July 15, 2021

Acting Director Donna Salyer
Office of Land and Emergency Management
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Notice of Request for Public Comment; Docket Number EPA-HQ-OLEM-2021-0312

Dear Acting Director Salyer:

Thank you for the opportunity to comment on the Environmental Protection Agency's (EPA) Request for Public Comment on "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act" [hereinafter "RMP rulemaking"].

I am a Senior Policy Analyst with the Center for Progressive Reform (CPR), a nonprofit research and advocacy organization that works to build thriving communities on a resilient planet. CPR's mission is to educate, collaborate, and advocate with the goal of driving public policy reform through rigorous and accessible legal analysis. CPR operates with a network of more than 60 leading scholars in various legal academic fields and a professional staff of policy analysts, communication experts, and others. We work together to advance the idea that government regulations are key to social justice and planetary health. Our website is https://progressivereform.org.

I have been studying the federal regulatory system for over 13 years, with a particular focus on the role of economic analysis and centralized review at the White House Office of Information and Regulatory Affairs (OIRA) in the regulatory decision-making process. Responses to the comments below may be sent to me at jgoodwin@progressivereform.org.

As explained below, these comments address specific issues related to the EPA's regulatory impact analysis for the RMP rulemaking.

Introduction

Over the last four decades, the related processes of centralized regulatory review at the White House Office of Information and Regulatory Affairs (OIRA) and regulatory cost-benefit analyses have taken on significant influence in the rulemaking process. It has long been recognized that, in general, these institutions have operated in a biased fashion, serving to delay, weaken, and even block regulatory safeguards. More recently, we are also coming to appreciate how these institutions contribute to racial injustice by undermining safeguards that seek to address harms that disproportionately burden communities of color.

In recognition of these flaws of OIRA review and cost-benefit analysis, President Joe Biden issued an important memorandum on "Modernizing Regulatory Review" [hereinafter "Biden memo"] on the first day of his administration. The Biden memo sets forth a new vision of regulatory review — one that is governed by "processes and principles" that will "ensure swift and effective Federal action" in response to the "serious challenges" we face as a nation, "including a massive global pandemic; a major economic downturn; systemic racial inequality; and the undeniable reality and accelerating threat of climate change."

To fulfill this vision, the Biden memo calls on the Director of the White House Office of Management and Budget (OMB, the agency in which OIRA is housed) to develop a set of recommended reforms necessary for achieving that more progressive approach to OIRA review and regulatory analysis. Specifically, it asks for "concrete suggestions on how the regulatory review process can promote public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations." Furthermore, it seeks proposals for "procedures that take into account the distributional consequences of regulations . . . to ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities."

The OMB has likely begun implementing the Biden memo, though the agency has not taken any formal public steps as yet.

Significantly, the RMP rule implicates many of the issues that OMB is to consider in carrying out the Biden memo. Indeed, the vision of regulatory review called for in the Biden memo would seemingly be one that would "ensure" that the EPA's implementation of the RMP rule is as "swift and effective" as possible.

Consequently, I urge the EPA to collaborate with the OMB in using the RMP rulemaking as a "model" that could help inform the development of specific recommendations for modernizing and improving regulatory review, as called for in the Biden memo. Below, I

outline specific regulatory review issues the RMP rule raises that might be particularly useful in this regard.

Specific Regulatory Review Issues for the RMP Rule

Restoring Statutory Primacy in Regulatory Review

The Biden memo provides that "[i]t is the policy of my Administration to mobilize the power of the Federal Government to rebuild our Nation and address" the serious challenges our nation faces. As it correctly notes, though, the regulatory review process can undermine such mobilization efforts.

When it comes to regulation, the federal government's ultimate source of power is authorizing statutes. Historically, though, regulatory review and cost-benefit analysis have operated to produce regulations that are inconsistent with the authority provided for in those statutes. In particular, they have tended to yield regulations that are substantially weaker — and thus, less effective — than what Congress had intended when enacting the authorizing statutes.

In short, mobilizing the full power of the federal government will require instituting a regulatory review process that recognizes and respects the primacy of statutes. The role of cost-benefit analysis has been particularly problematic in this regard. There are several "types" of cost-benefit analysis, but the one enshrined in Executive Order 12866 (which currently governs the regulatory review process) is grounded in the controversial theory of welfare economics. This theory holds that the exclusive duty of government policy is to maximize economic growth. Consistent with this duty, regulations must be designed to maximize their economic efficiency — a condition that holds when a particular regulation achieves maximized net benefits.

Very few statutes have adopted cost-benefit analysis as the decision-making standard for writing new regulations. While Congress has long been familiar with this approach to regulatory decision-making, it has nevertheless consistently rejected it on both practical and ethical grounds.

Identifying economically optimal regulations requires agencies to consider an infinite variety of regulatory approaches to determine the net benefits for each. This requires the agency to quantify and monetize all the negative impacts of the rule (*i.e.*, the costs), as well as all the positive impacts (*i.e.*, the benefits), and then directly compare them to calculate the net benefits.

Such a process is not possible in practice, of course. More to the point, though, Congress often decides that other considerations — such as fairness, dignity, and justice — demand that our policies achieve *greater* protections than what is "economically optimal." In other words, we as a society have decided that we are willing to give up some economic growth to protect people and the environment against certain harms that they are unable to protect themselves against.

The upshot is that cost-benefit analysis, and the regulatory review process that superintends its performance, systematically produces weak and ineffective regulations relative to what agencies' statutory authorities demand. In contrast, a modernized, progressive approach would seek to promote greater fidelity in agency decision-making to those authorizing statutes, rather than privileging an arbitrary and controversial goal such as economic efficiency. This in turn would generate stronger and more effective regulations.

Significantly, recent polling from CPR and Data for Progress shows broad public support for this approach. In particular, the polling results demonstrate that likely voters across the political spectrum reject the foundational principle of the welfare economics form of cost-benefit analysis — namely, that maximizing economic growth should take priority in regulatory decision-making. Full details on this polling are appended to these comments.

The RMP rule illustrates how restoring statutory primacy to the regulatory process will both lead to more effective public protections and better accord with public expectations for the regulatory system. The specific statutory provision that authorizes the RMP is section 112(r)(7) of the Clean Air Act. This provision establishes what is generally referred to as a "technology-based standard," directing the EPA to write the implementing regulations for the RMP that "provide, *to the greatest extent practicable*, for the prevention and detection of accidental releases of regulated substances and for response to such releases by the owners or operators of the sources of such releases." (emphasis mine) Further, the provision provides a non-exhaustive list of technology-relevant factors that the EPA may account for in writing these implementing regulations.

Technology-based standards such as these are not oblivious to costs, of course. Implicitly, cost is built into the notion of what is technologically "practicable," especially when considered in conjunction with the other list technology-relevant factors. Nevertheless, even the weakest forms of technology-based standards place a thumb on the "benefits" side of the scale, unlike cost-benefit analysis, which affords equal weight to both. That is because the standard demands that the agency go beyond what is merely economically efficient and instead to achieve some higher level of protection that can be provided for through the relevant level of technology. In the case of the RMP, that level is somewhat more than just a weak level. Indeed, the statute calls for the "greatest extent practicable" of protections, which implies a relatively high level of technology for achieving the RMP's protection goals, even if they entail a significant level of costs to implement.

To be sure, this Clean Air Act provision also requires that such regulations be "reasonable." The Supreme Court has held in *Michigan v. EPA*, 576 U.S. 743 (2015), in another statutory context, that the concept of "reasonableness" obliges agencies to consider regulatory costs in some manner. Significantly, though, the Court was careful to clarify that this obligation did not mandate a particular approach to considering costs,

and it certainly did not amount to a requirement that the agency adhere to a welfare economics approach to cost-benefit analysis.[1]

A modernized approach to regulatory review would dispense with cost-benefit analysis as its approach to regulatory evaluation and instead pursue an approach in which agencies assess the costs and benefits of their rules according to the context-specific framework outlined in their authorizing statutes. In the context of the EPA's RMP rulemaking, that would mean assessing those impacts in a manner that conforms to the agency's statutory obligation to design the regulation's requirements to achieve its protective goals to the "greatest extent practicable."

Addressing Relevant Methodological Flaws of Cost-Benefit Analysis

A progressive, modernized approach to regulatory review involves more than just overhauling the framework for analysis to replace the problematic focus on maximizing net benefits with a focus on the relevant statutory standard instead; it also requires attention to identifying and remedying specific flaws in evaluative methodologies. Significantly, as a model, the RMP rulemaking would help highlight several such key flaws and offer a concrete foundation on which to develop effective reforms.

Monetization

As noted above, the welfare economics approach to regulatory analysis demands that all regulatory impacts be presented into dollars-and-cents terms so that they can be directly compared against each other, with the object of calculating a regulation's net benefits. Many of the impacts of regulations are non-market goods, which by definition are not bought and sold in the marketplace. This is especially the case for regulatory *benefits* as opposed to regulatory *costs*. As such, the limitations of monetization are asymmetric in that the disproportionately impact regulatory benefits to a greater extent than regulatory costs, promoting an anti-regulatory bias in the analysis's results.

Because these impacts represent non-market goods, there is no natural mechanism for assigning them a monetary value. Instead, economists have devised a number of "tricks" or methodologies for converting these outcomes of rules into monetary terms — a process known as monetization.

Monetization has long been recognized as extremely controversial in many cases because attempts to assign a monetary value to certain regulatory impacts are at best incomplete and at worst morally offensive. For instance, cost-benefit analysis typically assigns a value of around $10 million to the protection of a human life by a regulation. At a superficial level, this value seems woefully low. How can that number possibly capture the full range of values represented by a particular human life — not just to the affected individual, but also to his or her family, friends, community, and so on?

[1] *See* Amy Sinden, *A 'Cost-Benefit State'? Reports of Its Birth Have Been Greatly Exaggerated*, 46 ENVTL. L. REPORTER 10933 (2016).

More deeply, just the attempt to assign a monetary value to a human life would strike many as morally outrageous. We certainly wouldn't endorse allowing human lives to be bought and sold on the marketplace at *any* price. The notion would be completely irreconcilable with our widely shared values of human dignity and fairness. (Note that these kinds of ethical concerns tend to asymmetrically affect the benefits side of the regulatory analysis ledger, as opposed to the costs side.) Yet, because many regulations have the impact of saving human lives, cost-benefit analysis requires that they be expressed in monetary terms in order to be accounted for.

Unlike cost-benefit analysis, the progressive evaluative framework does *not* intrinsically require monetization. Implementing this new framework does, however, require some fresh consideration of whether to use monetization and when. The RMP rulemaking provides a vehicle for exploring these issues.

Consistent with the goal of restoring statutory primacy to regulatory review, the threshold issue for determination is whether monetization is relevant to or even forbidden by the applicable statutory authority. Thus, the progressive approach should follow a bright-line rule of rejecting monetization where it would be irrelevant to or prohibited by the authorizing statute.

At the other extreme are situations where monetization is explicitly required by the statute. In these cases, which are extremely rare, the progressive approach would require a careful and disciplined use of monetization. Among other things, it should reflect the best available science, it should be contextualized, and it should be carefully monitored to avoid unintended consequences (*e.g.*, introducing racially discriminatory content into the analysis[2]). Above all, the agency should clearly articulate the limitations and uncertainties involved in these efforts.

In between the two extremes are cases where monetization would be permissible and potentially relevant. Identifying this category of cases is not easy, though, given that the dividing line between when monetization is relevant and irrelevant can be blurry. Indeed, the statutory provision at issue with the RMP rulemaking appears to raise this question — that is, while monetization does not appear to be prohibited, it is not clear whether it is relevant to the consideration of the statutorily defined factors. In such cases where monetization is relevant, or just potentially so, the progressive approach to regulatory review should nevertheless adopt a strong presumption against the use of monetization for non-market goods.

If the agency does decide to make some use of monetization as part of the regulatory analysis, it should be strictly disciplined and subject to meaningful constraints, as would be the case where monetization is statutorily required. Agencies should be alert to unintended consequences from the use of monetization, and they should carefully articulate the limitations and uncertainties that arise from its use.

[2] James Goodwin, *Cost-Benefit Analysis is Racist*, Ctr. for Progressive Reform, https://progressivereform.org/our-work/regulatory-policy/cost-benefit-analysis-racist/ (last visited July 13, 2021).

The RMP rulemaking illustrates how these lessons and limitations might be applied. For instance, the EPA should resist using the prevailing methodologies for monetizing the value of any lives that the rule might save, given the scientific and ethical flaws in those methodologies. Unless and until the EPA can develop a methodology that avoids such serious scientific and ethical concerns, the agency should refrain from putting a monetary value on protecting lives in its regulatory analyses.

This presumption against monetization could be applied to other benefits categories of the RMP rulemaking as well, including, for example, avoided health care costs that arise when residents seek out emergency medical treatment following major chemical releases or disasters at covered facilities.

More broadly, the EPA should work with OMB to begin developing a comprehensive framework of conditions and limitations necessary for disciplining the use of monetization in regulatory analysis and promoting integrity in its use.

Missing Benefits Categories

A common problem in cost-benefit analysis as it is currently practiced is that many significant categories of benefits are often left out due to a lack of data that renders quantification and monetization of those benefits impossible. For instance, a recent empirical study looked at the major EPA rulemakings over a 13-year period, spanning the George W. Bush and Obama administrations, and found that in 80 percent of its cost-benefit analyses, the EPA was entirely unable to quantify whole categories of benefits that the agency itself described as "important, significant, or substantial."[3]

The upshot is that these missing components of the analysis make it impossible to calculate anything near a credible estimate of a regulation's net benefits. But not only are the results inaccurate, they are also fundamentally misleading, given that the problem of missing data asymmetrically affects the benefits side of the analysis.

Put differently, these data shortcomings generate results that reflect a "mostly complete costs estimate" compared to a "woefully incomplete benefits estimate." The significant and systematic underestimate of net benefits that results from this dynamic leads to a strong bias against strong regulatory safeguards.

This phenomenon of missing benefits provides another strong rationale for abandoning the use of the welfare economics form of cost-benefit analysis where not explicitly required by law. But it also suggests a need for reforming agencies' existing analytical procedures. The EPA's RMP rulemaking offers an opportunity to reform agencies' regulatory evaluation procedures to account for such elements of the analysis for which missing data makes quantification and monetization impossible.

As a preliminary matter, the EPA should explicitly disclaim all efforts to calculate the RMP rule's net benefits, and it should provide a concise and clear explanation of why a

[3] Amy Sinden, *The Problem of Unquantified Benefits*, 49 Envtl. L. 73 (2019).

net benefits calculation would not only be legally irrelevant, but also analytically misleading. The analysis should provide a clear accounting of significant categories of regulatory impacts — especially those related to regulatory benefits — for which quantification or monetization is not possible. This accounting should describe these impacts in easy-to-understand qualitative terms. The EPA and the OMB should seek public input — particularly from affected communities that have been historically excluded from the rulemaking process — to inform these efforts. Finally, the EPA's analysis should also clearly explain how these qualitative impacts relate to and inform the specific statutory factors outlined in section 112(r)(7) of the Clean Air Act.

More broadly, the EPA and the OMB should work together to establish general guidelines for how agencies can more effectively describe in qualitative terms regulatory impacts for which quantification and monetization is not possible.

Low-Probability, High-Impact Events

One of the long-recognized shortcomings of the welfare economics form of cost-benefit analysis is its inability to properly account for low-probability, high-impact events — that is, events that are colloquially referred to as "disasters." The sheer magnitude of their consequences alone makes attempts at monetization impossible. For instance, how would you monetize the impacts of something like the BP oil spill in the Gulf of Mexico? The low probability of these events' occurrence complicates things further. How often can we expect something like the BP oil spill to occur in the future? If we "guess" wrong, that could have a significant impact on the valuation.

Preventing low-probability, high-impact events is one of the most significant benefits of the RMP rule, of course. Thus, this rulemaking provides an ideal opportunity for establishing reforms on how agencies account for these kinds of impacts in their regulatory analyses.

While there exists a sizeable literature on how agencies can better account for disasters in their cost-benefit analyses, the better approach would be for agencies to not attempt to monetize these impacts at all, even if they arguably have the legal authority to do so. The proposed methodologies for monetizing these impacts lack sufficient scientific credibility. Moreover, any resulting numbers these methodologies produce would necessarily exclude many of the important subjective values that are implicated by preventing chemical facility-related disasters but which are intrinsically incommensurable with monetary valuations.

In performing the regulatory analysis for the RMP rule, rather than attempting to monetize the benefits that result from low-probably, high-impact events, the EPA should work with the OMB to develop more effective approaches to discussing these impacts in qualitative terms.

Equity in Regulatory Analysis

The welfare economics form of cost-benefit analysis that currently prevails contributes to the systemic racism of the regulatory system. A full discussion of this issue is

appended to these comments. Consequently, it will be impossible to ensure that regulatory analysis is conducted consistent with racial equity considerations, as long as this form of analysis remains in use. This provides still another reason for the OMB to abandon the use of the welfare economics form of cost-benefit analysis as part of the centralized regulatory process.

But the OMB can and should go beyond this step to ensure racial equity is accounted for and promoted as part of regulatory analysis. Significantly, the Biden memo has called on the OMB to take precisely this step. Specifically, it directs the OMB to develop recommendations for "procedures that take into account the distributional consequences of regulations . . . to ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities."

The OMB can take this step by focusing on new methodologies and tools for considering disproportionate and cumulative burdens on marginalized communities. Given that one of the primary goals of the EPA's RMP rulemaking is to address disproportionate and cumulative burdens experienced by marginalized communities (*i.e.*, chemical facility-related disasters and releases), the EPA and the OMB should use the rulemaking as a concrete model for developing new methodologies and tools for incorporating equity considerations into regulatory analysis.

For instance, many of the fenceline communities that live in close proximity to the chemical facilities covered by the RMP rulemaking are disproportionately low-wealth/low-income people and people of color.[4] These communities face a wide range of environmental and public health harms beyond just those that the RMP rulemaking is meant to address.[5] These harms can include any of various climate-related hazards *(e.g.*, flooding or storm surges), toxic chemical exposures (*e.g.*, through consumer products or unsafe drinking water), and poor ambient air quality (*e.g.*, ground-level ozone or particulate matter). The analysis should thus strive to understand and account for how the RMP-related impacts interact with and compound these other environmental and public health burdens.

Moreover, due the legacy of racism and poverty, members of these communities tend to have less absorptive capacity to overcome the harms that the RMP rulemaking is meant to address. The regulatory analysis for the RMP rulemaking should thus seek to fully account for how the harms that the RMP rule is meant to address can be particularly significant for these populations. For instance, a lack of access to adequate health care

[4] CTR. FOR EFFECTIVE GOVT, LIVING IN THE SHADOW OF DANGER (2016), *available at* https://www.foreffectivegov.org/shadow-of-danger; RONALD WHITE, LIFE AT THE FENCELINE: UNDERSTANDING CUMULATIVE HEALTH HAZARDS IN ENVIRONMENTAL JUSTICE COMMUNITIES (Envtl. Justice Health Alliance, Coming Clean, Campaign for Healthier Solutions, 2018), available at https://new.comingcleaninc.org/assets/media/documents/Life%20at%20the%20Fenceline%20-%20English%20-%20Public.pdf.

[5] *See* Kristi Pullen Fedinick et al., *A Cumulative Framework for Identifying Overburdened Populations under the Toxic Substances Control Act: Formaldehyde Case Study*, INT. J. ENVIRON. RES. PUBLIC HEALTH 2021, 18(11), 6002.

can exacerbate potential public health harms. Similarly, affected individuals in these communities are disproportionately employed in jobs for which they lack paid medical leave or for which their employment status is precarious. Even one sick day that results from a RMP-related harm could result in a loss of employment, leading to additional economic and public health harms for affected individuals and their families. The RMP rulemaking's analysis should attempt to account for these kinds of indirect effects that are uniquely traceable to historic and systemic racism and injustice.

The EPA and the OMB should work together to affirmatively seek out public input — particularly from affected communities that have been historically excluded from the rulemaking process — to inform their efforts to identify and qualitatively describe the kinds of disproportionate and cumulative burdens that these communities face that would be relevant to the regulatory analysis.

Conclusion

As my comments explain above, the EPA's pending RMP rulemaking provides a useful vehicle for exploring how to establish and implement a more progressive and modernized approach to regulatory review and regulatory analysis. Consequently, I urge the EPA to work closely with the OMB on the development of the rule's regulatory analysis. As the work on developing this regulatory impact analysis, the EPA and the OMB should commit to engaging in a robust effort to obtain public input — especially from affected communities that have historically been unrepresented in the rulemaking process — on what impacts this analysis should address and the best means for addressing them. For its part, the OMB should use this exercise to help inform its own efforts on implementing the Biden memo. My comments offer a starting point and some guidance on how the EPA and the OMB undertake these respective tasks.

I appreciate your attention to these comments. If you have any questions regarding the foregoing, or if I can be of further assistance in this effort, please do not hesitate to reach out to me.

Sincerely,

James Goodwin
Senior Policy Analyst
Center for Progressive Reform