue.

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[117] *See, e.g.*, Joint Comments on the Flawed Monetization of Forgone Benefits in the Proposed Rule, Oil and Nature Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, Nov. 25, 2019, https://policyintegrity.org/documents/Methane_Rule___Joint_SCC_Comments.pdf.

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

[119] 85 Fed. Reg. at 35,624.

[120] *Id*.

[121] *Id.*

[122] *Id.*

In conclusion, the proposed rule is unjustified, unnecessary, and arbitrarily biased, and should not be finalized.

Sincerely,

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Rosalie Winn, Senior Attorney, Environmental Defense Fund

Attachments:

- Joint Comments on the Flawed Monetization of Forgone Benefits in the Proposed Rule, Oil and Nature Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, Nov. 25, 2019, https://policyintegrity.org/documents/Methane_Rule___Joint_SCC_Comments.pdf
- Policy Integrity, Comments on Strengthening Transparency in Regulatory Science, Supplemental Notice, May 14, 2020, https://www.regulations.gov/document?D=EPA-HQ-OA-2018-0259-11911.