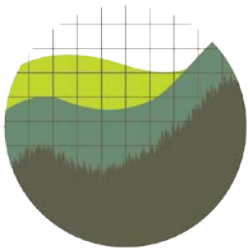

Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

October 8, 2019

VIA ELECTRONIC SUBMISSION

Environmental Protection Agency

Attn: Jessica Montañez, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504-03)

Re: Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting

Docket ID: EPA-HQ-OAR-2018-0048

The Institute for Policy Integrity ("Policy Integrity") at New York University School of Law[1] respectfully submits the following comments to the Environmental Protection Agency ("EPA" or the "agency") regarding proposed changes to its New Source Review ("NSR") applicability regulations ("Proposed Rule").[2] 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.

Our comments focus on EPA's failure to perform a cost-benefit analysis for the Proposed Rule. Specifically, we note the following:

- Both Executive Order 12,866 and the Administrative Procedure Act ("APA") require EPA to assess the costs and benefits of the Proposed Rule;
- The appropriate baseline against which to assess the Proposed Rule's costs and benefits is EPA's emissions-accounting policy prior to March 2018; and
- Relative to this baseline, the Proposed Rule has costs and benefits, which EPA unreasonably fails to consider.

Due to these shortcomings, the Proposed Rule violates both Executive Order 12,866 and the APA.

[1] This document does not purport to present New York University School of Law's views, if any.
[2] Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting, 84 Fed. Reg. 39,244, 39,252 (proposed Aug. 9, 2019) [hereinafter Proposed Rule].

I. EPA Must Assess the Proposed Rule's Costs and Benefits

EPA fails to conduct any reasoned assessment of the Proposed Rule's potential effects on air-pollution emissions or regulatory compliance costs. Finalizing the Proposed Rule in the absence of such an analysis would violate both Executive Order 12,866 and the APA.

Executive Order 12,866 provides that "[f]or each matter identified as . . . a significant regulatory action, the issuing agency shall provide to OIRA: . . . An assessment of the potential costs and benefits of the regulatory action."[3] This assessment must be based "on the best reasonably obtainable scientific, technical, economic, and other information," including quantifiable measures "to the fullest extent that [they] can be usefully estimated."[4] Costs considered include not just "direct cost . . . to businesses and others in complying with the regulation," but also "any adverse effects" the rule might have on "health, safety, and the natural environment."[5]

Separate from the requirements of Executive Order 12,866, the APA requires an agency to "articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made."[6] That explanation must be "based on consideration of the relevant factors."[7] Among these, "[a]gencies have long treated cost as a centrally relevant factor when deciding whether to regulate."[8]

By EPA's own admission, the Proposed Rule is "a significant regulatory action."[9] Accordingly, the White House Office of Information and Regulatory Affairs ("OIRA") urged the agency to "provide an estimate of the cost savings and emissions impacts of this proposed rule," as required by Executive Order 12,866.[10] But EPA declined to prepare such an analysis, claiming that the Proposed Rule has no costs or benefits because it merely "provides clarification to the existing regulations," with no effect relative to the status quo.[11] This is untrue, for reasons

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[3] Exec. Order no. 12,866 § 6(a)(3)(B) (emphasis added).
[4] § 1(a), (b)(7).
[5] § 6(a)(3)(C)(ii).
[6] Motor Vehicle Mfrs. Ass's v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotation marks omitted).
[7] *Id.* at 42.
[8] Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015). *See also* Mingo Logan Coal Co. v. EPA, 829 F.3d 710, 732 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) ("As a general rule, the costs of an agency's action are a relevant factor that the agency must consider before deciding whether to act.").
[9] *See* Proposed Rule, 84 Fed. Reg. at 39,252.
[10] EO 12866 Office of Management and Budget Comments on U.S. Environmental Protection Agency Draft Proposed Rule Titled, "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting," (ID: EPA-HQ-OAR-2018-0048-0026), at 28 [hereinafter OMB Comments Round 1] (May 8, 2019), *available at* https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OAR-2018-0048-0026&attachmentNumber=1&contentType=pdf.
[11] *See* EO 12866 Office of Management and Budget Comments on U.S. Environmental Protection Agency Draft Proposed Rule Titled, "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting," (ID: EPA-HQ-OAR-2018-0048-0029), at 31 [hereinafter OMB Comments Round 2] (July 17, 2019), *available at* https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OAR-2018-0048-0029&attachmentNumber=1&contentType=pdf ("In EPA's March 2018 Memorandum, along with this

explained in Sections II and III of this comment letter. As a result, finalizing the Proposed Rule without first assessing its likely costs and benefits would be arbitrary and capricious.

II. The Appropriate Baseline for Assessing the Proposed Rule's Costs and Benefits Is EPA's Emissions-Accounting Policy Prior to Issuance of the March 2018 Memorandum

As support for its assertion that the Proposed Rule has no costs or benefits, EPA cites a statement of policy—entitled "Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program" ("March 2018 Memorandum")—issued by then-EPA Administrator Scott Pruitt.[12] But the emissions-accounting policy set forth in the March 2018 Memorandum is not a legitimate baseline against which to assess the incremental costs and benefits of the Proposed Rule. Instead, EPA must assess the Proposed Rule's impacts relative to EPA's pre-2018 emissions-accounting policy.

A. The March 2018 Memorandum Is an Illegitimate Baseline Against Which to Assess the Costs and Benefits of the Proposed Rule

As stated in the Proposed Rule, the existing two-step test of the NSR program has been in place since the 1980s and involves a clear, two-step process for calculating emissions increases.[13] It is well-established that at step one, a facility must determine if the project will result in a significant emission increase ("Step 1"). If it does, the facility must then proceed to step two, which requires a more extensive emission analysis ("Step 2"). Step 2 calculations include all contemporaneous, source-wide emission increases and decreases.[14] Yet last year, Administrator Scott Pruitt offered a new interpretation of Step 1.[15] His March 2018 Memorandum's stated purpose was to

> communicate the EPA's interpretation that its current NSR regulations provide that emissions *decreases as well as* increases are to be considered at Step 1 of the NSR applicability process, provided they are part of a single project. The EPA has at times indicated that the relevant provisions of the NSR regulations preclude the consideration

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proposal, the agency has interpret[ed] the current regulations to allow for project emissions accounting. Thus EPA does not believe that this proposal, if finalized, will provide cost savings nor reduce permitting authority burden beyond any cost savings or burden reduction that is currently occur[r]ing in the absence of this rule, because this action only provides clarification to the existing regulations, for projects that involve multiple emissions units, consistent with the EPA's current interpretation to provide regulatory certainty.").

[12] Memorandum from E. Scott Pruitt, Administrator, Environmental Protection Agency, to Regional Administrators (Mar. 13, 2018), *available at* https://www.epa.gov/sites/production/files/2018-03/documents/pea_nsr_memo_03-13-2018.pdf [hereinafter March 2018 Memorandum].

[13] *See* Proposed Rule, 84 Fed. Reg. at 39,246.

[14] *See id.* at 39,248 ("EPA determined in the March 2018 Memorandum that decreases could be considered at Step 1 for all project categories [i.e., new, existing or projects that involve multiple types of emissions units]. Although the existing language in the NSR regulations supports this interpretation, this rulemaking proposal is intended to eliminate uncertainty regarding this issue.").

[15] *See* March 2018 Memorandum, *supra* note 12.

> of emissions decreases at Step 1, but for the reasons discussed below, the agency will no longer apply any such interpretation reflected in prior statements on this issue.[16]

Environmental organizations filed a challenge to the March 2018 Memorandum in the U.S. Court of Appeals for the D.C. Circuit, but, on July 13, 2018, the court granted a motion to hold the case in abeyance in light of the fact that EPA was "preparing a formal rulemaking that [was] likely to substantially affect the issues in [the] case."[17] EPA now argues that the Proposed Rule has no costs or benefits because the emissions-accounting approach it codifies is already authorized by existing regulations *as interpreted in* the March 2018 Memorandum.[18] In responding to OIRA's request that it provide more information on costs and benefits, EPA stated:

> As we explained in the March 2018 Memorandum . . . we interpret our current regulations, those that exist without finalizing this rule, to allow for project emissions accounting. Thus, this proposal, if finalized, will not provide cost savings nor reduce permitting authority burden beyond any cost savings or burden reduction that is currently occurring in the absence of this rule.[19]

But an agency cannot evade its responsibility to provide a reasoned explanation for a policy change—including a discussion of the relevant factor of cost—simply by announcing the change in a memorandum prior to codifying it in a regulation.[20] Under EPA's logic, it could avoid assessing the costs of even its most significant regulatory decisions by (1) issuing a guidance document that sets forth the new policy but purports, however unreasonably, to be consistent with existing regulatory text; (2) promptly proposing the same new policy in the form of a rule, before a court can adjudicate the legality of the guidance; and (3) claiming that the proposed rule has no incremental costs or benefits because it merely codifies the policy already advanced in the guidance. The requirements of the APA are not so easily circumvented.

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[16] *Id.* at 1 (emphasis added).
[17] Unopposed Motion to Hold Case in Abeyance (Doc. No. 1738879), No. 18-1149 (D.C. Cir. July 2, 2018); Clerk's Order (Doc. No. 1740468), No. 18-1149 (D.C. Cir. July 13, 2018).
[18] *See* Proposed Rule, 84 Fed. Reg. at 39,248 ("EPA determined in the March 2018 Memorandum that decreases could be considered at Step 1 for all project categories [i.e., new, existing or projects that involve multiple types of emissions units]. Although the existing language in the NSR regulations supports this interpretation, this rulemaking proposal is intended to eliminate uncertainty regarding this issue.").
[19] OMB Comments Round 2, *supra* note 11, at 31.
[20] *See* Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F. 2d 33, 38–39 (D.C. Cir. 1974) ("An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy."); *see also* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515–16 (2009) (agency must provide a "reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy").

B. The Appropriate Baseline for Assessing Costs and Benefits Is EPA's Pre-2018 Approach to Emissions Accounting

As OMB's Circular A-4 explains, the "[b]enefits and costs of a rule must be measured against a baseline, which "should be the best assessment of the way the world would look absent the proposed action."[21] EPA claims that its "current NSR applicability regulations, promulgated in 2002[,] can be reasonably interpreted to allow for project emissions accounting at Step 1."[22] But even if it were true that the 2002 regulations could *theoretically* have been interpreted in this way, they had not *actually* been interpreted in this way prior to the issuance of the March 2018 Memorandum. Therefore, the appropriate baseline against which to assess the costs and benefits of the Proposed Rule is EPA's pre-2018 interpretation of the 2002 regulations.

The EPA NSR Workshop Manual has provided instructions for how to do these calculations since 1990.[23] The manual specifies that only emission increases, not decreases, should be used to determine whether a facility needs to conduct a source-wide analysis of all contemporaneous changes in emissions.[24] This approach was codified in the 2002 NSR regulations.[25]

In 2006, EPA proposed a new rule that would have allowed sources to include decreases at Step 1 of the calculations, as the Proposed Rule does.[26] Although the regulation was finalized in January 2009, its implementation was indefinitely stayed.[27] Thus, in practice, emissions accounting has never departed from the approach specified in the 2002 regulations. Accordingly, that approach should be used as the baseline for any analysis of the Proposed Rule's costs and benefits.

III. Relative to EPA's Prior Policy, the Proposed Rule Has Costs and Benefits That EPA Fails to Consider

Relative to EPA's longstanding prior approach to emissions accounting, the Proposed Rule will have costs and benefits that the agency must consider. Specifically, the Proposed Rule is likely to

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[21] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-4, at 15, *available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf [hereinafter CIRCULAR A-4]; *see also* EPA, GUIDELINES FOR PREPARING ECONOMIC ANALYSIS, at 5-1 (Dec. 2010), *available at* https://www.epa.gov/sites/production/files/2017-08/documents/ee-0568-50.pdf (baseline of an economic analysis is "a reference point that reflects the world without the proposed regulation").

[22] *See* Proposed Rule, 84 Fed. Reg. at 39,249.

[23] EPA, NEW SOURCE REVIEW WORKSHOP MANUAL (Oct. 1990) (draft), *available at* https://www.epa.gov/nsr/new-source-review-publications.

[24] *See id.* at A-45 (describing the procedures for calculating whether there has been a net emission change from a source, with the first step to "[d]etermine the emissions increases (but not any decreases) from the proposed project. If increases are significant, proceed; if not, the source[] is not subject to review").

[25] *See* 40 C.F.R § 52.21(a)(2)(iv)(a).

[26] *See* Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Debottlenecking, Aggregation, and Project Netting, 71 Fed. Reg. 54,235 (Sept. 14, 2006).

[27] *See* Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation; Reconsideration, 75 Fed. Reg. 19,567 (Apr. 15, 2010); Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation, 75 Fed. Reg. 27,643 (May 18, 2010).

allow more facilities to undertake upgrades without triggering NSR permitting requirements, leading to both emissions changes and compliance-cost savings. To the extent that these emissions changes are *increases*, the Proposed Rule will impose costs in the form of health and environmental harms.

A. Projects That Would Have Triggered New Source Review Under EPA's Prior Policy Will Not Do So Under the Proposed Rule

As explained in Section II.A, calculations of emission increases under NSR involve a two-step process. At Step 1, a facility must determine if the project will result in a significant emission increase. If it does, the facility must then proceed to Step 2, which requires a more extensive emission analysis.

By allowing sources to include emission decreases at Step 1 of these calculations, the Proposed Rule reduces the likelihood that sources proceed to Step 2 and trigger NSR permitting requirements.[28] For example, imagine a major facility would like to replace a boiler that currently emits nitrogen oxides at 30 tons per year in an area of the United States subject to the Prevention of Significant Deterioration program. The new boiler will emit 60 tons per year. The significance threshold[29] for increases in nitrogen oxides is 40 tons per year.[30] Under the 2002 regulation, the only relevant consideration at Step 1 is that the boiler will emit 60 tons per year. Because this is above the nitrogen-oxides threshold of 40 tons per year, the facility will then be required to undertake a Step 2 analysis that examines all emission increases and decreases within the contemporaneous period. If the facility has other small pollution increases, such as adding an emergency generator that emits 20 tons per year, these must be considered along with the 30-ton-per-year reduction from removing the old boiler. Under the Step 2 analysis, the facility will trigger NSR requirements, as 60 + 20 – 30 = 50, a net increase above the nitrogen-oxides threshold.[31]

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[28] *See* Am. Lung Ass'n, Earthjustice, Envtl. Integrity Project, Galveston Houston Ass'n for Smog Prevention, Nat. Res. Def. Council & Sierra Club, Comments on "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Debottlenecking, Aggregation, and Project Netting," at 30 (Nov. 13, 2006), *available at* https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OAR-2003-0064-0075&attachmentNumber=1&contentType=pdf [hereinafter Envtl. NGO Comments on 2006 Proposed Rule].

[29] Once facilities emit pollution above the significant threshold for a pollutant, they must meet NSR requirements. *See* Linda Tsang, *EPA Proposes New Permitting Test for Power Plant Modifications*, CONG. RESEARCH SERV., Sept. 25, 2018, at 2, *available at* https://fas.org/sgp/crs/misc/LSB10199.pdf ("EPA's NSR regulations define modification as any physical or operational change that results in a 'significant net emissions increase' of its annual emissions, expressed in tons per year. An emissions increase is considered 'significant' if it exceeds regulatory emissions thresholds.").

[30] *See* 40 C.F.R. 51.21(b)(23)(i) ("Significant means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates: . . . Nitrogen oxides: 40 tpy.").

[31] This example is adapted from several comments submitted in response to the 2006 Proposed Rule, Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Debottlenecking, Aggregation, and Project Netting, 71 Fed. Reg. 54,235 (Sept. 14, 2006). *See, e.g.*, N.Y. State Dep't of Envtl. Conservation, Comments on "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Debottlenecking,

In contrast, under the Proposed Rule, the facility in question would not trigger NSR permitting requirements. At Step 1, the facility would be able to deduct the decrease in emissions from removing the old boiler, 30 tons per year, from the increase caused by the new boiler, 60 tons per year. For Step 1 purposes, the project will thus be deemed to yield an emission increase of only 30 tons per year, below the nitrogen-oxides threshold, and will not need to proceed to a Step 2 analysis or comply with NSR permitting requirements.

B. Emission Levels Are Likely to Change If Fewer Sources Are Subject to New Source Review

Implementing an emissions-accounting policy under which upgrades are less likely to trigger NSR permitting requirements could increase or decrease emissions at any given facility, depending on how the facility's investment decisions change relative to a baseline scenario.

One possibility is that facilities that would have performed NSR-triggering upgrades under the prior policy will now perform those upgrades *without* triggering NSR. This will lead to an increase in emissions because the sources will not become subject to stringent NSR emission-control requirements. NSR permits require facilities to take steps to lower their pollution, with the precise obligations dependent on where the facility is located. If the source is in an area of the country subject to the Prevention of Significant Deterioration program, it will need to install the best available control technology ("BACT"). [32] If the source is located in a nonattainment area for National Ambient Air Quality Standards, it will need to meet the lowest achievable emissions rate (LAER).[33] BACT and LAER can yield emission reductions of more than 90 percent from prior levels.[34]

Another possibility is that sources that would *not* have made upgrades under the prior policy for fear of triggering NSR will do so now that they are assured of avoiding NSR permitting requirements. The effect on emissions from these sources is ambiguous. A source's hourly emissions could decrease if the source is able to operate more efficiently.[35] But its *annual*

Aggregation, and Project Netting" (Oct. 30, 2006), *available at* https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OAR-2003-0064-0035&attachmentNumber=1&contentType=msw8; Cent. States Air Res. Agencies Ass'n, Comments on "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Debottlenecking, Aggregation, and Project Netting" (Nov. 13, 2006), https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OAR-2003-0064-0063&attachmentNumber=2&contentType=msw8; Pa. Dep't of Envtl. Prot., Comments on "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Debottlenecking, Aggregation, and Project Netting" (Nov. 14, 2006), https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OAR-2003-0064-0069&attachmentNumber=1&contentType=pdf.

[32] *See* NAT'L RESEARCH COUNCIL, NEW SOURCE REVIEW FOR STATIONARY SOURCES OF AIR POLLUTION 20 (2006).

[33] *See id.*

[34] *See* Envtl. NGO Comments on 2006 Proposed Rule, *supra* note 28, at 33.

[35] *See* NAT. RESEARCH COUNCIL, AIR QUALITY MANAGEMENT IN THE UNITED STATES 185-186 (2004) (noting that making it easier for projects to be undertaken without triggering NSR may lead to greater efficiency and decrease emissions, according to some industry representatives). *See also* James B. Bushnell & Catherine Wolfram, *The Economic Effects of Vintage Differentiated Regulations: The Case of New Source Review* 3 (CSEM Working Paper

emissions could nevertheless increase if it is able to operate more hours per year as a result of being less likely to break down and need maintenance.[36]

A third possibility is that the rule will incentivize sources to continue to operate for more years than they otherwise would. Facilities that might retire rather than comply with BACT or LAER can now upgrade without installing expensive control technologies. This may delay their replacement with cleaner sources, increasing emissions relative to a baseline scenario.[37]

Legal and economic scholars have long recognized that stringently regulating new sources of pollution while exempting existing sources—a regulatory practice commonly known as "grandfathering"—can perversely encourage those existing sources to stay in operation longer than they otherwise would and lead to adverse environmental consequences.[38] Academics call this distortion of retirement decisions the "old plant effect," and the Clean Air Act's approach to federal performance standards for stationary sources' criteria-pollutant emissions—with tight controls for new sources and none for existing ones—is a classic example of the type of bifurcated policy that causes it.[39]

NSR is intended to reduce the number of these "grandfathered" facilities over time by requiring sources to comply with BACT or LAER once they undergo a major modification that will lead to a significant increase in emissions. By amending the NSR program in ways that make upgrades less likely to trigger additional pollution-control obligations, the Proposed Rule will, in effect, expand the grandfathering of existing sources. As a result, it might also extend their economically useful lives of these highly polluting facilities.[40]

Notably, EPA itself has previously estimated whether proposed exemptions from NSR permitting requirements might have this effect on certain types of sources and predicted that the exemptions would result in fewer facility retirements and higher annual emissions in the

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No. 157, 2006) (finding that stricter NSR requirements lead to less capital investments in coal-fired power plants but determining that there was no resulting change in plant efficiency).

[36] *See* Garth Heutel, *Plant Vintages, Grandfathering, and Environmental Policy*, 61 J. ENVTL. ECON. & MGMT. 36 (2011) (finding that when grandfathering regulations are weakened, there is increased investment in more polluting facilities rather than cleaner sources).

[37] *See* Robert N. Stavins, *Vintage-Differentiated Environmental Regulation*, 25 STAN. ENVTL. L.J. 29, 30 (2006) (explaining that grandfathering "can result in higher levels of pollutant emissions than would occur in the absence of regulation").

[38] *See* RICHARD L. REVESZ & JACK LIENKE, STRUGGLING FOR AIR: POWER PLANTS AND THE "WAR ON COAL" 30-35 (2016); *see also* Richard L. Revesz & Allison L. Westfahl Kong, *Regulatory Change and Optimal Transition Relief*, 105 NW. U. L. REV. 1581 (2011); Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 NW. U. L. REV. 1677 (2007).

[39] Nash & Revesz, *supra* note 38, at 1708.

[40] *See* Inst. for Policy Integrity, Comments on "Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program," at 20 (Oct. 31, 2018), *available at* https://policyintegrity.org/documents/PolicyIntegrityACEComments2_2018.10.31.pdf.

modeled period.[41] There is no reason to suspect that similar effects would not result from the Proposed Rule's changes to Step 1 emission calculations.

Ultimately, to show that the benefits of the Proposed Rule justify the costs, EPA must estimate the probabilities of sources' potential responses to the policy change, as well as the magnitude of any costs savings and emissions changes that will result from those responses.

Finally, it is worth noting that, even measured against the *inappropriate* baseline of the March 2018 Memorandum, the Proposed Rule could result in changed investment decisions by some sources and thus have incremental costs and benefits. As OIRA pointed out to EPA in correspondence, "there are states that currently do not allow emission decreases to be considered in Step 1."[42] By codifying the emissions-accounting approach advanced in the March 2018 Memorandum, the Proposed Rule could prompt those states to change their permitting procedures. As a result, choosing the March 2018 Memorandum as a baseline does not obviate the need to do a cost-benefit assessment.

C. EPA's Claim That It Is Unable to Estimate Any Cost Savings or Emission Changes Is Not Credible

In addition to insisting that it has no obligation to assess the costs and benefits of its new approach to emissions accounting, EPA claims that it is unable to do so.[43] The agency gives two reasons for this assertion. The first is that it does not have information about the costs and emission impacts of existing state permitting practices.[44] The second is that it does not have access to decisionmaking records from sources that would allow it to determine whether any projects were or were not undertaken because of the potential for emission deductions at Step 1.[45]

But when an agency is confronted with significant uncertainties about the effects of a rulemaking, OMB guidelines on regulatory impact analysis instruct it to consider doing additional research.[46] Indeed, EPA has previously performed such research in order to estimate state permitting costs in other rulemakings. For example, EPA recently proposed the rule

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[41] *Id.* at 20-21.
[42] EO 12866 Review of Environmental Protection Agency Draft Proposed Rule Titled, "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting," (ID: EPA-HQ-OAR-2018-0048-0027, attachment), at 31 cmt. A57.
[43] *See* Proposed Rule, 84 Fed. Reg. at 39,251.
[44] *Id.* ("The EPA is currently unable to estimate any cost savings or emissions decreases associated with project emissions accounting because most NSR permits are issued by state and local agencies and the EPA does not have estimates of those permitting statistics.").
[45] *Id.* ("Furthermore, neither the EPA nor state and local permitting agencies have access to any decision-making records made by company owners that would indicate whether a project was or was not undertaken due to the availability of project emissions accounting. NSR permitting is a case-by-case determination and source owners make permitting decisions based on many factors.").
[46] *See* CIRCULAR A-4, *supra* note 21, at 39.

"Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act."[47] In the regulatory impact analysis that accompanied that proposal, the agency estimated permitting costs based on data obtained through an information collection request to state agencies.[48] EPA could likewise issue an information collection request to determine the typical costs to sources and state agencies from the New Source Review permitting process.

Furthermore, case law makes clear that uncertainty about the magnitude of an effect is not an excuse for refusing to consider it altogether.[49] Thus, even if EPA is ultimately unable to fully quantify the Proposed Rule's effects on emissions and compliance costs, the agency must at least provide a rigorous qualitative assessment of those effects.[50] When EPA put forward a similar emissions-accounting proposal in 2006, it claimed it was unable to quantify the expected environmental and human health impacts from changes to the Step 1 calculation. However, it did perform a qualitative assessment describing the emissions consequences of several projected scenarios.[51] As the requirements of the Proposed Rule mirror those of the 2006 proposal, it is unclear why EPA could not provide a similar analysis here.

There are other examples of NSR regulations where EPA has at least provided a qualitative assessment of costs and benefits. When EPA proposed changes to NSR permitting practices in 2002, it qualitatively analyzed the expected health and environmental impacts from the changes.[52] EPA determined that the rule would result in net benefits because it would reduce emissions from industrial facilities, leading to fewer cases of chronic respiratory diseases, infant mortality, cancer, and other serious health effects.[53] The agency determined there would also be economic benefits by decreasing regulatory uncertainties in the permitting process and other costs to industry.[54] Thus, EPA cannot credibly claim in this proceeding that data limitations prevent it from providing *any* assessment of the Proposed Rule's costs and benefits.

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[47] *See* Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, 84 Fed. Reg. 36,304 (proposed July 26, 2019).
[48] *See* Memorandum from Brian Palmer, Eastern Research Group, to Eric Goehl *et al*., EPA, Documentation of the cost savings analysis for the proposed rulemaking "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act," (ID: EPA-HQ-OAR-2019-0282-0144), at 7 n. 5 (May 2019).
[49] *See* Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1190, 1200 (9th Cir. 2008) (finding agency reasoning arbitrary and capricious where agency argued that benefits of carbon dioxide reductions were "too uncertain to support their explicit valuation and inclusion" in a regulatory cost-benefit analysis).
[50] *See* CIRCULAR A-4, *supra* note 21, at 27 ("If you are not able to quantify the effects, you should present any relevant quantitative information along with a description of the unquantified effects . . . .").
[51] *See* EPA, DEBOTTLENECKING, AGGREGATION AND PROJECT NETTING PROPOSED RULE: QUALITATIVE ENVIRONMENTAL ANALYSIS 11-12 (2006), *available at* https://www.epa.gov/sites/production/files/2015-12/documents/dapn_analysis_9-8-06.pdf.
[52] *See* EPA, NEW SOURCE REVIEW (NSR) IMPROVEMENTS: SUPPLEMENTAL ANALYSIS OF THE ENVIRONMENTAL IMPACT OF THE 2002 FINAL NSR IMPROVEMENT RULES (Nov. 21, 2002), *available at* https://www.epa.gov/sites/production/files/2015-12/documents/nsr-analysis.pdf.
[53] *See id*. at 15.
[54] *See id.*

For all of the reasons described above, the Proposed Rule violates both Executive Order 12,866 and the APA. In the absence of a cost-benefit analysis performed against a reasonable baseline, finalizing the Proposed Rule would be arbitrary and capricious.

Respectfully submitted,

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