UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Comments on the June 11, 2020 Proposed Rule: Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process

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Earthjustice, California Communities Against Toxics, and Sierra Club

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I. Introduction

With the Clean Air Act, Congress established a comprehensive program with the "broad" and "unequivocal" purpose of "protect[ing] and enhanc[ing] the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population[.]"[1] All told, the statute includes more than sixty provisions that authorize or require the EPA to adopt air-quality standards, emissions limits, and other kinds of regulatory protections.[2] These provisions differ, of course, in many respects—including their approach to costs. While some sections of the statute direct the EPA to engage in an examination of regulatory costs and benefits, others call for a more limited assessment of costs along with other factors.[3] And as both the Supreme Court and the D.C. Circuit have recognized, still other provisions prohibit the EPA from considering costs altogether.[4]

In proposing a regulation that would require extensive cost-benefit analysis during all significant Clean Air Act rulemakings, the Administrator has defied the

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[1] 42 U.S.C. § 7401(b)(1); *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1571 (D.C. Cir. 1984); *Chrysler Corp. v. EPA*, 631 F.2d 865, 888 (D.C. Cir. 1980).

[2] Cong. Research Serv., Cost and Benefit Considerations in Clean Air Act Regulations (May 5, 2017) (Rep. No. R44840, Version 4) ("CRS Report") (attached), at 1, 3-7 (cataloguing the statute's authorizing provisions).

[3] *See, e.g.*, 42 U.S.C. § 7612(a) (requiring the EPA to undertake "a comprehensive analysis of the impact of … [the statute] on the public health, economy, and environment of the United States[,]" including an assessment of "the costs, benefits and other effects associated" with implementing specified sections of the statute); 42 U.S.C. § 7585(b)(1) (authorizing the EPA to "promulgate a revised less stringent standard for … [heavy-duty clean-fuel] vehicles or engines … if the Administrator determines that the 50 percent reduction [otherwise] required … is not technologically feasible for clean diesel-fueled vehicles and engines, taking into account durability, costs, lead time, safety, and other relevant factors").

[4] *See, e.g.*, *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 471 (2001) (holding that "[t]he text of § 109(b), interpreted in its statutory and historical context and with appreciation for its importance to the … [statute] as a whole, unambiguously bars cost considerations from the NAAQS-setting process"); *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 640 (D.C. Cir. 2000), *as amended on denial of reh'g* (Feb. 14, 2001) (noting that "cost may not influence the determination of a MACT floor" under Section 112, "which depends exclusively upon the emissions reductions achieved by the best-performing sources").

distinct mandates Congress set forth in the statute regarding the consideration (or not) of costs.[5] Under the proposed rule, the EPA would be obligated to prepare a lengthy "assessment of all benefits and costs" for an array of "regulatory options" before proposing or finalizing any air-quality regulation the Administrator deems "significant."[6] As the agency has acknowledged, the rule's requirements would even apply to actions in which the EPA is statutorily prohibited from taking economics into account.[7] This is unlawful. While the agency may prefer "that information regarding the benefits and costs of regulatory decisions is provided and considered in a consistent … manner[,]" the Supreme Court has rightly held that the EPA's "'preference for symmetry cannot trump an asymmetrical statute.'"[8]

The proposed rule is also arbitrary. In insisting that the "strength of scientific evidence should be strongest when … benefits are estimated[,]" as opposed to costs, the proposal promises to arbitrarily understate the importance of Clean Air Act protections and deny members of the public the protective "margin of safety" they are owed under the statute.[9] In relying on a "willingness to pay" approach to calculating benefits, the proposal threatens to further marginalize frontline communities that lack resources equal to their desire for air that's safe to breath.[10] And in focusing on the "net benefits" of air-quality regulations—their "potential to improve the aggregate well-being of society"—the proposal fails to consider whether benefits and burdens would be distributed in an equitable manner.[11]

In short, the proposed regulation is arbitrary, unjust, and unlawful. On behalf of our members and supporters, Earthjustice, California Communities Against Toxics, and Sierra Club urge the EPA to abandon it.

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[5] EPA, Notice of Proposed Rulemaking: Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 85 Fed. Reg. 35,612 (June 11, 2020).

[6] *Id.* at 35,612, 35,625-26 (proposed rule sections 83.1 and 83.3).

[7] *Id.* at 35,615.

[8] *Id.* at 35,612; *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015) (quoting *CSX Transp., Inc. v. Ala. Dep't of Revenue,* 562 U.S. 277, 296 (2011)).

[9] Proposed Rule, 85 Fed. Reg. at 35,620; 42 U.S.C. § 7409(b)(1) (requiring that primary air-quality standards include "an adequate margin of safety").

[10] Proposed Rule, 85 Fed. Reg. at 35,619.

[11] *Id.* at 35,613-14.

II. The EPA does not have the authority to require cost-benefit analysis during all significant Clean Air Act rulemakings.

When implementing the Clean Air Act, the EPA is bound by the judgments that have been made by Congress.[12] As the D.C. Circuit has explained, the "EPA is a federal agency—a creature of statute. It has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress."[13] Given the limits of the EPA's powers, "when Congress directs … [the] agency to consider only certain factors in reaching an administrative decision, the agency is not free to trespass beyond the bounds of its statutory authority by taking other factors into account."[14]

Despite the proposed rule's suggestions to the contrary, the EPA's lack of authority to consider factors that weren't mentioned by Congress includes the question of regulatory costs.[15] Indeed, the Supreme Court itself has "refused to find implicit in ambiguous sections of the … [Clean Air Act] an authorization to consider costs that has elsewhere, and so often, been expressly granted."[16] In order to move forward with the proposed rule, then, the agency "must show a textual commitment of authority to the EPA to consider costs" in every Clean Air Act rulemaking the Administrator deems significant.[17] It cannot do so. As the Congressional Research

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[12] *See, e.g.*, *Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1150 (D.C. Cir. 1980) (noting that "[a] policy choice such as … [whether the EPA may consider costs] is one which only Congress, not the courts and not EPA, can make"). *See also, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

[13] *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001).

[14] *Lead Indus. Ass'n*, 647 F.2d at 1150. *See also Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (noting that "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider").

[15] *See, e.g.*, Proposed Rule, 85 Fed. Reg. at 35,615 (asserting that "while certain statutory provisions may prohibit reliance on BCA or other methods of cost consideration in decision making, such provisions do not preclude the Agency from providing additional information regarding a proposed or final rule to the public").

[16] *Whitman*, 531 U.S. at 467-68.

[17] *See id.*

Service has noted, while "[t]he act requires or authorizes the … Administrator to promulgate regulations or set standards in more than 60 sections or subsections[,] … [i]n 25 of these sections or subsections, cost is not mentioned or implied as a factor to be considered."[18] And even where costs are mentioned, the statute often doesn't authorize the exhaustive assessment of costs, benefits, and regulatory alternatives that would be required under the proposed rule.[19]

The EPA has not even attempted to show how its proposal is authorized by, or consistent with, the language and purpose of each of the many statutory provisions onto which it would graft its cost-benefit mandate. Indeed, aside from a few of the Act's provisions, the EPA's proposal does not even mention any of the specific sections of the statute that the proposed rule would apply to, much less explain how its extensive cost-benefit analytical scheme is authorized by and consistent with each and every one of them. The proposal is completely untethered from the Clean Air Act's specific directives and expressions of congressional intent. As a result, the proposal is unlawful and arbitrary.[20]

A. The Clean Air Act prohibits the EPA from considering costs under numerous provisions that would be subject to the proposed rule.

The requirements of the proposed rule are irreconcilable with the Clean Air Act's provisions that prohibit the consideration of costs. In Section 109, for example, Congress directed the EPA to establish "[n]ational primary ambient air quality

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[18] CRS Report, *supra* note 2, at 1. The report's list of authorizing provisions that do not mention costs includes Sections 109(a), 109(b), 110(c)(1), 112(d)(2) and (3), 112(d)(2) and (3), 112(d)(8), 112(f), 112(k), 126(c), 129(a)(2), 166, 202(a), 202(j), 202(m), 211(i), 211(o), 219(c), 243, 328, 407(b)(1), 604(c), 605(c), 609, 610, and 615. *Id.* at 6-7.

[19] *See* Section II.B, *infra*.

[20] *Massachusetts v. EPA*, 549 U.S. 497, 532-33 (2007) (holding that the EPA's "reasons for action or inaction must conform to the authorizing statute[,]" and the agency cannot rely on reasoning "divorced from the statutory text"); *Cal. Cosmetology Coal. v. Riley*, 110 F.3d 1454, 1460 (9th Cir. 1997) (noting that a "regulation may not … add to the statute something which is not there") (internal quotations omitted); *Pascavage v. Office of Pers. Mgmt.*, 773 F. Supp. 2d 452, 459 (D. Del. 2011) ("[W]hen Congress has directly addressed an issue, an agency may not engraft additional conditions onto the statute.") (citing *Bureau of Alcohol, Tobacco and Firearms v. Fed. Labor Relations Auth.*, 464 U.S. 89 (1983)).

standards" for criteria pollutants at levels that "are requisite to protect the public health" with "an adequate margin of safety[.]"[21] As the Supreme Court observed in *Whitman v. American Trucking Associations*, this language "'is absolute.'"[22] Under it,

> [t]he EPA, "based on" the information about health effects contained in the technical "criteria" documents compiled under § 108(a)(2), … is to identify the maximum airborne concentration of a pollutant that the public health can tolerate, decrease the concentration to provide an "adequate" margin of safety, and set the standard at that level. Nowhere are the costs of achieving such a standard made part of that initial calculation.[23]

"The text of § 109(b)," in short, "interpreted in its statutory and historical context and with appreciation for its importance to the … [Clean Air Act] as a whole, unambiguously bars cost considerations from the NAAQS-setting process[.]"[24]

Given the critical importance of placing limits on hazardous air pollutants, Congress also included provisions in Section 112 that prohibit the EPA from considering costs. Under Section 112(d), standards for new and existing sources are generally required to provide for "the maximum degree of reduction in emissions of … hazardous air pollutants … that the Administrator … determines is achievable" after "taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements[.]"[25] The statute, however, sets a floor: under Section 112(d)(3), the EPA's standards may "not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator."[26] "Cost," in other words, "may be taken into account only in considering beyond-the-floor emissions limitations"; it "may not influence the

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[21] 42 U.S.C. § 7409(b)(1).

[22] 531 U.S. at 465 (quoting D. Currie, Air Pollution: Federal Law and Analysis 4-15 (1981)).

[23] *Id.*

[24] *Id.* at 471; *id.* at 471 n.3 (concluding that the EPA is similarly barred from "consider[ing] implementation costs in setting the secondary NAAQS").

[25] 42 U.S.C. § 7412(d)(2).

[26] *Id.* § 7412(d)(3).

determination of … [the] floor, which depends exclusively upon the emissions reductions achieved by the best-performing sources."[27] (Notably, this approach to costs was also incorporated into the statute's specific achievability standards for solid-waste-incineration units.)[28]

Section 112's coke-oven provisions also cabin the EPA's consideration of costs.[29] As a general matter, when establishing emission standards for coke ovens, the Administrator must consider a number of emission-limiting practices and technologies in light of their costs and other factors.[30] Section 112(d)(8), however, ultimately "require[s] at a minimum that coke oven batteries will not exceed 8 per centum leaking doors, 1 per centum leaking lids, 5 per centum leaking offtakes, and 16 seconds visible emissions per charge, with no exclusion for emissions during the period after the closing of self-sealing oven doors."[31] Here, again, costs can only be considered when the EPA is determining whether to impose limitations in excess of the statutory minimums established by Congress.[32]

In directing the EPA to determine which stationary sources must be regulated under Section 112's standards, Congress also placed limits on the consideration of costs. According to the Supreme Court's decision in *Michigan v. EPA*, the agency "must consider cost—including, most importantly, cost of compliance—before deciding whether regulation [of power plants] is appropriate

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[27] *Nat'l Lime Ass'n*, 233 F.3d at 640.

[28] *See* 42 U.S.C. § 7429(a)(2) (providing that "[t]he degree of reduction in emissions that is deemed achievable for new [solid-waste-incineration] units … shall not be less stringent than the emissions control that is achieved in practice by the best controlled similar unit, as determined by the Administrator"); *Med. Waste Inst. and Energy Recovery Council v. EPA*, 645 F.3d 420, 426 (D.C. Cir. 2011) (noting that "the floor-setting that is the initial step in establishing emissions standards" for incineration units "does not" require consideration of costs).

[29] 42 U.S.C. § 7412(d)(8)(A).

[30] *Id.*

[31] *Id.*

[32] *Id.*

and necessary" under Section 112(n)(1)(A).[33] As the Court emphasized, however, the Clean Air Act "treat[s] power plants *differently* from other stationary sources":

> Congress crafted narrow standards for … [the agency] to apply when deciding whether to regulate other sources; in general, these standards concern the volume of pollution emitted by the source, … and the threat posed by the source "to human health or the environment[.]"[34]

In other words, except with respect to power plants, the agency is barred from considering costs when determining which source categories require regulation under Section 112.[35]

Another Clean Air Act provision that bars consideration of costs is Section 165(e)'s requirement for at least one year of ambient air-quality monitoring prior to an application for a PSD permit.[36] The D.C. Circuit has ruled that this is a rigid mandate that cannot be relaxed or modified based on cost-benefit considerations, as EPA attempted to do by rule.[37]

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[33] 135 S. Ct. at 2711 (adding that "[w]e need not and do not hold that the law unambiguously required the Agency, when making this preliminary estimate, to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value").

[34] *Id.* at 2710 (emphasis in original) (citing 42 U.S.C. §§ 7412(c)(1), 7412(c)(3)).

[35] *See* 42 U.S.C. 7412(c)(1) (directing the Administrator to "publish, and … from time to time … revise, … a list of all categories and subcategories of major sources and area sources … of … [hazardous] air pollutants"); *id.* § 7412(a)(1)-(2) (defining "major source" as one "that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants[,]" and "area source" as "any stationary source of hazardous air pollutants that is not a major source"); *id.* § 7412(c)(3) (directing the Administrator to "list … each category or subcategory of area sources which the Administrator finds presents a threat of adverse effects to human health or the environment (by such sources individually or in the aggregate) warranting regulation" under Section 112).

[36] *Id.* § 7475(e).

[37] *Sierra Club v. EPA*, 705 F.3d 458, 467-69 (D.C. Cir. 2013) ("To authorize the EPA to exempt the plain requirement of preconstruction monitoring … would allow the EPA to engage in an impermissible cost-benefit analysis.").

Section 202(a)(1) of the Act requires the EPA's Administrator to "by regulation prescribe … standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in … [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[38] The cost of compliance is not a permissible factor for consideration in the Administrator's determination of whether an air pollutant causes or contributes to air pollution which may reasonably be anticipated to endanger public health or welfare.[39] The same is true under Section 111(b)(1)(A), which requires the agency to identify categories of stationary sources that "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare[,]" thus requiring standards of performance to limit their emissions.[40] Yet again, the Administrator must identify such source categories without regard to costs.

The above are only a few examples of specific provisions that foreclose cost-benefit analysis.[41] Others are cited in the Congressional Research Service analysis that is attached and incorporated by reference.[42]

Despite the clear prohibitions on the consideration of costs in provisions like those outlined above, the proposed rule would require the EPA to prepare an exhaustive analysis of regulatory costs and benefits during every "significant" rulemaking under the Clean Air Act—without regard to statutory standards.[43] According to the proposal, this shouldn't be a problem. While admitting that "certain statutory provisions may prohibit reliance on … [cost-benefit analysis] or other methods of cost consideration in decision making," the proposal declares that

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[38] 42 U.S.C. § 7521(a)(1).

[39] *Massachusetts,* 549 U.S. at 532-533; *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102, 117-19 (D.C. Cir. 2012), *aff'd in part & rev'd in part on other grounds*, *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014).

[40] 42 U.S.C. § 7411(b)(1)(A).

[41] Another example is the Act's bar on consideration of economic feasibility in deciding whether to approve or disapprove a state implementation plan under 42 U.S.C. §7410. *Union Electric Co. v. EPA*, 427 U.S. 246, 265 (1976) (holding that Congress intended economic and technological infeasibility to be irrelevant to the Administrator's consideration of a state implementation plan).

[42] CRS Report, *supra* note 2, at 4-7.

[43] 85 Fed. Reg. at 35,615.

"such provisions do not preclude the Agency from providing additional information regarding a proposed or final rule to the public[,]" and that the EPA's own use of its cost-benefit analyses "would be determined by the statutes and regulations governing particular subsequent rulemakings."[44]

The proposal's assurances to the contrary aside, there can be no doubt that the actual purpose of the proposed rule is to influence the EPA's decisionmaking process when implementing the Clean Air Act. The notion that the EPA could somehow engage in cost-benefit analysis without unlawfully considering costs cannot be taken seriously. It also disregards the very design of the proposed regulation. Under the rule, the EPA would be required to assess a range of "regulatory options" on the basis of their calculated costs and benefits—even when the relevant statutory provision prohibits the consideration of costs.[45] The agency would then have to present a summary of its analysis—"including total costs, benefits, and net benefits"—"in the preamble" of its proposed and final rules.[46] The results of the agency's economic assessments, in other words, would have to be incorporated into the text of actions for which costs cannot be considered. It is difficult to imagine more open defiance of the Clean Air Act's mandates.[47]

In attempting to justify this defiance, the EPA points to its own past practice. According to the proposal, "while the … [Clean Air Act] prohibits the EPA from considering cost when establishing requisite National Ambient Air Quality Standards … for criteria pollutants, the EPA nonetheless provides Regulatory Impact Analyses … to the public for these rulemakings."[48] The fact that the agency

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[44] *Id.* (acknowledging that the information produced under the requirements of the proposed rule "would be in addition to the information provided by other methodologies and analyses as directed by specific … statutes and regulations").

[45] *Id.* at 35,618 (declaring that "[t]he key elements of a rigorous regulatory … [cost-benefit analysis] include: (1) A statement of need; (2) an examination of regulatory options; and (3) to the extent feasible, an assessment of all benefits and costs of these regulatory options relative to the baseline (no action) scenario").

[46] *Id.* at 35,622. *See also id. at* 35,627 (Proposed Rule Section 83.4) (setting forth the "presentation" requirements of the proposed rule).

[47] *See Whitman*, 531 U.S. at 471 n.4 (noting that even a concealed act of defiance—"secretly considering … costs … without telling anyone"—"would be grounds for vacating" an air-quality standard, "because the Administrator had not followed the law").

[48] *Id.* at 35,615 (internal citations omitted).

has done something before, however, does not make it lawful.[49] Though the proposal also argues, incorrectly, that the rule's requirements would be good policy—a means of "increas[ing] transparency and consistency across" Clean Air Act rulemakings—the Supreme Court has confirmed that the EPA's "'preference for symmetry cannot trump an asymmetrical statute.'"[50]

Because the requirements of the proposed rule are at odds with the Clean Air Act's provisions that bar the EPA from considering costs, the regulation must be abandoned.[51]

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[49] *See, e.g.*, *Judulang v. Holder*, 565 U.S. 42, 61 (2011) ("Arbitrary agency action becomes no less so by simple dint of repetition .... And longstanding capriciousness receives no special exemption from the APA."); *Southeast Ala. Med. Ctr. v. Sebelius*, 572 F.3d 912, 920 (D.C. Cir. 2009) ("[N]o amount of historical consistency can transmute an unreasoned statutory interpretation into a reasoned one."); *F.J. Vollmer Co. v. Magaw*, 102 F.3d 591, 598 (D.C. Cir. 1996) ("[W]e do not see how merely applying an unreasonable statutory interpretation for several years can transform it into a reasonable interpretation."). The proposed rule, moreover, goes beyond regulatory impact analyses: it would require the EPA not only to *present* the costs and benefits of its actions—the primary purpose of an impact analysis—but to *justify* those costs and benefits in light of other regulatory alternatives. *See, e.g.*, Proposed Rule, 85 Fed. Reg. at 35,626.

[50] Proposed Rule, 85 Fed. Reg. at 35,612; *Michigan*, 135 S. Ct. at 2710 (quoting *CSX Transp., Inc.,* 562 U.S. at 296).

[51] The cases cited in the EPA's proposal are not to the contrary. *See* Proposed Rule, 85 Fed. Reg. at 35,615-17. While the Supreme Court has concluded that cost-benefit analysis can sometimes be allowed under statutes that do not expressly require it, *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009) (interpreting Clean Water Act Section 316(b)), the Court has also made clear that costs cannot be considered where Congress has required the EPA to rely on other factors. *See, e.g.*, *Whitman*, 531 U.S. at 471 (interpreting Clean Air Act Section 109); *Entergy Corp.*, 556 U.S. at 223 (reaffirming *Whitman*). And the fact that some "lower courts have noted the usefulness" of cost-benefit analysis, moreover, says nothing about whether such an analysis is legally permissible in a particular rulemaking. Proposed Rule, 85 Fed. Reg. at 35,616. The question, ultimately, is what the relevant statutory provisions allow—and the proposed rule ignores what the Clean Air Act's provisions allow.

B. The proposed rule's requirements would also violate the Clean Air Act provisions calling for a more limited consideration of costs.

The conflict between the proposed rule and the Clean Air Act is not limited to the statute's provisions that entirely prohibit the consideration of costs. Even where Congress has allowed the EPA to take costs into account, it has often called for a more narrow inquiry than a formalized cost-benefit analysis would entail. The proposed rule ignores these limitations as well.

An example of a provision that authorizes the EPA to engage in a limited evaluation of costs is Section 245, which allows the EPA to "promulgate a revised less stringent standard" for heavy-duty clean-fuel vehicles or engines "if the Administrator determines that the 50 percent reduction [otherwise] required … is not technologically feasible … , taking into account durability, costs, lead time, safety, and other relevant factors."[52] The statute's repeated calls for "achievable" emissions reductions place similar constraints on the consideration of costs. Under Section 173, for example, new sources in nonattainment areas are "required to comply with the lowest achievable emission rate[,]" which Congress defined as the rate of emissions that equals either "the most stringent emission limitation which is contained in the implementation plan of any State … , unless the owner or operator of the … source demonstrates that such limitations are not achievable," or "the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent."[53]

As the D.C. Circuit has noted, Congress itself "stressed that cost factors … [a]re not to play as important a role" in determining the "lowest achievable emission rate" as they do under other sections of the statute.[54] In the words of the conference committee's report, when "determining whether an emission rate is achievable, cost will have to be taken into account, but cost factors in the nonattainment context will have somewhat less weight than in determining new source performance standards[.]"[55] There was good reason for this. As Senator Edmund Muskie

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[52] 42 U.S.C. § 7585(b)(1).

[53] *Id.* §§ 7501(3); 7503(a)(2).

[54] *Sierra Club v. Costle*, 657 F.2d 298, 330 (D.C. Cir. 1981).

[55] *Id.* at 330 n.107 (quoting H.R. Rep. Conf. No. 95-564, 95th Cong., 2d Sess. (1977), at 157).

explained in introducing the legislation, a broader grant of discretion to consider costs would be "inappropriate" in areas "where public health is at risk[.]"[56]

The Clean Air Act's call for "economic impact assessments" also reflects a more narrow approach to the consideration of costs.[57] Under Section 317, which goes unmentioned in the proposed rule, the EPA is required to prepare economic assessments before proposing a variety of regulations for which costs are a relevant consideration—among them, new source performance standards under Section 111(b); standards of performance for existing sources under Section 111(d); motor-vehicle standards under Section 202; and aircraft standards under Section 231.[58] Notably, Section 317 does not direct the EPA to prepare an exhaustive quantification of regulatory costs and benefits. Instead, it requires a more modest evaluation of the "costs of compliance" and similar economic considerations.[59] It also makes clear that the EPA's economic assessments need only "be as extensive as practicable, … taking into account the time and resources available" to the agency.[60]

To be sure, Congress does know what cost-benefit analysis is. And it knows how to require such an analysis when it wants one. With Section 812 of the Clean Air Act, for example, Congress directed the EPA to prepare "a comprehensive analysis of the [statute's] impact … on the public health, economy, and environment of the United States"—an analysis that "consider[ed] the costs, benefits and other effects" of the statute's various standards.[61] Congress further specified what it

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[56] *Id.* (internal quotations omitted) (quoting 123 Cong. Rec. 18,018 (1977)).

[57] 42 U.S.C. § 7617.

[58] *Id.* §§ 7617(a)-(b).

[59] *Id.* § 7617(c) (providing that "the assessment required … shall contain an analysis of … the costs of compliance … ; … the potential inflationary or recessionary effects of the standard or regulation; … the effects on competition of the standard or regulation with respect to small business; … the effects of the standard or regulation on consumer costs; and … the effects of the standard or regulation on energy use").

[60] *Id.* § 7617(d).

[61] *Id.* § 7612(a). *See also, e.g.*, *id.* § 7403(j)(3)(B)(iii) (calling for an "analysis of the costs, benefits, and effectiveness of the acid deposition control program"); *id.* § 7545(c)(2)(B) (providing that "[n]o fuel or fuel additive may be controlled or prohibited … except after consideration of available scientific and economic data, including a cost benefit analysis comparing emission control devices or systems which are or will be in general use").

meant by "costs" and "benefits."[62] With respect to benefits, Section 812 declared that the EPA should consider:

> all of the economic, public health, and environmental benefits of efforts to comply with … [the Clean Air Act's] standard[s]. In any case where numerical values [we]re assigned to such benefits, a default assumption of zero value … [was] not [to] be assigned … unless supported by specific data. The … [agency was also required to] assess how benefits … [were] measured in order to assure that damage to human health and the environment … [was] more accurately measured and taken into account.[63]

As to costs, Congress directed the EPA to "consider the effects of … [the statute's] standard[s] on employment, productivity, cost of living, economic growth, and the overall economy of the United States."[64] Ultimately, Section 812 required the EPA to "submit a report to … Congress" that addressed "all costs incurred previous to November 15, 1990, in the effort to comply" with the Clean Air Act's standards, and "all benefits that have accrued to the United States as a result of such costs."[65]

The design of Section 812's cost-benefit requirements underscores the remarkable—and unlawful—overreach of the proposed rule. Under Section 812, the EPA was obligated to provide Congress with a report analyzing the costs and benefits of the Clean Air Act—a report that Congress could use in reevaluating, as a matter of policy, what protections the statute should afford.[66] Under the proposed rule, in contrast, the EPA would be required to engage in cost-benefit analysis so as to decide—for itself, during each and every "significant" rulemaking—whether there is a "compelling need for federal government intervention in the market[,]" and

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[62] *Id.* §§ 7612(b)-(c).

[63] *Id.* § 7612(b).

[64] *Id.* § 7612(c).

[65] *Id.* § 7612(d). The EPA concluded its retrospective report regarding the Clean Air Act's costs and benefits on October 15, 1997; two prospective studies were later published on November 15, 1999 and March 1, 2011. *See* EPA, Benefits and Costs of the Clean Air Act, *available at* https://www.epa.gov/clean-air-act-overview/benefits-and-costs-clean-air-act.

[66] *See* 42 U.S.C. § 7612(d).

whether the benefits of various "regulatory options" justify their costs.[67] This goes too far. Where the Clean Air Act requires the EPA to regulate with only limited consideration of costs—or with no consideration at all—Congress has already decided that "federal government intervention in the market" is necessary to abate air pollution and protect the public's well-being.[68] As the EPA has no authority to second-guess Congress's judgment in these instances, the proposed rule must be withdrawn.

Finally, the EPA has no authority to add extensive cost-benefit analytical requirements that would be so time-consuming as to prevent the agency from meeting statutory deadlines for proposing and finalizing rules. The EPA cannot impose mandates on itself that Congress has not imposed, or in many cases not even authorized, and then later plead that its failure to meet statutory deadlines is due to those self-imposed mandates. In this regard, it is also arbitrary for the EPA to impose the extensive cost-benefit mandates it has proposed without even considering the time and cost that this analysis (and the accompanying notice and comment) will impose on the EPA itself, and the potential for delaying critically needed public-health protections. Nor does the EPA consider the time and expense to the agency and its staff from having to defend the validity of its cost-benefit analyses, both administratively and potentially in court. The proposal's stated concern with cost seems remarkably and arbitrarily indifferent to the expense it will impose on the agency, and the time and resources that it will divert from the EPA's core obligation to protect public health and the environment.

C. The EPA has failed to undertake the section-by-section analysis required to determine when and how cost-benefit analysis can be mandated.

The EPA's failure to confront the illegality and arbitrariness of requiring cost-benefit analysis under Clean Air Act provisions like those discussed above points to a broader flaw in this proposed rulemaking: the agency's failure to evaluate whether cost-benefit analysis is authorized by, and consistent with, the

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[67] 85 Fed. Reg. at 35,618 (declaring that "[t]he key elements of a rigorous regulatory … [cost-benefit analysis] include: (1) A statement of need; (2) an examination of regulatory options; and (3) to the extent feasible, an assessment of all benefits and costs of these regulatory options relative to the baseline (no action) scenario").

[68] *See id.*

language and purpose of each section of the statute that would be subject to the proposal's requirements.[69]

The Supreme Court has made clear that a determination of whether the EPA can consider costs—and if so, how—requires an analysis of each statutory section's language and context. To that end, the agency "must show a textual commitment of authority to the EPA to consider costs[.]"[70] As the Court has explained, if Congress directs the EPA to "regulate on the basis of a factor that on its face does not include cost, the Act normally should not be read as implicitly allowing the agency to consider cost anyway."[71] Nor is it the case, as the EPA wrongly seems to assume, that a section's use of terms such as "appropriate," "necessary," "reasonable," "requisite," or "adequate" automatically authorizes the consideration of costs.[72] In *Michigan v. EPA*, the Supreme Court cautioned that its reading of "appropriate and necessary" was dependent on the statutory context, explaining that "[t]here are undoubtedly settings in which the phrase 'appropriate and necessary' does not encompass cost."[73]

The proposed rulemaking unlawfully and arbitrarily flouts these principles. The EPA has failed to provide section-specific evaluations of whether and how each affected provision and its context allows for consideration of costs and, where cost consideration is permitted, whether imposing a cost-benefit requirement is consistent that section's language and purpose. Instead, the EPA proposes to force a cost-benefit mandate on every provision of the Clean Air Act that could be used to authorize a significant rule without having first conducted the section-specific analyses and demonstration that Supreme Court and D.C. Circuit precedent require.[74] Such an approach is unlawful and arbitrary. The EPA's policy preference

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[69] *See* Sections II.A and II.B, *supra*.

[70] *Whitman*, 531 U.S. at 468.

[71] *Michigan*, 135 S.Ct. at 2709 (citations omitted).

[72] *See Murray Energy Corp. v. EPA*, 936 F.3d 597, 621-22 (D.C. Cir. 2019); *Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414, 448 (D.C. Cir. 2018).

[73] 135 S. Ct. at 2707.

[74] *Massachusetts*, 549 U.S. at 532-33 (holding that the EPA's "reasons for action or inaction must conform to the authorizing statute" and the agency cannot rely on reasoning "divorced from the statutory text"); *Sierra Club v. EPA*, 705 F.3d 458, 469 (D.C. Cir. 2013) ("To engage in cost-benefit decisions, the EPA's implied authority 'must be based not on a general doctrine but on a fair reading of the specific statute, its aims and legislative history.'").

for cost-benefit analysis does not grant the agency authority to disregard specific statutory directives, purposes, and context.

D. The Clean Air Act's general rulemaking provision does not provide the EPA with authority to adopt the proposed cost-benefit requirements.

Tellingly, the proposed rule ignores Section 812 and every other Clean Air Act provision that actually mentions cost-benefit analysis. In addressing the EPA's authority to enact a cost-benefit requirement, the proposal instead focuses on Section 301(a)(1), which authorizes the Administrator "to prescribe such regulations as are necessary to carry out … [the Administrator's] functions" under the statute.[75] As the D.C. Circuit has emphasized, however, this language does not "'provide [EPA] Carte blanche authority to promulgate any rules, on any matter relating to the Clean Air Act, in any manner that the [EPA] wishes."[76] Instead, it authorizes only those regulations that are, in fact, "necessary" to implement the statute.[77]

Not only is the proposed rule not "necessary" to implement the Clean Air Act, it directly contradicts the statute in numerous regards, as noted above.[78] The EPA has also managed to fulfill its obligations under the Act without the proposed regulation for nearly fifty years, which further undermines any claim of necessity.

As Congress has not given the EPA authority to adopt the proposed rule, it must be withdrawn.

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[75] 42 U.S.C. § 7601(a)(1).

[76] *North Carolina v. EPA*, 531 F.3d 896, 922 (D.C. Cir.), *on reh'g in part*, 550 F.3d 1176 (D.C. Cir. 2008) (alterations in original) (quoting *Citizens to Save Spencer County v. EPA,* 600 F.2d 844, 873 (D.C. Cir. 1979)). *See also, e.g.*, *WildEarth Guardians v. EPA*, 830 F.3d 529, 539 (D.C. Cir. 2016) (noting that the "'EPA cannot rely on its gap-filling authority to supplement the Clean Air Act's provisions when Congress has not left the agency a gap to fill'") (quoting *Natural Res. Def. Council v. EPA*, 749 F.3d 1055, 1063-64 (D.C. Cir. 2014)).

[77] 42 U.S.C. § 7601(a)(1).

[78] *See In re Permanent Surface Min. Regulation Litig.*, 653 F.2d 514, 523 (D.C. Cir. 1981) (noting that regulations adopted pursuant to a statute's general grant of rulemaking authority "must not be arbitrary, capricious, or inconsistent with the Act" they purport to implement).

E. The proposed rule is not an internal measure exempt from notice and comment.

Though the EPA is soliciting comments on the proposed cost-benefit requirements, it has also declared that the rule involves nothing more than "agency organization, procedure or practice" and is accordingly "exempt from the notice and comment requirements set forth in the Administrative Procedure Act."[79] This is incorrect. As the D.C. Circuit has emphasized, the exceptions to notice and comment are to be "'narrowly construed and only reluctantly countenanced.'"[80] In the words of the court:

> Advance notice and public participation are required for those actions that carry the force of law. These "legislative" or "substantive" rules can be issued only if Congress has delegated to the agency the power to promulgate binding regulations in the relevant area. Legislative rules thus implement congressional intent; they effectuate statutory purposes. In so doing, they grant rights, impose obligations, or produce other significant effects on private interests. They also narrowly constrict the discretion of agency officials by largely determining the issue addressed.[81]

Unlike legislative rules, the "[n]on-binding action[s]" that are exempt from notice and comment "merely express[] an agency's interpretation, policy, or internal practice or procedure."[82]

> Such actions or statements are not determinative of issues or rights addressed. They express the agency's intended course of action, its tentative view of the meaning of a particular statutory term, or internal house-keeping measures organizing agency activities. They do not,

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[79] Proposed Rule, 85 Fed. Reg. at 35,613 (citing 5 U.S.C. § 553(b)(A)).

[80] *Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (quoting *State of New Jersey, Dep't of Envtl. Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980)).

[81] *Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980) (cited in Proposed Rule, 85 Fed. Reg. at 35,613).

[82] *Id.* at 702.

> however, foreclose alternate courses of action or conclusively affect rights of private parties.[83]

The EPA's own preamble makes clear that the proposed rule is a binding, legislative action subject to notice and comment. If the rule is finalized, the EPA will be obligated to prepare cost-benefit analyses that are not currently required (or even allowed).[84] The agency's discretion, in other words, would be significantly limited as a result of the action.[85] The proposed rule would also significantly affect the public. As explained below, the rule mandates an analytical approach that will understate the importance of Clean Air Act protections, and accordingly serve to justify actions that weaken or eliminate them. It could also arbitrarily limit the kinds of scientific studies that members of the public could submit in an effort to demonstrate the benefits of a particular action.[86] In short, while the EPA was right to request comments on the proposed rule, it was wrong in declaring that the rule is exempt from the notice-and-comment requirements of the APA.[87] Further, given that the proposed rule seeks to impose requirements on rulemaking under statutes governed by 42 U.S.C. § 7607(d), notice-and-comment rulemaking is also required under that provision, and subject to the other detailed requirements it specifies.

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[83] *Id.*

[84] Proposed Rule, 85 Fed. Reg. at 35,625-26 (establishing the proposed requirements for cost-benefit analysis).

[85] *Batterton*, 648 F.2d at 702 (noting that notice and comment is required when a rule "narrowly constrict[s] the discretion of agency officials by largely determining the issue addressed").

[86] Proposed Rule, 85 Fed. Reg. at 35,620-21; *Batterton*, 648 F.2d at 708 (noting that an "agency action trenches on substantial private rights and interests[,]" and accordingly requires notice and comment, when it subjects "drug producers … to new specifications for the kinds of clinical investigations deemed necessary to establish the effectiveness of drug products prior to FDA approval") (citing *Pharmaceutical Mfrs. Ass'n v. Finch*, 307 F. Supp. 858, 863 (D. Del. 1970)).

[87] *See* Proposed Rule, 85 Fed. Reg. at 35,613 (asserting that the EPA "voluntarily seeks comment because it believes that the information and opinions supplied by the public will inform the Agency's views").

III. The proposed rule's arbitrary approach to quantifying costs and benefits will diminish the importance of Clean Air Act protections at the expense of the frontline communities that are disproportionately exposed to air pollution.

As the EPA tells it, the proposed cost-benefit requirements are simply good government. "High quality economic analyses[,]" the agency argues, "enhance the effectiveness of environmental policy decisions by providing policy makers and the public with information needed to systematically assess the likely consequences of various actions or options."[88] The proposed rule, however, actually promises to obscure the importance of Clean Air Act protections. Under the regulation, the EPA's cost-benefit analyses would likely understate the benefits of clean air while overstating the costs of pollution limits. And in focusing on the "net benefits" of air-quality regulations, the proposed rule would ignore the disproportionate harms that have long fallen on the nation's frontline communities.[89]

A. The proposal's reliance on "willingness to pay" estimates will arbitrarily reduce benefits calculations and devalue the well-being of low-income communities.

The proposed regulation relies on a troubling method of converting the Clean Air Act's "social benefits" into dollars.[90] Under the rule, the EPA would monetize the value of air-quality protections by estimating how much people would be willing to pay for them.[91] As Professor Lisa Heinzerling has noted, however, "[i]n trying to assess the wisdom of public policies by considering private 'willingness to pay,' cost-benefit analysis inevitably must fail."[92]

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[88] *Id.* at 35,613.

[89] *See id.*

[90] *Id.* at 35,619.

[91] *Id.* (asserting that "[w]illingness to pay … is the correct measure" of "social benefits" and "social costs[,]" and that a cost-benefit analysis "must include a robust explanation" for any decision to rely on a different methodology).

[92] Lisa Heinzerling, *Markets for Arsenic*, 90 Geo. L.J. 2311, 2313 (2002). *See also, e.g.*, Amartya Sen, *The Discipline of Cost-Benefit Analysis*, 29 J. Legal Stud. 931, 949 (2000) (noting that "[t]he very idea … [we] treat the prevention of … environmental damage just like buying a private good is itself quite absurd").

Though the proposed rule doesn't mention it, the amount that people are willing to pay for things is determined by the amount of money they have. As a result, the EPA's "willingness to pay" standard "inherently gives more weight to those with bigger budgets."[93] If the "benefits" of pollution limits are determined based on the wealth of the people they protect, any regulation that safeguards low-income communities will be devalued—making it more likely that air-quality protections will be weakened or eliminated in light of compliance costs. The EPA's approach to cost-benefit analysis thus "ensures that risks will be unevenly distributed; indeed, it condones uneven distribution."[94] Such a profoundly inequitable methodology is arbitrary in the extreme and is unsupported by any provision of the Clean Air Act. Indeed, the fundamental purpose of the statute is to "promote the *public* health and welfare"—not just the health and welfare of the wealthy.[95]

The problems with the proposal's reliance on "willingness to pay" calculations run deeper. By rejecting the "willingness to accept" approach, for instance, the proposed rule would further suppress benefits estimates.[96] Under the "willingness to accept" approach, the EPA would instead assess how much people would demand to be paid in order to give up the benefits of specific air-quality protections.[97] The difference between a person's "willingness to accept" and "willingness to pay" can be significant. As Professor Thomas McGarity has explained:

> [w]hen converted to dollars, the willingness-to-accept measure invariably yields much larger values … [than] the willingness-to-pay measure. People have limited resources to draw upon in deciding how much they can pay to reduce

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[93] Henry S. Richardson, *The Stupidity of the Cost-Benefit Standard*, 29 J. Legal Stud. 971, 973 (2000).

[94] Heinzerling, *supra* note 92, at 2322.

[95] 42 U.S.C. § 7401(b)(1) (emphasis added).

[96] Proposed Rule, 85 Fed. Reg. at 35,619 n.27 (rejecting the "willingness to accept" approach as less measurable).

[97] *See id.* (noting that "an individual's 'willingness-to-accept' … compensation for not receiving the improvement can also provide a valid measure of opportunity cost").

> risks, but there is no limit to the amount that they can demand to accept those risks.[98]

Given that the Clean Air Act grants members of the public a right to air that's safe to breathe, moreover, it is the "willingness to accept" approach that would most accurately reflect the relevant legal entitlements.[99]

Ultimately, the proposed rule's focus on people's "willingness to pay" is simply "a crazy way to value [a] collective good[]" like clean air.[100] In the words of Professor Heinzerling, "[e]ven if individuals are asked to state their willingness to pay based on an assumption that others will be willing to pay the same amount, they are not able to consult other people about the reasons underlying their willingness to pay and thus cannot engage in the process of reason-giving and deliberation that marks rational decisionmaking."[101] The "willingness to pay" approach also ignores the fact that people often look to government to guide, or even override, their individual preferences.[102] The Clean Air Act reflects our collective commitment to human health and welfare.[103] The proposed rule would arbitrarily undermine this commitment—along with the agency's own expertise—by relying on

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[98] Thomas McGarity, *Professor Sunstein's Fuzzy Math*, 90 Geo. L.J. 2341, 2370 (2002). *See also* Heinzerling, *supra* note 92, at 2317.

[99] *See, e.g.*, 42 U.S.C. § 7409(b)(1) (requiring the EPA to establish "[n]ational primary ambient air quality standards" that are "requisite to protect the public health" with "an adequate margin of safety"). *See also* Heinzerling, *supra* note 92, at 2332 (noting that federal health standards can influence private preferences, and that the "divergence between preferences as they exist before regulation and preferences as they exist after regulation makes it highly problematic to justify regulatory inaction by reference to preregulation willingness to pay").

[100] Heinzerling, *supra* note 92, at 2331.

[101] *Id.*

[102] *Id.* (noting that there are many reasons "people may want the government to interfere with their own private preferences[,]" and that "sometimes people are smart enough—or rational enough—to know when they need help").

[103] 42 U.S.C. § 7409(b) (establishing protections for "public health" and "public welfare").

assessments of individuals' "willingness to pay" for certain air-quality protections.[104]

B. The proposed rule's arbitrary limits on the use of scientific studies will also undermine the EPA's benefits calculations.

The proposed regulation promises to further reduce the EPA's benefits calculations by placing arbitrary limitations on the scientific studies the agency may use in assessing the health and welfare implications of air-quality protections.[105] According to the proposal, the "strength of scientific evidence should be strongest when … benefits are estimated" as "information anticipated to have a higher impact must be held to higher standards of quality."[106] This arbitrary approach to benefits, however, would turn the Clean Air Act on its head, subjecting public-health protections to a heightened standard of proof rather than ensuring they provide an "adequate margin of safety."[107] It would also give costs an unreasonable advantage in the EPA's cost-benefit analyses, making it more likely that the agency would weaken or eliminate existing air-quality protections, adopt inadequate new protections, or refuse to regulate in the first place, all on account of costs.

The proposed rule's restrictions on the use of scientific studies, of course, are not new. More than two years ago, the EPA issued the first of two proposals aimed

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[104] Heinzerling, *supra* note 92, at 2330 (noting that people's "irrational impulses" as "intuitive toxicologists" also drive "the market decisions on which cost-benefit analysis relies").

[105] Proposed Rule, 85 Fed. Reg. at 35,620-21 (providing that the EPA would be limited to using "studies that satisfied the following minimum standards: (1) The study was externally and independently peer-reviewed consistent with Federal guidance; (2) the pollutant analyzed in the study matches the pollutant of interest in the regulation; (3) concentration-response functions must be parameterized from scientifically robust studies; and (4) when an epidemiological study is used, further criteria include: (a) It must assess the influence of confounders; (b) the study location must be appropriately matched to the analysis; and (c) the study population characteristics must be sufficiently similar to those of the analysis"); *id.* at 35,622 (proposing to require making "the information (including data and models) that was used in the development of … [an analysis] publicly available").

[106] *Id.* at 35,620.

[107] *See* 42 U.S.C. § 7409(b)(1) (providing that primary NAAQS must be "requisite to protect the public health" with "an adequate margin of safety").

at placing similar limits on its use of scientific research—epidemiological studies, in particular.[108] As we noted in comments opposing that proposal, comments we attach here, such requirements would "exclude critical … scientific studies—the very studies that have been instrumental in setting pollution limits that save hundreds of thousands of lives[.]"[109] Accordingly, the proposed rule's restrictions on the use of scientific studies are illegal and arbitrary.

C. The proposed rule's arbitrary efforts to diminish the significance of co-benefits will further compromise the EPA's benefits calculations.

In his statements to the press, Administrator Wheeler has suggested that the proposed regulation may be used to disregard "co-benefits"—benefits that are ancillary to the primary purpose of an action, such as the reduction in conventional pollution that typically results from rules that limit greenhouse-gas emissions.[110] While the proposal does not expressly prohibit the consideration of co-benefits, it would require the EPA "to clearly distinguish between the social benefits attributable to the specific pollution reductions or other environmental quality goals that are targeted by the statutory provisions that give rise to the regulation [under review], and other welfare effects[.]"[111] The proposal's science provisions would also limit the EPA to studies in which "[t]he pollutant analyzed … matches the pollutant

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[108] EPA, Proposed Rule: Strengthening Transparency in Regulatory Science, 83 Fed. Reg. 18,768 (Apr. 30, 2018); EPA, Supplemental Notice of Proposed Rulemaking, 85 Fed. Reg. 15,396 (Mar. 18, 2020).

[109] Comments of 88 Environmental, Farmworker, Environmental Justice, Public Health, and Animal Protection Organizations on Proposed Regulations on "Transparency" in Regulatory Science (Aug. 15, 2018) (attached), at 1. *See also* Comments on the Environmental Protection Agency's "Strengthening Transparency in Regulatory Science" Supplemental Notice of Proposed Rulemaking (May 18, 2020) (attached).

[110] Coral Davenport and Lisa Friedman, *Trump, Citing Pandemic, Moves to Weaken Two Key Environmental Protections*, N.Y. Times (June 4, 2020) (reporting that "Mr. Wheeler said that the E.P.A. would still calculate the economic value of … co-benefits" under the proposed rule, but "those calculation[s] would no longer be used in defending rules"), *available at* https://www.nytimes.com/2020/06/04/climate/trump-environment-coronavirus.html.

[111] Proposed Rule, 85 Fed. Reg. at 35,622.

of interest in the regulation"—a restriction that some might point to in an arbitrary effort to prevent the agency from evaluating ancillary benefits.[112]

The EPA cannot allow or require co-benefits to be ignored. Where a rule designed to limit one pollutant requires controls that will also cut other dangerous pollutants, thereby saving additional lives and providing other significant health benefits, it would be arbitrary and unlawful in the extreme to ignore those co-benefits or pretend they are not attributable to the rule. The lives saved through reductions in a co-pollutant are no less valuable than those saved by reductions in the directly regulated pollutant. Indeed, from an economic perspective, when choosing between two alternatives that provide similar benefits with respect to the regulated pollutant, it would be irrational not to consider co-pollutant benefits. The fact is that if the EPA indeed considers their full benefits, rules that cut additional pollution beyond the targeted pollutant may well be double, triple, or even more cost-effective—and far more efficient—than rules that restrict only one type of pollutant, not the reverse. A cost-benefit analysis that looks at only a lopsided equation is arbitrarily one-sided and cannot be justified based on basic principles of economics, the EPA's public-health mission, or the law.

Indeed, under the Administrative Procedure Act, an agency must not ignore "an important aspect of the problem" when issuing a rule.[113] The Clean Air Act's first declared purpose is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population[.]"[114] When the EPA exercises its Clean Air Act authority to limit a particular air pollutant, the effects of that action on other air pollutants is exactly such an "important aspect of the problem" that the agency must address.[115]

Given their importance, federal administrations and agencies—including the EPA—have long included co-benefits in their cost-benefit calculations.[116] The EPA must continue to do so.

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[112] *Id.* at 35,626 (Proposed Rule Section 83.3(a)(9)(iii)(B)).

[113] *State Farm*, 463 U.S. at 43.

[114] 42 U.S.C. § 7401(b)(1).

[115] *See also U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 625 (D.C. Cir. 2016) (noting that "considering co-benefits … is consistent with the … [Clean Air Act's] purpose").

[116] *See, e.g.*, Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (directing agencies to "assess all costs and benefits of available regulatory alternatives");

D. The proposed rule arbitrarily fails to address the likelihood that compliance costs will be overstated.

While much of the proposed rule is dedicated to ensuring that the EPA's benefits calculations will be unreasonably low, the regulation ignores the likelihood that regulatory costs will be overstated. This is arbitrary. "Regulatory analysis is notorious for failing to take into adequate account the technological innovations that ultimately make many regulations cheaper to implement than regulators anticipate."[117] The EPA's proposed framework for cost-benefit analysis fails to rationally assess or address this issue.

IV. Rather than increasing transparency, the proposed cost-benefit requirements would obscure the basis for the EPA's decisions.

In attempting to justify the proposed cost-benefit requirements, the EPA argues—repeatedly—that they will "increase the Agency's ability to provide … transparency to the public in regard to the rulemaking process" under the Clean Air Act.[118] The suggestion that cost-benefit analysis inevitably increases the transparency of decisionmaking is a common one.[119] And it's largely hollow. As

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Office of Mgmt. and Budget, Circular A-4 (Sept. 17, 2003), at 26 (directing agencies to "look beyond the direct benefits and direct costs of … [a] rulemaking and consider any important ancillary benefits and countervailing risks"), *available at* https://www. whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf; EPA Nat'l Ctr. for Envtl. Econ., Guidelines for Preparing Econ. Analyses, at 11-2 (2010) (directing the EPA to assess "all identifiable costs and benefits," including "ancillary (or co-) benefits and costs").

[117] Heinzerling, *supra* note 92, at 2314, 2314 n.15 (citing Winston Harrington, *et al.*, *On the Accuracy of Regulatory Cost Estimates*, 19 J. Pol'y Analysis & Mgmt. 297 (Spring 2000); Eban Goodstein & Hart Hodges, *Polluted Data*, Am. Prospect, Nov-Dec. 1997, at 64; Claudia H. Deutsch, *Together at Last: Cutting Pollution and Making Money*, N.Y. Times, Sept. 9, 2001, at A1).

[118] Proposed Rule, 85 Fed. Reg. at 35,613. *See also, e.g.*, *id.* at 35,615 (arguing that "the information provided as a result of the procedural requirements of this proposal, if finalized, would increase transparency and consistency across" Clean Air Act rulemakings).

[119] Heinzerling, *supra* note 92, at 2338.

Professor Lisa Heinzerling has noted, cost-benefit language often makes sense only to economists and professors.[120]

> [F]or other people, references to "statistical lives" will either be incomprehensible or seem irrelevant to real people; references to market decisions will be taken to mean real markets, like the ones with impulse shopping and pervasive advertising, rather than markets contrived to make the shoppers more careful; and saying that benefits you can count are bigger than benefits you cannot will not be decisive on any issue of real importance.[121]

The likelihood that members of the public would be confused by cost-benefit analysis is particularly pronounced under the EPA's proposal. As explained above, the proposed rule would require the EPA to prepare an economic assessment even when the agency is statutorily prohibited from considering costs.[122] It would also bar the agency from citing scientific research that may be highly relevant to the regulation in question.[123] These requirements promise to obscure—rather than clarify—the basis for the EPA's decisions. In order to advance transparency, the proposed rule should be abandoned.

V. The proposed cost-benefit requirements would also obscure the environmental-justice implications of the EPA's decisions.

The EPA's proposed approach to cost-benefit analysis would also obscure the environmental-justice implications of the agency's actions, including its failure to adopt sufficient air-quality protections (or, in some cases, any air-quality protections at all). Under the proposed rule, the EPA's cost-benefit reviews would be required to focus on the "net benefits" of the agency's actions—the question of whether their total calculated benefits exceed their total costs.[124] What this approach ignores, of course, are distributional equities—the question of who benefits from a decision to regulate (or not), and who is burdened. If the proposed rule is finalized, the EPA will be required to regard the balance sheets of wealthy

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[120] *Id.*

[121] *Id.*

[122] *See* Section II, *supra.*

[123] *See* Section III.B, *supra.*

[124] Proposed Rule, 85 Fed. Reg. at 35,614, 35,625.

industries as being no less important than the health and welfare of frontline communities.

This is manifestly arbitrary and unjust. For far too long, low-income communities and communities of color have been disproportionately impacted by air pollution and other forms of environmental degradation. The research on this issue is extremely comprehensive and well-established.[125] Just to give a few examples, in 2018, EPA scientists published a study in the American Journal of Public Health finding that communities living below the poverty line have a 35 percent higher burden from emissions of fine particulate matter than the overall population.[126] The study also found that people of color had a 28 percent higher health burden and that Black Americans had a 54 percent higher burden than the overall population.[127]

The Department of Health and Human Services currently reports that Black Americans are approximately three times more likely to die, visit the emergency room, or be admitted to the hospital on account of asthma than whites.[128] A 2015 study published in the American Journal of Public Health found that Black and Hispanic/Latino Californians were approximately six times more likely than whites to live in the top decile of zip codes most affected by cumulative environmental

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[125] *See, e.g.*, EPA, Final Rule: Nat'l Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3,086, 3,267 (2013) (noting the "potential disproportionately high and adverse effects on minority and/or low-income populations related to $PM_{2.5}$ exposures," and identifying "persons from lower socioeconomic strata as an at-risk population for PM-related health effects"); EC/R Inc., *Risk and Technology Review—Final Analysis of Socio-Economic Factors for Populations Living Near Secondary Lead Smelting Facilities* (Dec. 2011) (attached), *available at* http://earthjustice.org/sites/default/files/Leadsmeltersocioeconomicanalysis.pdf; EC/R Inc., *Risk and Technology Review—Analysis of Socio-Economic Factors for Populations Living Near Petroleum Refineries* (Jan. 2014) (attached), *available at* https://www.regulations.gov/document?D=EPA-HQ-OAR-2010-0682-0226.

[126] Ihab Mikati, *et al.*, *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, Am. J. Pub. Health 108(4): 480-485 (2018).

[127] *Id.*

[128] U.S. Dep't of Health and Human Servs., Office of Minority Health, *Asthma and African Americans*, *available at* https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=15.

burdens.[129] And in a recent case study of traffic-related pollution in Allegheny County, Pennsylvania, researchers found that communities with high percentages of low-income and non-white residents were between 4 and 25 times more likely to be in the highest quartile of exposure to black carbon and nitrogen dioxide compared to the lowest quartile for those pollutants.[130]

One of the reasons that these kinds of environmental inequities persist has been the EPA's focus on only aggregate costs and benefits when evaluating its rule proposals. As previously explained, this approach ignores the ways in which those costs and benefits are distributed unevenly across different communities. To help remedy this injustice, the EPA must reject aggregate-level-only analyses going forward. The proposed rule, however, would arbitrarily mandate that approach for all major Clean Air Act rulemakings in the future. In order to ensure that the EPA's decisions remedy environmental inequities, rather than perpetuate them, the proposed rule must be abandoned.

VI. The EPA has failed to assess the environmental-justice implications of the proposed rule, as required by Executive Order 12,898.

The EPA's proposal also violates the environmental-justice requirements of Executive Order 12,898.[131] By its own admission, the agency ignored its obligation to assess the environmental-justice implications of the rule prior to issuing the proposal, dismissively stating that the action is not subject to Executive Order 12,898 "because it does not establish an environmental health or safety standard."[132] The EPA's rationale is inconsistent with the order and contrary to the agency's own environmental-justice plan and previous practices.

First, by its own terms, Executive Order 12,898 applies to more than just "standards."[133] Indeed, the order applies to all agency "programs, policies, and

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[129] Lara Cushing, *et al.*, *Racial/Ethnic Disparities in Cumulative Envtl. Health Impacts in California: Evidence from a Statewide Envtl. Justice Screening Tool (CalEnviroScreen 1.1)*, Am. J. Pub. Health, 105(11): 2341–2348 (2015).

[130] James P. Fabisiak, *et al.*, *A risk-based model to assess environmental justice and coronary heart disease burden from traffic-related air pollutants*, Envtl. Health, 19:34 (2020).

[131] 59 Fed. Reg. 7,629 (Feb. 11, 1994).

[132] Proposed Rule, 85 Fed. Reg. at 35,625.

[133] *See* 59 Fed. Reg. at 7,629.

activities[.]"[134] Toward that end, when promulgating rules "that substantially affect human health or the environment"—as the proposed regulation will—the EPA must ensure they do not have a disproportionate impact on minorities, and it must "provide minority populations and low-income populations the opportunity to comment on the development and design of research strategies undertaken pursuant to th[e] order."[135] The EPA's novel and unsupported interpretation is wholly untethered from both the spirit and the text of Executive Order 12,898.

Second, EPA's limiting interpretation ignores the agency's own environmental-justice plan, which was issued pursuant to the same executive order. The plan rightly calls on the EPA to "integrate[] environmental justice into everything" it does.[136] To accomplish this, the EPA set forth eight different priority areas, the first of which is "rulemaking."[137] Specifically, the EPA aimed to "institutionalize environmental justice in rulemaking," requiring, among other things, the performance of "rigorous assessments of environmental justice analyses in rules," in order to "deepen environmental justice practice within EPA programs to improve the health and environment of overburdened communities."[138] Recognizing that "[r]ulemaking is an important function used by the EPA to protect human health and the environment for all communities," the EPA devoted the second chapter of its plan to ensuring that "environmental justice is appropriately analyzed, considered, and addressed in EPA rules with potential environmental justice concerns, to the extent practicable and supported by relevant information and law."[139]

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[134] *See id.* (providing that each federal agency must make "achieving environmental justice part of its mission by identifying and addressing as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations").

[135] *Id.* at 7,631.

[136] EPA, EJ 2020 Action Agenda (Oct. 2016), at iii, *available at* https://www.epa.gov/sites/production/files/2016-05/documents/052216_ej_2020_strategic_plan_final_0.pdf.

[137] *Id.*

[138] *Id.*

[139] *Id.* at 13.

Consistent with its environmental-justice plan and Executive Order 12,898, the EPA has issued its own "Guidance on Considering Environmental Justice during the Development of Regulatory Actions."[140] The guidance recognizes how "vital" it is "that Agency rule-writers identify and address potentially disproportionate environmental and public health impacts experienced by minority populations, low-income populations, and/or indigenous peoples[.]"[141] In short, the EPA has consistently recognized the need for environmental-justice assessments during its rulemakings. The agency's unsupported assertion that the proposed rule does not require an environmental-justice assessment is at odds with what the EPA has itself recognized it must do to comply with both Executive Order 12,898 and its own policies.

Third, the EPA's failure to perform an environmental-justice analysis is inconsistent with the agency's past practice. Indeed, the EPA has repeatedly performed this sort of assessment when acting under the Clean Air Act, Clean Water Act, and other statutes. This information has undoubtedly been relevant to public-health rulemakings in the past. The EPA's refusal to consider the environmental-justice consequences of its proposal—which are certainly a relevant consideration—is an arbitrary and unexplained departure from the agency's long-standing practice.[142]

Fourth, and as discussed above, the proposed rule would perpetuate the very same inequities that the executive order was designed to protect against. As the EPA has itself recognized, minority, low-income, and tribal communities "may face greater risks" to their health and environment "because of proximity to a contaminated sites or because fewer resources are available to avoid exposure to

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[140] EPA, Guidance on Considering Environmental Justice during the Development of Regulatory Actions (May 2015), *available at* https://www.epa.gov/sites/production/files/2015-06/documents/considering-ej-in-rulemaking-guide-final.pdf.

[141] *Id.* at 1. *See also* EPA, Technical Guidance for Assessing Environmental Justice in Regulatory Analysis. Technical Guidance (June 2016), *available at* https://www.epa.gov/sites/production/files/2016-06/documents/ejtg_5_6_16_v5.1.pdf.

[142] *See, e.g.*, *State Farm*, 463 U.S. at 43 (noting that an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'").

pollution."[143] Examples include disproportionate exposure to lead, particulate matter, and other hazardous air pollutants.[144] Indeed, as noted above, study after study has confirmed that communities of color and economically disadvantaged communities are disproportionately located near sources of pollution, and that these communities disproportionately suffer adverse health and environmental impacts as a result.

In short, the EPA was required under Executive Order 12,898—as well as its own environmental-justice plan and guidance—to conduct an assessment of the proposal's environmental-justice implications. As the agency has refused to do so, the proposal cannot stand.

VII. Conclusion

The EPA's proposed rule arbitrarily and unlawfully defies the requirements of the Clean Air Act at the expense of the public's health and welfare. It must be withdrawn.

Earthjustice
California Communities Against Toxics
Sierra Club

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[143] EPA, Envtl. Justice FY2017 Progress Report at 8, *available at* https://www.epa.gov/sites/production/files/2018-04/documents/usepa_fy17_environmental_justice_progress_report.pdf.

[144] *Id.*