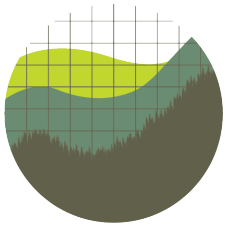

Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

April 4, 2022

To: Environmental Protection Agency

Subject: Comment on "Control of Air Pollution from Aircraft Engines: Emission Standards and Test Procedures," 87 Fed. Reg. 6324 (proposed Feb. 3, 2022)

Docket ID: EPA–HQ–OAR–2019–0660

The Institute for Policy Integrity at New York University School of Law ("Policy Integrity")[1] respectfully submits the following comment to the Environmental Protection Agency ("EPA") on its proposed rule, Control of Air Pollution from Aircraft Engines: Emission Standards and Test Procedures ("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.

EPA's proposal would impose standards that have no effect on emissions and require no technological improvements; instead, it would adopt international standards that themselves are "technology-following" and can already be met by all in-production engines.[3] Accordingly, EPA finds that the Proposed Rule would result in "no costs and no additional benefits."[4] This comment offers the following recommendations to strengthen EPA's final rule and maximize net benefits:

- **EPA should evaluate a full suite of regulatory alternatives, including more stringent standards that would reduce emissions.** Rather than simply deferring to an international body's *technology-following* standards, EPA should exercise its broad discretion under the Clean Air Act to consider *technology-forcing* standards. EPA should then presumptively adopt the alternative that maximizes societal net benefits.
- **EPA should conduct a distributional analysis to evaluate the impacts of the Proposed Rule and all reasonable regulatory alternatives**. Rather than conducting a separate analysis of the disproportionate burdens that pollution from aircraft imposes on communities of color living near airports, EPA should conduct a thorough distributional analysis as part of this rulemaking process. This analysis should include evaluation of the relative distributional consequences for each regulatory alternative.

[1] This document does not purport to represent the views, if any, of New York University School of Law.
[2] 87 Fed. Reg. 6324 (proposed Feb. 3, 2022) (Docket ID EPA–HQ–OAR–2019–0660).
[3] 87 Fed. Reg. at 6349.
[4] *Id.*

I. EPA Should Consider, and Evaluate the Costs and Benefits of, Regulatory Alternatives to the ICAO Standards

Under Section 231 of the Clean Air Act, EPA is directed to propose and enact emission standards for any air pollutant emitted by aircraft engines when such emissions "cause[], or contribute[] to, air pollution which may reasonably be anticipated to endanger public health or welfare."[5] Given the lack of further statutory direction, the D.C. Circuit has interpreted EPA's mandate under this section to provide significant discretion in setting standards, allowing the agency to balance among various factors including emission reductions, cost, energy, and safety.[6] But in the Proposed Rule, rather than balancing among relevant factors, EPA exclusively justifies its proposed standard based on a purported need for international harmonization.[7] While the D.C. Circuit in *NACAA* agreed with EPA that it had discretion to "weigh various factors,"[8] it did *not* find that the agency could entirely ignore some factors and base its decision solely on one factor as the agency did here.

In the Proposed Rule, EPA seeks to "match" particulate matter standards set by the International Civil Aviation Organization ("ICAO")[9] and proposes standards that are "equivalent in scope, stringency, and effective date" as those set by ICAO. EPA claims that harmonizing with ICAO is necessary to provide international uniformity and regulatory certainty, and that deviation from the ICAO standards would undermine future efforts to obtain international consensus.[10] Rather than seeking to reduce emissions or balance other relevant factors related to "public health or welfare" as EPA is required to do,[11] ICAO "seeks to capture the technological advances made in the control of emissions through the adoption of anti-backsliding standards reflecting the current state of technology."[12] Thus, the harmonized standards EPA proposes to adopt are "technology-following"; that is, the standards can already be met by all in-production engines.[13] In its discussion adopting ICAO's standards, EPA does not consider other relevant factors, such as the public health benefits from reducing PM emissions from aircraft or the technological feasibility of methods to reduce PM emissions. Nor does it consider the evidence of foreign reciprocity driven by strong domestic climate policies.[14]

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[5] 42 U.S.C. § 7571(a)(2)(A); *id.* § 7571(a)(3).

[6] *See Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1230 (D.C. Cir. 2007) [hereinafter *NACAA*] (finding that Congress "conferred broad discretion to the Administrator to weigh various factors in arriving at appropriate standards").

[7] *See, e.g.*, 87 Fed. Reg. at 6326.

[8] *NACAA*, 489 F.3d at 1230.

[9] 87 Fed. Reg. at 6325–26.

[10] *Id.* at 6337.

[11] 42 U.S.C. § 7571(a)(2)(A).

[12] 87 Fed. Reg. at 6326.

[13] *Id.* at 6349.

[14] *See, e.g.*, Trevor Houser & Kate Larsen, Rhodium Grp., *Calculating the Climate Reciprocity Ratio for the U.S.* (2021), https://perma.cc/7MJ8-DN23 (conservatively estimating that for every ton the United States pledged to reduce, other countries had collectively pledged to reduce 6.1–6.8 tons in return); *see also* Exec. Order No 13,990 § 6(d) ("Our domestic efforts must go hand in hand with U.S. diplomatic engagement. Because most greenhouse gas emissions originate beyond our borders, such engagement is more necessary and urgent than ever. The United States must be in a position to exercise vigorous climate leadership in order to achieve a significant increase in global climate action and put the world on a sustainable climate pathway.").

Compounding this failure to consider factors that may weigh in favor of adopting more stringent standards, EPA does not evaluate the costs and benefits of a more stringent alternative that would actually decrease emissions. Indeed, the agency does not consider *any regulatory alternatives at all*.

It is well established that agencies should consider a range of regulatory alternatives in order to properly evaluate the costs and benefits of a regulatory proposal. Executive Order 12,866 explains that "agencies should select those approaches that maximize net benefits" when "choosing among alternative regulatory approaches."[15] Accomplishing such a goal of maximizing net benefits is impossible without first considering a broad range of alternatives at different levels of stringency.[16] Circular A-4 directs agencies to "describe the alternatives available to [the agency] and the reasons for choosing one alternative over another."[17] When, as here, there is a continuum of possible alternatives based on the level of stringency, agencies "generally should analyze at least three options: the preferred option; a more stringent option that achieves additional benefits (and presumably costs more) beyond those realized by the preferred option; and a less stringent option that costs less (and presumably generates fewer benefits) than the preferred option."[18] Circular A-4 makes clear that an analysis that, as here, merely compares the agency's proposal to a baseline without discussing the incremental costs and benefits of alternatives is not adequate.[19]

Since the Supreme Court held in *State Farm* that NHTSA had acted arbitrarily and capriciously by refusing to consider a "technological alternative within the ambit of [its] existing standards,"[20] the D.C. Circuit has repeatedly held that rational decisionmaking by administrative agencies requires consideration of "significant alternatives to the course it ultimately chooses."[21] Agencies must consider "obvious" alternatives and provide an explanation when alternatives are rejected.[22] And in explaining why alternatives are rejected, agencies may not "put a thumb on the scale by undervaluing the benefits and overvaluing the costs of more stringent standards."[23] EPA's failure to consider alternatives is particularly egregious here, where proposing alternative performance standards with varying levels of stringency is such a "familiar tool in [EPA]'s tool kit."[24]

Without any analysis of more stringent alternatives, EPA cannot rationally conclude that a Proposed Rule that provides zero benefits is a reasonable approach. At minimum, EPA should have proposed a preferred alternative along with one less stringent alternative and one more stringent alternative, as Circular A-4 recommends.[25] As EPA instead only proposed what is

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[15] 58 Fed. Reg. 51,735 §1(a) (Oct. 4, 1993).

[16] *See* Richard L. Revesz & Samantha Yi, *Distributional Consequences and Regulatory Analysis*, 52 ENV. LAW _ , *33–34 (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3927277.

[17] OFFICE OF MGMT. & BUDGET, CIRCULAR A-4: REGULATORY ANALYSIS 16 (2003).

[18] *Id.*

[19] *Id.*

[20] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983).

[21] *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000).

[22] *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 816 n.41 (D.C. Cir. 1983).

[23] *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008).

[24] *See Chamber of Com. of U.S. v. Sec. & Exch. Comm'n*, 412 F.3d 133, 144 (D.C. Cir. 2005).

[25] CIRCULAR A-4, *supra* note 17, at 16.

essentially the least-stringent option possible, EPA should include at least two more stringent alternatives in its final rule. The agency should presumptively select the alternative that maximizes net benefits,[26] and, if it does not select that policy, should offer an adequate justification for rejecting the alternative that is most economically efficient.[27]

In order to ensure adequate notice and opportunity for comment on any new alternatives evaluated, EPA should consider issuing a Supplemental Notice of Proposed Rulemaking before moving to the final rulemaking stage.

II. EPA Should Conduct a Distributional Analysis of the Consequences of Its Proposed Rule Instead of Postponing Such an Analysis for a Separate Action

EPA acknowledges the disproportionate burdens on people of color living near airports as a result of aircraft emissions.[28] A baseline understanding of disproportionate burdens created by the source category is helpful, but must be accompanied by an analysis that evaluates the distribution of impacts resulting from the Proposed Rule and any marginal differences from adopting EPA's proposed alternatives. Indeed, President Biden's Memorandum on Modernizing Regulatory Review calls for analysis of rules' "distributional *consequences* . . . to ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities."[29] And evaluation of alternatives is crucial to a meaningful analysis, as the distributional impacts of an available regulatory alternative may be more desirable than those of the proposed policy.[30]

But instead of evaluating how the Proposed Rule will—or, in this case, will not—provide any pollution benefit directly to these overburdened communities, EPA claims it will conduct a demographic analysis of pollution burdens from aircraft in an unnamed action separate from this proposed rulemaking.[31] EPA simply concludes that because the Proposed Rule will not result in *any* emission reductions, EPA "does not anticipate an improvement in air quality for those who live near airports where these aircraft operate."[32] But EPA fails to consider any policy that will "appropriately benefit . . . disadvantaged, vulnerable, or marginalized communities," since it merely proposes technology-following international standards without considering any emission-reducing alternatives.[33]

EPA should conduct a distributional analysis of the Proposed Rule—and all reasonable regulatory alternatives as described in section I*, supra*—to determine whether another approach may be more advantageous to disadvantaged communities. The agency should consider the results of that analysis—along with the findings of a full regulatory impact analysis—when

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[26] Exec. Order 12,866 §1(a) ("[A]gencies should select those approaches that maximize net benefits . . ., unless a statute requires another regulatory approach.").

[27] EPA, Guidelines for Preparing Economic Analyses 1-4 (2010) ("The policy that maximizes net benefits is considered the most efficient").

[28] 87 Fed. Reg. at 6335–36.

[29] Memorandum on Modernizing Regulatory Review § 2(b)(ii), 86 Fed. Reg. 7223, 7223 (Jan. 25, 2021) (emphasis added).

[30] *See* Revesz & Yi, *supra* note 16, at *35.

[31] 87 Fed. Reg. at 6336 & n.83.

[32] *Id.* at 6336.

[33] Memorandum on Modernizing Regulatory Review, *supra* note 29, § 2(b)(ii).

assessing whether to adopt the regulation as proposed or whether to adopt a more stringent alternative.

Respectfully,

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