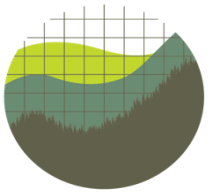

Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

November 13, 2023

To: Environmental Protection Agency

Subject: Review of Final Rule Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, 88 Fed. Reg. 66,336 (EPA–HQ–OAR–2023–0330) (proposed September 27, 2023)

The Institute for Policy Integrity at New York University School of Law (Policy Integrity)[1] respectfully submits this comment letter to the Environmental Protection Agency (EPA) regarding its proposal, under Section 112 of the Clean Air Act (CAA), to prevent emissions increases from reclassified major sources (Proposed Rule).[2] Policy Integrity is a nonpartisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

EPA advances the Proposed Rule to prevent increases in toxic air pollution when major emissions sources reclassify as area sources, which are subject to less stringent or no emission control requirements. These reclassifications became possible under a rule finalized in 2020, which EPA refers to as the Major MACT to Area or MM2A Rule (2020 Rule).[3]

We make the following recommendations to improve the Proposed Rule's assessment of costs and benefits:

- **EPA should assess the costs and benefits of the Proposed Rule, and to the extent that the agency relies on any findings in the 2020 Rule's Regulatory Impact Analysis (2020 RIA),[4] EPA should acknowledge and account for the flawed assumptions in the 2020 RIA.**
    - Because the Proposed Rule is a significant regulatory action, EPA should conduct an analysis of the Proposed Rule's costs and benefits in accordance with relevant Executive Orders and guidance from the Office of Management & Budget (OMB).
    - EPA should provide a reasoned explanation for deviating from any findings that the agency made in the 2020 RIA that it now believes depend on flawed assumptions.

[1] This document does not purport to represent the views, if any, of New York University School of Law.
[2] Review of Final Rule Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, 88 Fed. Reg. 66,336 (proposed September 27, 2023) [hereinafter Proposed Rule].
[3] "Reclassification of Major Sources as Area Sources under Section 112 of Clean Air Act 2020 Rule, 85 Fed. Reg. 73883 (Nov. 19, 2020) [hereinafter 2020 Rule].
[4] EPA, REGULATORY IMPACT ANALYSIS FOR THE FINAL RECLASSIFICATION OF MAJOR SOURCES AS AREA SOURCES UNDER SECTION 112 OF THE CLEAN AIR ACT (Sept. 2020) [hereinafter 2020 RIA].

    - EPA should still do further analysis of costs and benefits even if there are uncertainties about which sources will reclassify and which reclassified sources will increase their emissions.

- **EPA should better characterize the benefits expected under the Proposed Rule from avoided hazardous air pollutant (HAP) emissions.**
- **EPA should assess the distributional effects of the Proposed Rule.**
- **EPA should acknowledge any anticipated reductions in cost savings for regulated entities under the Proposed Rule, relative to the baseline of the 2020 Rule, even if they are minimal.**
- **EPA should compare the Proposed Rule with a less stringent alternative and more stringent alternative.** For the more stringent alternative, EPA should consider evaluating a scenario in which EPA repeals the 2020 Rule and adopts language enshrining the federal enforceability requirements.
- **EPA should reach an explicit conclusion as to whether the Proposed Rule's benefits will exceed its costs.**

I. Background

Under Section 112 of the CAA, EPA must establish emissions standards to control and reduce HAP from any "major source" that "emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any [HAP] or 25 tons per year or more of any combination of [HAP]."[5] For major sources, EPA sets technology-based standards based on the maximum achievable control technology (MACT) used by the best performing units in a category. EPA then evaluates whether it should set more stringent, "beyond-the-floor" standards after considering the cost of achieving such emissions reductions, any non-air quality health and environmental impacts, and energy requirements. After performing this two-step initial standard setting process, EPA will subsequently conduct residual risk reviews under 112(f)(2) to determine if a stronger, health-based standard should be set and technology reviews under 112(d)(6) to determine if technological developments warrant a strengthening of the standards.

EPA may also—but is not obligated to—set HAP emissions standards for "area sources," which encompass "any stationary source of [HAP] that is not a major source," based on generally available control technologies (GACT).[6] The "area source" standards allow less stringent standards to be applied to small, but potentially numerous sources of toxic pollution, such as "wood stoves, service stations, [and] dry cleaners."[7] These sources are differently situated than the larger, industrial emitters captured in the major source category.

After EPA began promulgating individual National Emissions Standards for HAPs (NESHAPs) following the 1990 CAA amendments, EPA put forward guidance in the 1995 Seitz Memorandum stating EPA's interpretation that facilities which are "major sources" at the first

[5] 42 U.S.C. 7412(a)(1).
[6] 42 U.S.C. 7412(a)(2).
[7] CONG. RES. SERV., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 8491 (1993).

compliance date of a the relevant NESHAP standard must comply permanently with the requirements for a major source.[8] In other words, a major source could not, subsequent to the first compliance date, reduce its "potential to emit" below the major source threshold and then opt out of the major source category. This position became known as the "Once-in, Always-in" (OIAI) Policy.

This OIAI policy is consistent with the CAA's instruction that EPA's control standards for major HAP sources require the "maximum degree of reduction" in HAP emissions (considering cost and other factors), and shall "prohibit[] . . . such emissions, where achievable."[9] Because certain NESHAP categories require emissions reductions upward of 95%,[10] allowing major sources to reclassify as area sources and emit up to the 10-ton threshold for single HAPs or the 20-ton threshold for combined HAPs could cause significant increases in emissions of pollutants[11] that harm human health at very low levels.

In January 2018, EPA issued a memorandum withdrawing the OIAI Policy,[12] which was subsequently litigated.[13] In November 2020, EPA finalized the 2020 Rule, which more formally withdrew the OIAI Policy and attempted to remove the requirement that a "potential to emit" limitation taken by a source to control its emissions be federally enforceable. The Proposed Rule maintains the 2020 Rule's withdrawal of the OIAI Policy but requires that sources seeking to reclassify take steps to prevent subsequent emissions increases and restores federal enforceability requirements for potential to emit limits.

[8] *See* "Potential to Emit for MACT Standards—Guidance on Timing Issues," from John Seitz to the EPA Regional Air Division Directors (May 16, 1995) [hereinafter 1995 Seitz Memo] (available in the docket for the Proposed Rule).
[9] 42 U.S.C. § 7412(d)(2).
[10] *See, e.g.*, National Emission Standards for Hazardous Air Pollutants: Hydrochloric Acid Production, 66 Fed. Reg. 48173, 14879-81 (Sept. 18, 2001); National Emission Standards for Hazardous Air Pollutants: Hydrochloric Acid Production Residual Risk and Technology Review, 84 Fed. Reg. 1570, 1594 (Feb. 4, 2019), National Emission Standards for Hazardous Air Pollutants: Ethylene Oxide Commercial Sterilization and Fumigation Operations, 84 Fed. Reg. 67889, 67892-93, 67896-97, (Dec. 12, 2019). *See* Memo from Michael S. Bandrowski to David Cozzie 3 (Dec. 13, 2005), https://perma.cc/AKH7-YYZS ("Many [maximum achievable] standards require affected facilities to reduce their [hazardous air pollutant] levels at a control efficiency of 95% and higher.").
[11] EPA illustrates this potential risk in the Proposed Rule. Proposed Rule, *supra* note 2, at 66,343 ("For example, if a major source standard had the effect of reducing emissions of a certain pollutant to 1 ton per year but there is no corresponding area source standard for the same source category, then a source could take a PTE limit of 9.9 tons per year of a single HAP or 24.9 tons per year of combined HAP emissions, thus increasing its emissions, and reclassify under the 2020 MM2A final rule.").
[12] *See* "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act" from William L. Wehrum to the EPA Regional Air Division Directors (Jan. 25, 2018) [hereinafter the Wehrum Memo]. See notice of issuance of this guidance memorandum at 83 Fed. Reg. 5543 (Feb. 8, 2018).
[13] *See* California Communities Against Toxics v. EPA, 934 F.3d 627, 640 (D.C. Cir. 2019) (finding that the Wehrum Memo was not a final agency action).

II. EPA Should Provide an Assessment of the Costs and Benefits of the Proposed Rule and Provide a Reasoned Explanation for Deviating from Any of Its Conclusions in the 2020 Rule That Were Based on Flawed Assumptions

In the Proposed Rule, EPA notes that it has "not prepared a quantitative analysis of the potential costs and benefits associated with this action,"[14] but that it has included the regulatory impact analysis (RIA) and technical memoranda on costs from the 2020 Rule in the docket "to provide illustrative examples of the types of costs and costs savings that may occur due to reclassifications."[15] Since the Proposed Rule is a significant action, EPA should assess its costs and benefits as directed by Executive Orders 12,866 and 13,563[16] and further clarified by the guidance in Circular A-4.[17] To the extent that EPA's assessment is informed by the illustrative analyses prepared for the 2020 Rule, EPA should acknowledge the flaws in that 2020 analysis, as discussed below. EPA must also explain why it is changing its position with regard to any of the flawed assumptions or findings in that prior analysis.

A. Assessing the Costs and Benefits of the Proposed Rule

EPA notes that the Proposed Rule is a "significant regulatory action as defined in Executive Order 12,866, as amended by Executive Order 14,094."[18] OMB clarifies that the Proposed Rule is in the "other significant" category rather than the "economically significant" category.[19] This category of significant rule does not necessarily need to conduct a Regulatory Impact Analysis (RIA), but is subject to the same directive under Executive Order 12,866, as amended by Executive Order 14,094, to perform an analysis of the action's costs and benefits and should follow the best practices laid out in Circular A-4.[20] Such an analysis critically informs EPA's fulfillment of obligations under the Administrative Procedure Act (APA) to "examine the relevant data" and "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[21]

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[14] Proposed Rule, *supra* note 2, at 66,448.
[15] Proposed Rule, *supra* note 2, at 66,349.
[16] *See* Exec. Order No. 13,563 § 1, 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011) (aff'ing Exec. Order No. 12,866); *accord* Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. 51,735, 51,735 (Sept. 30, 1993) ("In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.").
[17] OFF. OF MGMT. & BUDGET, CIRCULAR A-4 2 (Nov. 9, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf [hereinafter CIRCULAR A-4 UPDATE] (noting that executive orders "require agencies" to conduct a regulatory impact analysis for economically significant actions and to "more generally to assess the benefits and costs of other significant actions."). This document is the proposed update of the longstanding Circular A-4. OFF. OF MGMT. & BUDGET, CIRCULAR A-4: REGULATORY ANALYSIS 33–34 (2003), https://perma.cc/SF4S-5V2R [hereinafter CIRCULAR A-4].
[18] Proposed Rule, *supra* note 2, at 66,349.
[19] Office of Information and Regulatory Affairs, "Review of Final Rule Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act," https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=2060-AV20 (last visited Nov. 7, 2023).
[20] *See* CIRCULAR A-4 UPDATE, *supra* note 17, at 2.
[21] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

While EPA has provided some discussion of relevant conditions affecting the scope of regulatory effects,[22] the agency should provide further qualitative—and if possible, quantitative—information on these effects in the final rule. In the 2020 Rule, EPA provided qualitative information on the public health and environmental costs of HAP pollution,[23] an estimation of HAP emissions changes from illustrative scenarios for a subset of affected facilities (despite identifying similar uncertainties about which facilities would reclassify and increase emissions),[24] and projections of monetized benefits from anticipated cost savings (mostly from anticipated reductions in monitoring, recordkeeping, and reporting (MRR)).[25] While EPA's 2020 analyses contained numerous flaws, which we discuss below and stress that EPA should correct in any future analyses, the 2020 analyses illustrate the opportunity for EPA to provide further information in the final rule on anticipated costs and benefits of the Proposed Rule relative to the baseline of the 2020 Rule.

B. Acknowledging Flaws in the Analyses Underlying the 2020 Rule and Providing a Reasoned Explanation for Taking Different Positions from the 2020 Analyses

To the extent that EPA relies on the RIA and technical analyses, (collectively 2020 Analyses) underlying the 2020 Rule, even if only as illustrative of relevant costs and savings affected by the Proposed Rule, EPA must acknowledge the flaws in these 2020 Analyses and contextualize any reliance within that acknowledgement. Policy Integrity, among others, submitted comments detailing numerous flaws in the proposed versions of the 2020 Analyses.[26] Our comments discussed the Proposed 2020 Rule's reliance on: (1) an inappropriate baseline that failed to account for the possibility of more stringent, future major-source emissions standards, (2) unrepresentative samples of sources, and (3) unreasonable assumptions. Some of these features led to an underestimation of the pollution-related costs of the 2020 Rule, including assumptions that permit restrictions would remain permanent and that reclassified sources will emit no more than 75% of the major-source threshold. Other choices led to overestimation of the cost savings associated with the 2020 Rule, such as assumptions that in at least some cases states would incorporate MRR requirements as a condition of permits,[27] but EPA not offsetting the costs of the state requirements from the anticipated cost savings of removing the NESHAP requirement.[28]

While the final 2020 Rule did update and expand its analysis, it continued to rely on a sample set that was not fully representative of the range of affected source categories[29] and make faulty assumptions leading to an underestimate of HAP emissions increases, and their resulting public

[22] *See* Proposed Rule, *supra* note 2, at 66,448–49.
[23] *See* 2020 RIA, *supra* note 4, at 149–59.
[24] *Id*. at 108–09.
[25] *Id*. at 33–105.
[26] Inst. for Pol'y Integrity, Comments on the Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, Docket ID No. EPA-HQ-OAR-2019-0282 (submitted Sept. 24, 2019) [hereinafter Pol'y Integrity Comments] (attached).
[27] *See* 2020 Rule, *supra* note 3, at 73,875.
[28] *See* 2020 RIA, *supra* note 4, at 4–5.
[29] While the final emissions analysis expanded coverage to facilities in more than 70 source categories, out of 114 source categories, it excluded source categories, such as the oil & gas category, which encompass a large share of facilities subject to NESHAPs and which may be very differently situated than the analyzed categories.

health costs, under the 2020 Rule.[30] For example, the final 2020 Analyses: (1) assumed a 10x cap on potential emission increases[31] that is at odds with the fact that NESHAP can require 95% or more reductions or more from required controls, (2) excluded emissions from major source facilities that emit above 75% of the major source threshold, (3) considered emission reductions from sources that emit over the MST but that may seek to reclassify (in an alternative scenario), (4) omitted analysis of affected source categories that have different characteristics from those studied, (5) grouped different types of pollution from facilities with qualifying emissions for 2 or more NESHAP categories into one pollutant category, and (6) made unsupported assumptions about the adjustability of certain controls and continuance of maintenance.

EPA should not only acknowledge the flawed elements of the 2020 Analyses, but also affirmatively clarify where it has changed positions from assumptions in the 2020 Analyses and provide good reasons for those changes. For example, given that the Proposed Rule's purpose is to prevent the potential emissions increases allowed under the current MM2A framework,[32] EPA may wish to discuss why it believes these allowed emissions increases are larger than it previously anticipated[33] or the cost savings expected under the 2020 Rule are lower than it expected. EPA may also wish to update its conclusions based on new information available from sources that have reclassified since the 2020 Rule—though it should be mindful that these first-mover sources may not be fully representative.[34]

EPA is not bound by its prior assessments, but it must acknowledge them and provide a reasoned explanation any time it contradicts its prior findings.[35] As noted above, commenters on the 2020 Rule have provided EPA with numerous reasons why the 2020 Analyses were flawed, particularly with regard to underestimating HAP emissions increases, which EPA can reference in explaining its new position.

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[30] *See* Petition for Reconsideration of Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, Docket ID No. EPA-HQ-OAR-2019-0282 and for Withdrawal of Guidance Memorandum titled Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act (OAQPS2020-415), at 14–26, 29–39 (submitted Jan. 18, 2018), https://www.regulations.gov/comment/EPA-HQ-OAR-2019-0282-0659 [hereinafter NGO Recon Petition] (describing a variety of problematic assumptions in the final analysis for the 2020 Rule leading to an underestimate of emissions increases).

[31] *See* EPA, DOCUMENTATION OF THE ILLUSTRATIVE EMISSIONS ANALYSIS FOR THE RULE "RECLASSIFICATION OF MAJOR SOURCES AS AREA SOURCES UNDER SECTION 112 OF THE CLEAN AIR ACT" 11 (Aug. 2020) [hereinafter 2020 Emissions Memo].

[32] *See* Proposed Rule, *supra* note 2, at 66,345 ("[T]his proposal would introduce conditions that apply to reclassified sources through their permitting authority. The intent is to create flexibility to meet emission reduction goals that did not exist under the OIAI policy while preventing the potential emissions increases allowed under the current MM2A framework.").

[33] *See id*. at 66,341 (discussing significant concerns raised by commenters during the 2020 rulemaking about emissions increases that would be possible from sources reclassifying).

[34] Sources which are willing to reclassify while there is legal uncertainty around whether the 2020 Rule will stick are likely sources that are more able to reverse any changes they make to reclassify.

[35] Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009) ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."); *see also Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (explaining that agencies must "cogently explain" a suspension (quoting State Farm, 463 U.S. at 48)).

C. Conducting Further Analysis of Costs and Benefits Despite Uncertainty

EPA's stated justification for not preparing a quantitative analysis of the potential costs and benefits associated with this action is that it is "highly uncertain which facilities may reclassify in the future as a result of the proposed rule, and any potential emissions changes that result from the added reclassification requirements will also be highly uncertain."[36] Even if EPA cannot fully resolve these uncertainties or fully quantify the anticipated emissions changes, it should use established best practices to make a best estimate or at least qualitatively describe the anticipated effects more fully in the final analysis.

Executive Order 12,866 directs agencies to "assess both the costs and the benefits of the intended regulation" while "recognizing that some costs and benefits are difficult to quantify."[37] The Office of Management and Budget's longstanding guidance document on regulatory analysis, Circular A-4, was recently updated and continues to instruct agencies that "[w]hen a benefit or cost cannot be expressed in monetary units, it is often informative to measure it in terms of physical or other quantitative units that may indicate the direction of welfare change," and [i]f it is not possible to estimate quantitatively, you should describe the benefit or cost qualitatively using the best methods available."[38] The Circular further explains that "it is often difficult to quantify and express all of the important effects of a regulation in monetary units" and so, "while monetized net benefits are an important guide for agencies deciding what course of action to pursue, regulatory analyses should encompass additional relevant factors; in particular, analyses should include any important non-monetized and unquantified effects."[39]

The updated Circular A-4 directs that "[a]n effect of a regulation should not be excluded from a regulatory analysis simply because its estimation is highly uncertain."[40] Circular A-4 acknowledges that in fact, "[t]he precise consequences (benefits and costs) of regulatory options are not generally known for certain…[b]ut even for highly uncertain effects, it is often possible to use available evidence to produce estimates of those effects for inclusion in a regulatory analysis that are more accurate than assuming uncertain effects do not occur or have no benefits or costs."[41] Examination of uncertain effects does not require overreliance on assumptions about what will occur. While Circular A-4 instructs agencies to consider uncertain effects, it also cautions agencies to "be particularly careful when interpreting effects that are highly speculative."[42] Both Circular A-4 and EPA's own Guidelines for Economic Analysis provide guidance on how EPA can account for uncertainty in its presentation of costs and benefits.[43]

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[36] Proposed Rule, *supra* note 2, at 66,348–49.
[37] Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. 51,735, 51,735 (Sept. 30, 1993).
[38] CIRCULAR A-4 UPDATE, *supra* note 17, at 5.
[39] *Id.* at 3.
[40] *Id.* at 67.
[41] *Id.*
[42] *Id.*
[43] *See* EPA, GUIDELINES FOR PREPARING ECONOMIC ANALYSIS, at 11-1 to 11-11 (Dec. 2010), https://www.epa.gov/sites/production/files/2017-08/documents/ee-0568-50.pdf; CIRCULAR A-4 UPDATE, *supra* note 17, at 67–75.

III. EPA Should Better Characterize the Benefits of the Proposed Rule

EPA should better characterize the anticipated benefits of avoided HAP pollution which will result from the Proposed Rule. EPA explains that the Proposed Rule's purpose is to prevent potential emissions increases possible under the 2020 Rule,[44] but its current E.O. 12,866 discussion contains minimal discussion of the anticipated benefits or costs of the Proposed Rule relative to the 2020 Rule. EPA also appropriately recognizes that HAPs "pose public health risks at levels well below the major source thresholds,"[45] but could go further to quantify the benefits of reduced pollution (from the prevention of increased emissions) when possible and discuss the benefits qualitatively when quantification is not possible.

A. Estimating HAP Emissions Reductions

While acknowledging that there are uncertainties regarding which sources will reclassify and which reclassified sources will increase their emissions, EPA can still discuss the potential magnitude of emissions increases and why those increases are likely to occur without the safeguards of the Proposed Rule.

The illustrative analyses conducted for the 2020 Rule featured a number of flawed assumptions that contributed to an underestimation of emissions increases, but nevertheless projected emissions increases on the order of 1000 tons of HAP pollution from a subset of potentially affected sources under the 2020 Rule.[46] If EPA believes these emissions will be prevented by the Proposed Rule, EPA could treat this number as a lower-bound estimate for emissions reductions potentially achieved by the Proposed Rule, and explain why it is very likely a significant underestimate of emissions increases possible without the safeguards—and therefore a significant underestimation of avoided emissions under the Proposed Rule. For example, EPA should explain that the 2020 Rule included illustrative analysis that was based on unrepresentative and incomplete samples of source categories[47] and inappropriately assumed that (1) sources would not increase emissions above a 10x cap[48] or above 75% of the major source threshold (MST) to ensure a compliance margin,[49] (2) major source facilities that emit over the MST would reduce their emissions to reclassify (under alternative scenario 2),[50] and (3) certain controls were non-adjustable or maintenance practices would be continued.[51]

In the 2020 Rule, EPA discussed how certain MRR requirements that would no longer apply to certain sources under NESHAP might become applicable as a condition of state permits and acknowledged arguments from commenters that such substitute requirements might not

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[44] *See* Proposed Rule, *supra* note 2, at 66,345.
[45] *Id*. at 66,343.
[46] *See* 2020 Emissions Memo, *supra* note 31, at 33 (finding just 128 facilities across seven source categories could result in more than 1000 tons of HAP pollution increases).
[47] *See* NGO Recon Petition, *supra* note 30, at 37–38.
[48] 2020 Emissions Memo, *supra* note 31, at 11.
[49] *Id*. at 5–6.
[50] *See* Pol'y Integrity Comments, *supra* note 26, at 7–8 (explaining issues with this assumption with regard to the proposed rule).
[51] 2020 Emissions Memo, *supra* note 31, at 16–17; *see also* NGO Recon Petition, *supra* note 30, at 34–37 (explaining how EPA's assumption about non-adjustable controls are not reasonable).

consistently be integrated into state permits, risking emissions increases.[52] If EPA believes replacement MMR requirements will not appear in state permits, then EPA should acknowledge the emissions increases that are likely to occur absent these requirements under the 2020 Rule and explain how the Proposed Rule may yield benefits by preventing these emissions increases. (And if EPA believes that MMR requirements will appear in state permits then it must acknowledge how the costs of fulfilling those requirements offset the expected cost savings of the 2020 Rule, as discussed in the relevant section below.)

EPA should also account for the impact of the Proposed Rule's provisions to strengthen federal enforceability of potential to emit limits and provide any relevant quantitative information on this effect. The CAA creates a compliance incentive that is unmatched by state and local enforcement structures. State enforcement agencies are already underfunded and subject to localized political pressure, especially when the targets of enforcement activities are major economic actors with political influence.[53] Even where federal statutes delegate enforcement authority to states, federal backstops bolster enforcement and compliance.[54] Allowing *exclusive* state and/or local authority over the enforcement of emissions limits would permit deregulatory-minded government entities to create paper limitations on emissions without any intention of enforcement. EPA should account for how the Proposed Rule will prevent emissions increases that could happen under the 2020 Rule due to inadequate state enforcement.

B. Characterizing the Effects of HAP and Other Pollution Reduction

In addition to improving its estimates of pollution reduction, EPA could better monetize the per-ton impacts where feasible and qualitatively discuss the public health and environmental effects of HAP reduction where infeasible to fully monetize. As discussed above, however, Executive Order 12,866, Circular A-4, and EPA's own emissions guidelines require the agency to quantify and monetize impacts whenever feasible.

EPA should quantitatively discuss the public health benefits of avoided HAP pollution where possible, and when it cannot fully quantify those effects, EPA should discuss them qualitatively.[55] EPA discussed these effects qualitatively in its 2020 RIA and should do so in the Proposed Rule as well, explaining how avoiding even small amounts of HAP pollution can create large benefits for public health. It should also account for how emissions may be more harmful when released over short intervals, rather than annually, and aggregating different types of HAP pollution under the rule may obscure the scale of public health harms from increased pollution because some pollutants are more dangerous to human health and the environment than

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[52] *See* 2020 Rule, *supra* note 3, at 73,875.

[53] *See* INST. FOR POLICY INTEGRITY, IRREPLACEABLE: WHY STATES CAN'T AND WON'T MAKE UP FOR INADEQUATE FEDERAL ENFORCEMENT OF ENVIRONMENTAL LAWS (2017), https://policyintegrity.org/files/media/EPA_Enforcement_June2017.pdf.

[54] *See id.* at 3.

[55] *See* Exec. Order No. 13,563 § 1, 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011) (aff'ing Exec. Order No. 12,866); accord Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. 51,735, 51,735 (Sept. 30, 1993) ("Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider.").

others.[56] In its Circular A-4 guidance to agencies on conducting regulatory analysis, OMB recognizes that "it is often difficult to quantify and express all of the important effects of a regulation in monetary units," and "[w]hen it is not possible to monetize all of the important benefits and costs, the alternative with the greatest monetized net benefits will not necessarily be the alternative that generates the greatest social welfare."[57] In these scenarios, EPA may also make use of other tools, such as breakeven analysis, a well-accepted approach to regulatory analysis that is appropriately used instead of traditional cost-benefit analysis when important costs or benefits cannot be monetized.[58] OMB has explicitly recognized breakeven analysis as an appropriate tool to justify a regulation when important costs or benefits cannot be fully monetized.[59] Breakeven analysis is particularly useful in cases where EPA can pin down at least the emissions reduction or the per-ton effects.

Additionally, EPA should also note the benefits of reducing non-HAP pollution and discuss them quantitatively where possible. For at least five pollutants (VOCs, Sulfur Dioxide, Nitrogen Oxides, Methane, and Particulate Matter) implicated by the Proposed Rule, EPA cannot reasonably contend that monetization is infeasible, because the agency has monetized their per-ton effects in past rulemaking.[60]

IV. EPA Should Better Characterize Distributional Effects of the Proposed Rule

In its characterization of benefits, EPA should also discuss distributional effects. For 30 years, Executive Orders and related guidance documents have directed EPA to consider distributional impacts in regulatory decisionmaking.[61] Most recently, President Biden has called for OMB to

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[56] NGO Recon Petition, *supra* note 30, at 26. Under the 2020 Rule, aggregation of different types of HAP pollution means that overall decreases in HAP pollution could obscure increases of individual pollutants.

[57] *See* CIRCULAR A-4 UPDATE, *supra* note 17, at 3.

[58] *See* CIRCULAR A-4 UPDATE, *supra* note 17, at 47–48; EPA, GUIDELINES FOR PREPARING ECONOMIC ANALYSIS, ch.7, 7–50 (Mar. 2016), https://www.epa.gov/environmental-economics/guidelines-preparing-economic-analyses; Giles Atkinson et al., COST-BENEFIT ANALYSIS AND THE ENVIRONMENT: FURTHER DEVELOPMENTS AND POLICY USE (2018), https://www.oecd.org/env/cost-benefit-analysis-and-the-environment-9789264085169-en.htm.

[59] When the agency determines that the non-monetized benefits or costs are important, OMB instructs agencies to carry out a "threshold" or "break-even" analysis to evaluate "what magnitude non-monetized benefits and costs would need to have for the regulation at issue to yield positive net benefits or to change which regulatory alternative is most net beneficial." CIRCULAR A-4 UPDATE, *supra* note 17, at 47. *See id*. at 47–48 (discussing importance considerations for when and how to conduct break-even analysis).

[60] *See* Pol'y Integrity Comments, *supra* note 26, at 9–10 (discussing how other regulatory proceeding have monetized per-ton effects of VOCs, Sulfur Dioxide, Nitrogen Oxides, Methane); ENV'T PROT. AGENCY, DRAFT REGULATORY IMPACT ANALYSIS FOR NATIONAL EMISSION STANDARDS FOR HAZARDOUS POLLUTANTS: COAL- AND OIL-FIRED ELECTRIC UTILITY STEAM GENERATING UNITS REVIEW OF THE RESIDUAL RISK AND TECHNOLOGY REVIEW ch. 4 (Apr. 2023), https://www.regulations.gov/document/EPA-HQ-OAR-2018-0794-5837 (discussing effects, and quantification of the effects, of particulate matter pollution).

[61] Executive Order 12,866, issued by President Clinton in 1993, instructs agencies to incorporate equity considerations, including "distributive impacts," into their cost-benefit analyses and regulatory decisions. Exec. Order No. 12,866 § 1(b)(5), 58 Fed. Reg. 51,735, 51,736 (Oct. 4, 1993). In 2011, President Obama issued Executive Order 13,563, which reaffirmed Executive Order 12,866 and further emphasized the importance of considering "equity, human dignity, fairness, and distributive impacts." Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011). Separate from these directives on cost-benefit analysis, Executive Orders and associated guidance instruct EPA and other agencies to weigh environmental justice considerations in their decisionmaking. Exec. Order No. 12,898 § 1-101, 59 Fed. Reg. 7629, 7629 (Feb. 16, 1994) ("To the greatest extent practicable and permitted by law, . . . each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing,

develop "procedures that take into account the distributional consequences of regulations, including as part of any quantitative or qualitative analysis of the costs and benefits of regulations, to ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities."[62] The updated Circular A-4 provides further direction on how EPA can best account for distributional effects, including advice for both quantitative and qualitative approaches.[63]

In the 2020 Rule, EPA included a cursory environmental justice analysis that should be improved and expanded in the Proposed Rule. In the 2020 environmental justice analysis, EPA evaluated the 69 sources that had already reclassified and concluded that even though a number of them were surrounded by above-average populations of low-income and minority populations, since those particular facilities had not yet increased their emissions, there would be no negative effects on these populations.[64] This analysis used an unrepresentative sample and fails to provide information on the potential distributional effects of the hundreds, or even thousands, of facilities that could potentially reclassify and increase their HAP emissions under the 2020 Rule without the safeguards of the Proposed Rule. Even if EPA cannot predict exactly which facilities will reclassify and increase their emissions, it can still assess the socioeconomic characteristics of communities living near affected sources.

EPA should consider the information on environmental justice impacts that it receives as part of the current comment period, and that it received during the public comment period for the 2020 Rule. For example, Earthjustice submitted evidence illustrating how specific facilities that EPA projected could reclassify are concentrated in communities that already face extreme cancer risk from HAP emissions.[65] EPA should consider the cumulative pollution burden on these and similarly-situated communities.

V. EPA Should Better Characterize the Costs of the Proposed Rule

While EPA has clearly stated that it "does not expect significant costs and whether any costs of savings are incurred due to reclassification are very case-specific,"[66] it should further discuss its

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as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations . . . .").

[62] Modernizing Regulatory Review: Memorandum for the Heads of Executive Departments and Agencies § 2(b)(ii), 86 Fed. Reg. 7223, 7223 (Jan. 26, 2021) (reporting the memorandum issued on January 20, 2021). Richard L. Revesz & Samantha P. Yi, *Distributional Consequences and Regulatory Analysis*, 52 ENV'T L. 53, 96–97 (2022) (discussing why this approach should be preferred).

[63] *See* CIRCULAR A-4 UPDATE, *supra* note 17, at 61–67. Policy Integrity has also repeatedly offered recommendations on best practices for assessing distributional effects and affirmed the legal and economic appropriateness of agencies weighing distributional effects in their assessment of regulatory costs and benefits. *See, e.g.*, JACK LIENKE ET AL., INST FOR POL'Y INTEGRITY, MAKING REGULATIONS FAIR: HOW COST-BENEFIT ANALYSIS CAN PROMOTE EQUITY AND ADVANCE ENVIRONMENTAL JUSTICE (2021); Richard L. Revesz & Samantha P. Yi, Distributional Consequences and Regulatory Analysis, 52 ENV'T L. 53, 57 (2022); Richard L. Revesz, Regulation and Distribution, 93 N.Y.U. L. REV. 1489, 1492 (2018).

[64] 2020 Rule, *supra* note 3, at 73,882.

[65] Earthjustice Supplemental Comments on the Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, Docket ID No. EPA-HQ-OAR-2019-0282 at 2–10 (submitted Nov. 1, 2019), https://www.regulations.gov/comment/EPA-HQ-OAR-2019-0282-0436.

[66] Proposed Rule, *supra* note 2, at 66,349.

estimations of the costs of the Proposed Rule relative the baseline of the 2020 Rule. As noted above, in the 2020 Rule, EPA projected considerable costs savings.[67] If EPA agrees with those estimates, it should explain whether and why the savings will not be forgone under the Proposed Rule. If it disagrees with those estimates, it should explain why. For example, state permits may keep some of the MRR requirements in place.[68] The costs of implementing the MMR requirements in state permits must be subtracted from any expected cost savings in the 2020 Rule from removing NESHAP MMR requirements.

EPA may also wish to discuss that far fewer sources have reclassified than it projected in the 2020 Rule, leading to lower total cost savings for the program. However, EPA should be careful to contextualize that information, as these early-acting sources may be those with the greatest flexibility to reverse their behavior in the future and other sources that would need to make less reversible changes to reclassify may be waiting until they have more legal certainty around the fate of the 2020 Rule.

Additionally, some of the flawed assumptions that EPA made regarding the use of adjustable controls and maintenance in the 2020 Analyses may also be relevant to cost calculations for the Proposed Rule. In the 2020 Analyses, EPA assumed that sources would not switch materials, adjust use of certain controls, or forego maintenance measures in a variety of instances that would have resulted in emissions increases and cost savings.[69] Commenters explained why these assumptions were not reasonable and regulated entities were likely to pursue these behaviors in pursuit of cost savings.[70] Provided that the safeguards in the Proposed Rule will prevent these behaviors, and the associated emissions increases, they will also cause the regulated entities to forgo the related cost savings.

VI. EPA Should Consider the Effects of Alternatives to the Proposed Rule

EPA should not only assess the costs and benefits of the Proposed Rule, but also of its regulatory alternatives. Executive Order 12,866 directs that EPA must further consider "all costs and benefits of available regulatory alternatives, including the alternative of not regulating."[71] For the

[67] 2020 RIA, *supra* note 4, at 9–11.

[68] EPA expressly acknowledges the potential for states to impose such alternative MRR requirements. Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, 84 Fed. Reg. 36,034, 36,320–21 (proposed July 26, 2019)(regulatory authority reviewing a reclassification request "will determine what alternative MRR are needed . . . to continue ensuring the source will not exceed the major source thresholds"); *see also* 2020 Rule, *supra* note 3, at 73,875. Though as noted elsewhere, EPA cannot necessarily count on the maintenance of those requirements in permits to ensure emissions aren't increased or that those requirements will be enforced fully.

[69] *See* EPA, "Documentation of the illustrative emissions analysis for the rule "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act" 16–17, 36 (Aug. 2020); EPA, DOCUMENTATION OF THE COMPLIANCE COST SAVINGS ANALYSIS FOR THE RULE "RECLASSIFICATION OF MAJOR SOURCES AS AREA SOURCES UNDER SECTION 112 OF THE CLEAN AIR ACT" 12 (Aug. 2020) ("The estimated capital costs of emission control equipment (e.g., add-on controls), process changes, and formulations associated with major source NESHAP were considered to be sunk costs and were not included in the cost savings estimates.").

[70] *See, e.g.*, Joint Environmental Petitioners Comments on the Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, Docket ID No. EPA-HQ-OAR-2019-0282) at 25–28 (submitted Sept. 24, 2019), https://www.regulations.gov/comment/EPA-HQ-OAR-2019-0282-0343 (discussing why these assumptions are not reasonable).

[71] Exec. Order No. 12,866, *supra* note 16, at § 1(a).

Proposed Rule, EPA should consider the baseline scenario of the 2020 Rule as its alternative of not regulating. It should also consider a more stringent alternative which could take the form of restoration of the OIAI Policy in combination with clarified requirements for federal enforceability. Through comparison of these alternatives, EPA could better clarify its different expectations regarding emissions increases under the scenarios of the 2020 Rule, the Proposed Rule, and restoration of the OIAI Policy. Consideration of these alternatives is not only a best economic practice, but longstanding case law dictates that agencies must weigh alternatives that represent an important aspect of the problem.[72]

In addition to these broader alternatives, EPA should also clarify any differences in its estimation of costs and benefits for application of the additional restrictions "for source categories that are subject to MACT standards for the persistent and bioaccumulative HAP listed pursuant to CAA section 112(c)(6)."[73] These include options to prevent reclassification for these source categories or to require that reclassified sources in these categories use the safeguard of adopting the same emission control methods and MRR requirements that they were subject to as major sources.[74]

In choosing among alternatives, EPA should consider both the total amount of net benefits provided by each and the distribution of regulatory effects. Executive Order 12,866 directs that "in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity)."[75] It would be particularly helpful for EPA to compare this package of benefits for the Proposed Rule and for restoration of the OIAI policy.

VII. EPA Should Make a Final Conclusion of Whether the Benefits of the Proposed Rule Justify Its Costs

Upon updating its assessment of the costs and benefits of the Proposed Rule and its alternatives, as consistent with the recommendations above, EPA should make a final decision regarding adoption of the Proposed Rule or one of its alternatives. Executive Order 12,866 instructs agencies to "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."[76] In making this final determination, EPA should consider "both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider" as well as distributive effects and equity.[77]

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[72] Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm, 463 U.S. 29 (1983) (finding that the agency's failure to consider an airbag-only alternative safety standard before adopting a vehicle safety standard based on passive restraints); s*ee also* Daniel Deacon, *Responding to Alternatives*, MICH. L. R. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4362386.
[73] Proposed Rule, *supra* note 2, at 66,346–47.
[74] *Id*.
[75] *Id*.
[76] Exec. Order No. 12,866, *supra* note 16, § 1(a), (b)(6).
[77] *Id*. at § 1(a).

Respectfully,

Dena Adler, *Senior Attorney*

Institute for Policy Integrity
New York University School of Law
Dena.Adler@nyu.edu

Enclosure

1) Inst. for Pol'y Integrity, Comments on the "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act," 84 Fed. Reg. 36,304 (proposed July 26, 2019) (submitted Sept. 24, 2019)
2) Petition for Reconsideration of "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act," 85 Fed. Reg. 73,854 (Nov. 19, 2020), Docket ID No. EPA-HQ-OAR-2019-0282 and for Withdrawal of Guidance Memorandum titled "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act" (January 25, 2018) (OAQPS2020-415) (submitted Jan. 18, 2021)