COMMENTS OF ATTORNEYS GENERAL OF NEW YORK, CALIFORNIA, CONNECTICUT, ILLINOIS, IOWA, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW JERSEY, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, WASHINGTON, WISCONSIN AND THE DISTRICT OF COLUMBIA

August 3, 2020

By Electronic Submission to www.regulations.gov

Andrew R. Wheeler
Administrator
U.S. Environmental Protection Agency
Washington, DC 20460

Re: Proposed Rule Regarding Benefit-Cost Analyses for Clean Air Act Rulemakings, Docket ID No. EPA-HQ-OAR-2020-00044, 85 Fed. Reg. 35,612 (June 11, 2020).

Dear Administrator Wheeler:

The undersigned eighteen Attorneys General respectfully submit the following comments on the U.S. Environmental Protection Agency's ("EPA") proposed rule purportedly "increasing consistency and transparency" in the consideration of benefits and costs in Clean Air Act ("CAA" or "Act") rulemakings, 85 Fed. Reg. 35,612 (June 11, 2020) ("Proposal"). For the reasons stated below, and consistent with comments from some of the undersigned ("2018 Comment Letter") on EPA's 2018 advance notice of proposed rulemaking ("ANPRM") (83 Fed. Reg. 27524 (June 13, 2018)),[1] we oppose the Proposal as unnecessary, contrary to law, arbitrary, and unworkable. As the 2018 Comment Letter pointed out, existing policy and guidance documents already fulfill the Proposal's stated purpose, and EPA fails to identify any shortcomings in those materials or to explain how the Proposal would provide any improvement.

On the contrary, we believe that, rather than "increasing consistency and transparency," the Proposal, if finalized, would weaken EPA's Clean Air Act standards by improperly discounting the benefits of important public health regulations while inflating the costs of those regulations. We also are very troubled by EPA's public statements indicating that the intent of the Proposal is to bar consideration of co-benefits when setting CAA standards.[2] Failure to consider co-benefits would not only flout fundamental economic precepts but would violate EPA's statutory duties and undercut the agency's core mission to protect human health and the environment. Our skepticism about the

[1] The June 13, 2018, Comment Letter is attached hereto as Exhibit A and the comments in that letter are incorporated herein.

[2] https://thehill.com/policy/energy-environment/501225-new-trump-air-rule-will-limit-future-pollution-regulations-critics

Proposal is compounded by EPA's continuing refusal to use a scientifically credible social cost of carbon estimate in its regulatory analyses, notwithstanding explicit condemnation of EPA's methodology by our nation's leading scientists.[3] The agency's distortion of this key metric in its analyses belies any intent to improve the quality of regulatory benefit-cost analyses.[4]

EPA's action is especially egregious coming at the precise moment when the COVID-19 pandemic is ravaging respiratory health, particularly in our most vulnerable communities. The Proposal conveys that EPA—contrary to its mission and the Congressional intent animating the CAA—is seeking to elevate the interests of regulated sources of air pollution over the interests of those whose health EPA is charged with protecting. Accordingly, we urge EPA to abandon this unnecessary Proposal. Should EPA proceed in any manner down this road, EPA should reclassify the Proposal as a supplemental ANPRM given the many unanswered questions that the Proposal raises and for which EPA merely seeks comment.

INTRODUCTION AND SUMMARY OF COMMENTS

EPA's methodology for benefit-cost analyses has wide-ranging implications for regulatory decisions affecting public health and welfare and the environment and on which many of our state programs rely. We have a strong interest in ensuring that these analyses faithfully follow the CAA, applicable Executive Orders, and EPA and Office of Management and Budget ("OMB") guidance documents that have been employed for many years. It is vital that EPA continue to fully account for the benefits of federal regulation to the health and welfare of our residents and the environment. Additionally, some states' environmental laws and regulations expressly adopt EPA standards in all or some instances, or require an express justification for any deviation.[5] A fundamental change in how EPA considers the relative costs and benefits of regulations would consequently affect standards that our states typically implement and enforce to protect public health and the environment. The correct

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[3] *See*, National Academies of Sciences, Engineering, and Medicine, 2017. *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide*. Washington, DC: The National Academies Press. doi: https://doi.org/10.17226/24651; see also, United States Government Accountability Office, *Social Cost of Carbon: Identifying a Federal Entity to Address the National Academies' Recommendations Could Strengthen Regulatory Analysis,*
Report to Congressional Requesters, June 2020, GAO-20-254.

[4] *See, e.g.*, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, Final Rule, 85 Fed. Reg. 24,174, 24,235 (April 30, 2020).

[5] For example, Pennsylvania may not promulgate air quality control measures to implement a NAAQS if the control measures are more stringent than federal measures unless it demonstrates that the higher standard is necessary to attain or maintain a NAAQS, to satisfy related CAA requirements, to prevent assessment or imposition of CAA sanctions, or to comply with a final federal court decree. *See* 35 *Pa. Consol. Stat.* § 4004.2. Similarly, New Jersey must justify any deviation from federal standards pursuant to N.J.S.A. 52:14B-1 et seq. Even those states that are not statutorily required to apply federal standards may not have the institutional capacity to develop their own standards and therefore, for practical reasons, often rely on the standards set by EPA. For example, because of lack of institutional capacity, and in acknowledgement of EPA's expertise, Washington D.C. has traditionally relied on EPA to set air quality standards.

balance of cooperative federalism in the implementation of these programs by the states depends on EPA fulfilling its duties as directed by Congress in the CAA, and in a rational manner.

As the 2018 Comment Letter explained, the Clean Air Act encompasses several interrelated but distinct programs, including, among others, national ambient air quality standards ("NAAQS"), national emission standards for hazardous air pollutants, and new source performance standards ("NSPS"). (2018 Comment Letter at 3-4.) Under each of these programs, Congress prescribed different approaches for EPA to consider benefits and costs in rulemakings. Thus, the Proposal is based on a false premise that uniformity across these disparate provisions is lawful and possible. On the contrary, to the extent that inconsistency is a driving rationale for EPA's Proposal, as EPA asserts, treating costs and benefits differently under distinct programs is in fact appropriate because it is consistent with the variable approach to regulation of distinct Clean Air Act programs that is dictated by the statute and interpretive case law. It is not a problem in need of a rulemaking solution. Indeed, EPA fails to document any concrete inconsistency in how it has conducted benefit-cost analyses, much less any inconsistency that is not explained by the statute's different requirements for different programs.

In light of the states' vested interests in EPA's faithful execution of its statutory duties, including the proper consideration of the costs and benefits of agency regulations, we are troubled that the Proposal does not identify any problem that needs a solution and completely disregards the 2018 Comment Letter's prominent identification of this shortcoming in the ANPRM. (2018 Comment Letter at 4-6.) Even "a 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.'" *Home Box Office, Inc. v. Fed. Commc'n Comm'n,* 567 F.2d 9, 35 (D.C. Cir. 1977), quoting *City of Chicago v. Fed. Power Comm'n*, 458 F.2d 731, 742 (D.C. Cir. 1971). EPA provides no concrete examples of inconsistent or non-transparent action in EPA's prior work on economic analyses.

As the 2018 Comment Letter also pointed out, OMB and EPA itself have published comprehensive guidance to promote consistency and transparency in consideration of benefits and costs. 2018 Comment Letter at 4-6. Indeed, one of those guidance documents expressly states that its purpose is to provide consistency in agency treatment of benefits and costs, that is, to "standardiz[e] the way benefits and costs of Federal regulatory actions are measured and reported."[6] The Proposal identifies no instance where EPA has failed to follow that guidance, nor does the Proposal explain why that existing guidance is inadequate. Instead, the Proposal states only that some unidentified stakeholders perceive that EPA has "either underestimated costs, overestimated benefits, or evaluated benefits and costs inconsistently in its rulemakings." 85 Fed. Reg. at 35,617. Even accepting that comment at face value – and the Proposal provides no concrete example to bear it out – the answer is for EPA to follow the existing guidelines and to address any specifically identified analytical deficiencies on a case-by-case basis, not to undertake a broad administrative rulemaking that will restrict EPA's ability to properly weigh costs and benefits in future Clean Air Act rulemakings.

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[6] Office of Management & Budget, Circular A-4 at 1 (Sept. 17, 2003) ("Circular A-4"), available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.

Our comments below explain in detail the Proposal's legal and technical flaws, including that:

- EPA has no legal authority for the proposal and unlawfully invokes general rulemaking authority to effect broad substantive change in benefit-cost analyses across numerous Clean Air Act regulatory programs;
- EPA failed to allow for sufficient public participation, and major provisions of the Proposal—including how benefit-cost analyses will be conducted, what rulemakings will be subject to the requirements, and how the analyses would inform regulatory decisions—are unlawfully vague;
- EPA failed to articulate any inconsistency or lack of transparency in existing benefit-cost analyses that would call for the drastic changes the Proposal would impose;
- EPA violated numerous Executive Orders by, for example, failing to consult with states on the Proposal's federalism implications and to assess regulatory costs and environmental justice impacts;
- The Proposal would arbitrarily weaken benefit-cost analyses by, for example, narrowing consideration of benefits, neglecting co-benefits, and minimizing greenhouse gas-related benefit-cost analyses, in violation of EPA's core mission to protect human health and the environment;
- EPA solicits comments on a broad range of substantive, consequential issues that are not appropriate for a proposed rule; and
- Each of the Proposal's provisions fails to further EPA's purported goal of increasing consistency or transparency.

For all of these reasons the Proposal should be abandoned or, at the least, reclassified as a supplemental ANPRM.

COMMENTS

I. There Is No Legal Authority For The Proposal.

EPA cites Section 301(a)(1) of the Clean Air Act[7] as the sole legal authority for the Proposal, but also "solicits comment on whether additional or alternative sources of authority are appropriate bases for this proposed regulation." 85 Fed. Reg. at 35,613. Section 301(a)(1) does not, however, authorize the Proposal because the Proposal is not a procedural rule about how EPA performs its duties under the Act but rather a substantive rule about the type and content of benefit-cost analyses the agency will use in establishing air quality standards and other air pollution rules. Further, it is troubling, and indeed telling, that two years after publishing the ANPRM, EPA is seeking advice from the public regarding the legal authority for the Proposal. It is incumbent upon EPA to inform the public of the authority for its proposed rules, not vice versa. An agency's essential duty in rulemaking is to exercise its subject-matter expertise to enact rules that implement and further the purposes of the statutes Congress has assigned it to administer. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*,

[7] This provision authorizes the Administrator "to prescribe such regulations as are necessary to carry out his functions." 42 U.S.C. § 7601(a)(1).

467 U.S. 837, 842-44 (1984). That duty does not include proposing rules without first determining the source of legal authority but instead asking commenters to supply that information.

Citation to Section 301(a)(1) is also unavailing because EPA cannot rely on a general grant of rulemaking authority to promulgate regulations or develop policies that are inconsistent with more specific statutory directives. *Nat. Res. Def. Council v. EPA*, 749 F.3d 1055, 1063-64 (D.C. Cir. 2014). As discussed above, the Clean Air Act includes very specific provisions regarding EPA's consideration of costs in setting standards. For example, EPA is barred from considering costs when setting NAAQS, 42 U.S.C. § 7409(b)(1), but is expressly required to consider costs in setting NSPS emission control levels, 42 U.S.C. § 7411(a)(1). A requirement to impose a uniform benefit-cost analysis on Clean Air Act rulemaking actions notwithstanding specific statutory mandates would invite arbitrary and capricious agency action, since any such requirement could potentially force EPA to rely on factors in its decision making that Congress did not intend it to consider, or otherwise fail to consider matters Congress deemed essential. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983). EPA is not empowered to substitute its judgment for Congress's, and, as the Supreme Court recently held, where Congress has not required a formal benefit-cost analysis, EPA is not required to undertake one. *Michigan v. EPA,* 135 S. Ct. 2699, 2711 (2015).

In addition, EPA is required to set standards based on the "latest scientific knowledge," 42 U.S.C. § 7408(a)(2), and to "use estimates of costs and benefits in [] regulatory analyses that are based on the best available science and economics," Executive Order 13,783.[8] EPA has repeatedly emphasized the importance of this fundamental precept, including in its 2018-2022 strategic plan, which states that one of the agency's priorities is to "identify, assess, conduct, and apply the best available science to address current and future environmental hazards."[9] As discussed more below, the Proposal's extensive restrictions and limitations related to uncertainty, concentration-response relationships, and co-benefits conflict with these requirements because those restrictions would result in the exclusion of important studies and information that do not fit within the Proposal's artificial limitations. Moreover, restricting consideration of the best scientific and economic information is inconsistent with the Clean Air Act's underlying purpose of protecting human health and the environment. Agencies lack authority to adopt or implement regulations that are "manifestly contrary to the statute." *See Chevron*, 467 U.S. at 843.

In sum, EPA should abandon the Proposal because there is no legal authority for it; the Proposal is not the type of rule authorized by Clean Air Act Section 301(a)(1), and the Proposal otherwise conflicts with EPA's other, more specific statutory duties.

II. EPA Has Not Met Its Obligations Under Section 307 Of The Clean Air Act And The Administrative Procedure Act

[8] *https://www.govinfo.gov/content/pkg/FR-2017-03-31/pdf/2017-06576.pdf.)*

[9] U.S. Envtl. Prot. Agency, Working Together: FY 2018-2022 EPA Strategic Plan, (2018) at page 42, https://www.epa.gov/sites/production/files/2019-09/documents/fy-2018-2022-epa-strategic-plan.pdf

In addition to lacking legal authority and conflicting with other statutory provisions, the Proposal is fatally flawed because it is arbitrary and capricious and not in accordance with law in several respects, and fails to meet EPA's obligations under Section 307 of the Clean Air Act and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553 ("APA"). An agency must propose rules with specificity and clarity as to the programs, regulations, and information to which they will apply. 5 U.S.C. § 553(b)(3); *Home Box Office, Inc.*, 567 F.2d at 35-36. EPA's vague, open-ended Proposal, which raises more questions than it answers, does not meet this minimum requirement.[10]

A. The comment period is too short to allow for meaningful public participation.

The APA requires agencies to "give interested persons an opportunity to participate in the rule making" through the submission of written comments or oral presentation. 5 U.S.C. § 553(c). The importance of this public comment process—the purposes of which include ensuring informed agency decision-making, encouraging public participation in the administrative process, and ensuring that agencies keep an open mind towards their rules—"cannot be overstated." *N.C. Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 763 (4th Cir. 2012). In order to achieve these purposes, "the opportunity to comment 'must be a meaningful opportunity.'" *Id.* (quoting *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011). It is well established that a 60-day comment period is the minimum amount of time needed for meaningful public participation. For example, Executive Order 13,563, section 2(b), provides that "each agency *shall* afford the public a meaningful opportunity to comment ... on any proposed regulation, with a comment period that should generally be *at least* 60 days" (emphases added.)[11]

Here, EPA has provided a comment period of only 53 days, which is grossly insufficient under the circumstances. First, many of the undersigned filed detailed and comprehensive comments on the August 2018 ANPRM, and nothing in the Proposal addresses our concerns. On the contrary, EPA has introduced significant new elements and posed complex questions that do not allow for a full response on an expedited basis. Second, it defies logic and common sense to impose a truncated timeline when many key stakeholders, including scientists and public health experts that are best placed to provide feedback on the impacts of this proposal, may be busy on work related to the COVID-19 pandemic. Third, we are aware that EPA's Science Advisory Board ("SAB") will hold public meetings on August 11, 2020, and September 15, 2020, to review the scientific and technical bases of the Proposal, receive briefings from EPA staff on those issues, and thereafter provide the Administrator with its advice and comments on the adequacy of the scientific and technical bases for the Proposal. 85 Fed. Reg. 44, 535

[10] EPA attempts to have it both ways, claiming the Proposal is exempt from the APA while simultaneously claiming to be following the APA's notice and comment procedures. 85 Fed. Reg. at 35,613. As discussed above, however, the Proposal clearly would "affect the rights or obligations of outside parties" and therefore is subject to the APA's requirements. EPA provides no reasoned basis to claim otherwise.

[11] See also Executive Order 12,866, section 6(a)(1), which provides: "[E]ach agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days."

(July 23, 2020). The public should have the benefit of the SAB's analysis and comments, as well as EPA's briefings to the SAB, before submitting their own comments.

Accordingly, we urge the agency to withdraw this ill-advised Proposal or to treat it, at most, as a supplemental ANPRM. At a minimum, the comment period should be extended until after the SAB completes its process and the public has had a meaningful opportunity to participate in any rulemaking process.

B. The Proposal is unlawfully vague and arbitrary.

The APA requires that "general notice of proposed rulemaking shall be published in the Federal Register," including the "terms or substance of the proposed rule." 5 U.S.C. § 553(b). The straightforward purpose of this requirement is to give the affected public an opportunity to provide meaningfully informed comment on an agency's proposal. *See Home Box Office, Inc.*, 567 F.2d at 35-36. Courts will not hesitate to strike down final rules based on proposals lacking in specificity. *See, e.g., Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) ("general notice that a new standard will be adopted affords the parties scant opportunity for comment"). Further, an agency's regulations cannot be arbitrary, capricious, or contrary to the agency's statutory authority. 5 U.S.C. § 706.

Here, EPA has left open major questions such as how the benefit-cost analyses would be conducted, what future rulemakings would be subject to the requirements, and how, if at all, the results of the required benefit-cost analyses would be used to inform regulatory decisions. These are critical matters that should be concretely addressed in a proposal for a final rule, rather than left open. Because EPA has failed to provide its views on key aspects of its rulemaking in a "concrete and focused form," commenters lack the ability to present full "criticism or formulation of alternatives," which, in turn, undercuts the agency's ability to ensure that it evaluates all necessary aspects of the problem it is considering. *See Home Box Office*, 567 F.2d at 36. This undue vagueness is compounded by EPA's failure to identify any real-world example of a benefit-cost analysis for a Clean Air Act standard that was lacking in consistency or transparency, or to provide any explanation why the Proposal is otherwise needed in light of existing guidance, as further discussed below. The Proposal thus runs afoul of the APA's procedural and substantive requirements due to its vagueness as well as its arbitrariness. Accordingly, if EPA does not abandon the Proposal altogether, it should reclassify the Proposal as, at most, a supplemental ANPRM.

1. *The Proposal's applicability is impermissibly unclear.*

EPA proposes that the requirement to perform a benefit-cost analysis would apply to "significant regulations," which it proposes to define as either (1) a proposed or final rule that is a "significant regulatory action" under Executive Order 12,866, or (2) a proposal or rule that "is otherwise designated as significant by the Administrator." 85 Fed. Reg. at 35,617, 35,625 (definition in proposed Section 83.1). While EPA seeks comment as to whether and how to apply the first category, 85 Fed. Reg. at 35,623, the second category is completely unbounded. The failure to specify the Proposal's applicability deprives the public of an adequate opportunity to comment because the Proposal on its face fails to identify the breadth of its application. Furthermore, the absence of

objective criteria to cabin the Administrator's discretion is arbitrary and contrary to the Proposal's stated goal of promoting consistency and transparency.

2. *EPA arbitrarily and capriciously failed to conduct analyses and consultation required by relevant Executive Orders.*

In developing the Proposal EPA failed to comply with various Executive Orders and thereby failed to assess significant issues implicated by the Proposal, including federalism, costs, and environmental justice. Among the APA's bedrock requirements is that agency decision-making be based on a consideration of the relevant factors and data, and failure to perform such analysis is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983). Accordingly, the Proposal should be withdrawn and EPA should conduct the required consultations and analyses before proceeding further.

a. The Proposal violates the principles set forth in Executive Order No. 13,132, Federalism, 64 Fed. Reg. 43,255 (Aug. 4, 1999).

Of paramount concern to our coalition, the Proposal violates Executive Order 13,132, which provides that agencies must have an accountable process to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications. *See* Exec. Order 13,132 § 6(a) (instructing agencies to "ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications"). Federalism implications are defined as including regulations and actions that have substantial direct effects on states or local governments (individually or collectively). *Id.* § 1. Contrary to EPA's unsupported, cursory assertion, 85 Fed. Reg. at 35,624-25, the Proposal indisputably has substantial federalism implications because, as explained herein, states and local communities are directly and significantly impacted by health and risk-based standards established by EPA.

The Proposal would unquestionably affect EPA's decision-making when considering adoption of Clean Air Act standards, or determining the stringency of such standards, which will have a substantial direct effect on our states. Standards lacking requisite stringency due to a skewed benefit-cost analysis will reduce air quality in our states, which will directly harm the health of our residents and natural resources. As discussed above and in the 2018 Comment Letter on the ANPRM, states may be statutorily required to adopt EPA standards or to obtain EPA approval of state-set standards, and may lack the resources or institutional capacity to deviate from EPA standards. Despite the substantial impact the Proposal would have on states and local governments, EPA did not seek any input from states and local governments in developing the Proposal, in violation of Executive Order 13,132. EPA must engage in the required consultation with state and local officials, as required by the Executive Order, before proceeding further. [12]

[12] For the same reasons stated here, EPA erred in concluding that it did not need to comply with Executive Order 13175: Consultation and Coordination with Indian Tribal Governments. 85 Fed. Reg, 35,625. EPA should also consult with Tribal Governments before proceeding further.

b. The Proposal does not comply with Executive Order No. 13,771, Reducing Regulations and Controlling Regulatory Costs, 82 Fed. Reg. 9339 (Feb. 3, 2017).

Pursuant to Executive Order 13,771, agencies must assess and consider the costs of regulatory actions when making regulatory decisions. Section 3(d) of the Order requires the Director of OMB to identify to agencies, including EPA, a total amount of incremental costs (or "regulatory cap" as stated in section 2) for all Executive Order 13,771 actions finalized during the fiscal year. The total incremental cost imposed by each agency cannot exceed the agency's allowance for that fiscal year, unless required by law or approved by the OMB Director. Despite imposing new and costly duties on EPA staff to conduct benefit-cost analyses, the Proposal fails to present any information about the type or magnitude of those duties and their attendant costs.

EPA wrongly seeks to excuse itself from compliance with Executive Order 13,771 by claiming, with no explanation, that the regulatory action relates only to "agency organization, management or personnel." 85 Fed. Reg. at 35,624. First, as discussed above, the Proposal is a substantive rule, not a procedural rule about how EPA performs its duties under the Act, and therefore does not fall within that category. Second, as EPA concedes, the Proposal does constitute a "significant regulatory action" as defined in Section 3(f) of Executive Order No. 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51,735 (Oct. 4, 1993). The absence of information about the costs of the Proposal denies commenters a meaningful opportunity to comment on all aspects of the Proposal. Moreover, it is both arbitrary and self-contradictory for EPA to propose a rule to purportedly increase transparency regarding the costs and benefits of Clean Air Act rules without providing any transparency about the costs of the Proposal itself.

c. The Proposal implicates Executive Order 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Communities, 59 Fed. Reg. 7629 (Feb. 16, 1994).

Executive Order 12,898, among other things, directs federal agencies to identify and address the disproportionately high adverse human health or environmental effects of their actions on minority and low-income populations, with the goal of achieving environmental protection for all communities. *See,* EPA, Summary of Executive Order 12898 – Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf. While EPA states that the Proposal is not subject to Executive Order 12,898 because it does not establish an environmental health or safety standard, 85 Fed. Reg. at 35,625, Executive Order 12,898 is not so limited in its application. Rather, it broadly applies to all agency "programs, policies, and activities," Exec. Order 12898 at 1, and, in any event, the Proposal would affect many Clean Air Act standards, including those that address the disproportionate impact of air pollution on environmental justice communities.[13] Indeed, the COVID-19 pandemic—

[13] *See* Marie Lynn Miranda, *et al.*, Making the Environmental Justice Grade: The Relative Burden of Air Pollution Exposure in the United States, *Int. J. Envtl. Res. & Public Health* at 1755–71 (June 2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3137995/.

which has disproportionately affected environmental justice communities and, in particular, those who suffer the most exposure to air pollution—underscores the critical importance of comprehensive analysis of environmental justice impacts of actions affecting public health and welfare regulations under the Clean Air Act.[14] EPA should not proceed any further with the Proposal until it analyzes the Proposal's significant environmental justice implications and provides the public with an opportunity to comment on EPA's analysis.[15]

d. The Proposal violates the principles of Executive Order No. 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

As EPA concedes, the Proposal is a "significant regulatory action" subject to Executive Order 12,866. 85 Fed. Reg. at 35,624. That Order provides as its overarching regulatory philosophy that federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. *Id.* at 1. As discussed above, the Proposal violates that principle because EPA has failed to provide a rationale for why the Proposal is necessary and failed to provide any concrete example of a benefit-cost analysis for a Clean Air Act standard that did not comply with the comprehensive EPA and OMB guidelines for such analyses—a failure that renders the proposal both arbitrary and in violation of Executive Order 12,866.

In sum, EPA has violated numerous Executive Orders in failing to assess the costs of the Proposal and its impacts on states, tribes, and our most vulnerable communities. The agency should meet these important obligations before proceeding any further.

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[14] X. Wu, *et al*, Exposures to air pollution and COVID-19 mortality in the United States: A nationwide cross-sectional study, at 2 (Apr. 20, 2020), https://projects.iq.harvard.edu/covid-pm/home; *see also* Office of Massachusetts Attorney General Maura Healey, COVID-19's Unequal Effects in Massachusetts: Remedying the Legacy of Environmental Injustice & Building Climate Resilience (2020), https://www.mass.gov/doc/covid-19s-unequal-effects-in-massachusetts/download.

[15] For these same reasons, EPA is incorrect in concluding that it need not comply with Executive Order 13,045: Protection of Children from Environmental Health Risks and Safety Risks (62 Fed. Reg. 19,885, Apr. 23, 1997). 85 Fed. Reg. at 35,625. Before proceeding any further, EPA must evaluate the effects of the planned regulation on children and explain why the regulation is preferable to potentially effective and reasonably feasible alternatives.

III. The Proposal Is Substantively Flawed And Too Uncertain To Support A Final Rule

Rather than address any actual problems with transparency or consistency in previous benefit-cost analyses under the CAA, the Proposal instead dwells on issues that are already adequately addressed in prior EPA benefit-cost guidance, such as uncertainty. It aims to narrow rather than comprehensively evaluate potential benefit endpoints, such as in its discussion of concentration-response relationships; and it almost entirely neglects certain key analytical issues, such as inclusion of co-benefits, approaches for addressing greenhouse gas-related benefit-cost analyses, and transparency and consistency in cost estimates. All of these flaws add up to an inadequately explained, arbitrary and capricious change from existing EPA policy that would result in substandard benefit-cost analyses and would detract from EPA's core mission to protect human health and the environment.

A. The Proposal Raises Issues Already Addressed In Existing Benefit-Cost Guidance

The proposal identifies purported problems in EPA's existing practice, such as uncertainty and "double-counting," yet fails to provide even a single example of prior benefit-cost analyses that did not appropriately address these issues. Indeed, EPA has already comprehensively addressed methods for grappling with uncertainty in benefit-cost analyses, a topic that is a substantial component of both Circular A-4 (see pages 38-42) and discussed within multiple chapters of the EPA's 2020 Draft Guidelines for Preparing Economic Analysis. The proposed rule provides no evidence that there is a gap that needs to be filled in this regard beyond its existing guidance, and, in fact, adds no additional insight into these issues *See, e.g., Fed. Communications Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 513, 515 (2009) (agency must show that there are "good reasons" and "reasoned explanation" for action); *State Farm*, 463 U.S. at 42-43 (agency must provide a "satisfactory explanation" for action). Instead, EPA's focus on uncertainty in the proposed rule seems designed to provide a basis for EPA to decide not to include certain benefits in economic analysis, biasing the analyses against regulations that otherwise meet statutory requirements and provide important environmental benefits, in contravention of the Clean Air Act's public-health protective mandate.

Similarly, in its rationale section supporting the need for this rule, EPA states that commenters claim that in the past there has been "double-counting" of pollution reduction benefits because the agency did not set the proper baseline, but EPA does not point to any specific instance in which this occurred. Regardless, the need to avoid double counting is already highlighted in the Draft EPA 2020 Guidelines for Preparing Economic Analyses and is discussed multiple times in Circular A-4. This justification of the need for this proposed rule is unsupported as presented given EPA's existing guidance on this issue. The Proposal does not provide anything to remedy the alleged issues it seeks to address that has not already been accomplished through existing guidance.

B. The Proposal's Treatment of Concentration-Response Relationships is Unduly Restrictive

Concentration-response relationships are a critical element of the assessment of impacts from potential changes in pollutant levels, as discussed in EPA descriptions of the risk assessment process.[16]

[16] EPA, "Conducting a Human Health Risk Assessment," https://www.epa.gov/risk/conducting-human-

The Proposal's extensive restrictions and limitations on the selection and use of concentration-response relationships are unlawfully vague and seem arbitrarily designed to exclude or restrict evidence of such relationships. For example, the rule proposes restriction of the universe of concentration-response relationships to pollutants that "match" the pollutant of interest without elucidating how specific the "match" must be; this restriction is inappropriate because related pollutants may operate in similar ways. 85 Fed. Reg. at 35626 (proposed Subsection 83.3(a)(9)(iii)). Strict requirements for matching may result in EPA excluding concentration-response data that would elucidate potential benefits from reductions of a pollutant.

The Proposal also aims to limit the use of epidemiological studies to those with a study location "appropriately matched to the analysis" and a population "sufficiently similar to those of the analysis." *Id.* at 35626 (proposed Subsection 83.3(a)(9)(iii)(D)). But EPA does not provide examples where such an approach would be appropriate (e.g., examples where the geographic location of a study would impact epidemiological endpoints) nor indicate in any meaningful, objective way how the agency would conclude studies are appropriately matched or that populations are sufficiently similar.

EPA likewise appears to arbitrarily narrow the number of alternative concentration-response functions that must be developed without providing clear criteria; only "available data and resources" are mentioned as a means for determining if development of these functions is "technically feasible." *Id.* at 35626 (proposed Subsection 83.3(a)(9)(v)). An alternative, appropriate approach would be to evaluate the number of alternative concentration-response functions considered, not just through available data and resources, but also by their potential to improve estimation and uncertainty related to critical benefit endpoints. Along these lines, Chapter 7 of the Draft 2020 EPA Guidelines for Preparing Economic Analyses provides multiple important questions for an analyst to ask related to benefit endpoints, including relative importance of the endpoint, importance of the endpoint to disadvantaged and minority populations, and the potential for the endpoint to vary across policy options under consideration. EPA has provided no valid reason to deviate from these existing Guidelines.

The Proposal's discussion of endpoints also raises concerns in suggesting a need for "robust" scientific evidence that supports quantification before an effect on an endpoint should be quantified.[17] While we do not disagree with the premise that rigorous science should be used in developing benefit-cost analyses, Executive Order 13,563 already provides useful guidance in this regard in its discussion of the use of "best available science." In our view, "best available science" comports with EPA's numerous statutory obligations to evaluate the "best available science," provides a more expansive consideration of the types of endpoints that may be considered, and acknowledges that emerging, "best available" science related to impacts of air pollution may limit the number of studies available for quantification of effects. Again, the 2020 EPA Draft Guidelines for Preparing Economic Analyses

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health-risk-assessment.

[17] The term "robust" also comes up in the discussion of the type of scientific literature required to support concentration-response functions.

provides an extensive discussion of benefits estimation (see 7-5 through 7-7), highlighting the need for a comprehensive list of potential endpoints that can be updated as more scientific information becomes available. If there are uncertainties in the quantification of an endpoint because of more limited scientific information, this can be addressed in a discussion of the uncertainties related to the benefits. Stating that the Agency "must quantify effects for endpoints which scientific evidence is robust enough to support such quantification" appropriately requires quantification of effects but introduces ambiguity in its linkage of this requirement to the vague requirement that the science be "robust enough," potentially leading to a less comprehensive quantification of effects in the analysis.

C. **The Proposal's Treatment of Important Benefit-Cost Analysis Issues is Insufficient**

The proposed rule's treatment of ancillary benefits is arbitrary and capricious and may in some cases violate Clean Air Act requirements. In the rationale section, EPA suggests disaggregating ancillary benefits (sometimes referred to as "co-benefits") from "targeted" benefits to facilitate identification of more "appropriate ways of obtaining ancillary benefits." 85 Fed. Reg. at 35622. But the rule itself does not then discuss approaches for considering ancillary benefits or ways that the disaggregation will lead to more efficient means for obtaining these benefits. Instead, the Proposal indicates that the agency should make an additional presentation in the preamble discussions for its rules that is limited to benefits that "pertain to the specific objective . . . of the CAA provision or provisions under which the rule is promulgated," thus implying that co-benefits will be disregarded or minimized. 85 Fed. Reg. at 35627. And the EPA Administrator has also stated that co-benefits "cannot be used to justify the rule."[18]

That approach is both impracticable and not lawful. Determining which benefits relate to the "specific objectives" of the CAA provision at issue may be difficult, if not impossible; the proposed rule provides no guidance, and without such guidance, decisions as to what to exclude may often be arbitrary and capricious. Further, the narrow focus on the presentation of a certain set of benefits seems to be precisely the type of "tunnel vision" that the Science Advisory Board's Economic Guidelines Review Panel recently recommended analysts avoid when conducting a benefit-cost analysis (*see* Science Advisory Board Draft Report at 67). In fact, the panel's draft comments on the 2020 EPA Draft Guidelines for Preparing Economic Analyses suggest that an analyst will likely already be focused on the direct costs and benefits from a rulemaking and the comments ask for EPA to include "strong language" that would direct the analyst to investigate and present information on ancillary benefits and costs. While the proposed regulatory language itself indicates that the Agency must "quantify all benefits" and "qualitatively characterize benefits that cannot be quantified or monetized," 85 Fed. Reg. at 35626 (proposed Subsections 88.3(a)(8)(i) & (iii)), the requirements related to the preamble appear designed to tilt the balance of consideration to only those benefits that are directly related to the CAA provision.

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[18] https://thehill.com/policy/energy-environment/501225-new-trump-air-rule-will-limit-future-pollution-regulations-critics

Giving less or no consideration to benefits because they are purportedly "ancillary" when the Clean Air Act requires consideration of factors that are reflected in those excluded benefits would violate the statute and be arbitrary and capricious under *State Farm*. More broadly, relegating ancillary benefits to secondary status would be inconsistent with the purpose and structure of the Clean Air Act. The Clean Air Act's declared purpose is broadly to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare." 42 U.S.C. § 7401(b)(1). As a means to achieve that end, Congress understood that emission control standards or technologies required under certain provisions would lead to reductions in emissions not only of the pollutants directly targeted by that specific provision, but reductions in other harmful pollutants covered under other provisions of the Act. *See* 42 U.S.C. § 7412(d)(1) (acknowledging that regulation under a separate subsection might reduce pollutants and obviate the need for separate regulation under this subsection); S. Rep. No. 101-228, 1990 U.S.C.C.A.N. at 3557 (authorizing EPA to "consider the benefits" from control technologies that reduce emissions of certain listed pollutants and that "may also have the effect of limiting other [] emissions"). It is thus contrary to the Act, and Congress's intent, to disregard or minimize ancillary benefits when Congress expressly anticipated that implementing the Act's various provisions would lead to substantial ancillary benefits, and when it contemplated that EPA would consider those benefits.

Additionally, for a rule focused on the CAA, the lack of a discussion of the complexities related to greenhouse gas benefit-cost analysis is a notable gap. For example, the role of domestic versus non-domestic benefits related to greenhouse gas emissions is only referenced in a request for comments responding to whether non-domestic costs and benefits "when examined" should be reported separately. 85 Fed. Reg. at 35623 The rule is also silent on the issue of discounting of benefits and costs over time (particularly relevant for climate change issues) and methods for calculating the social cost of carbon. The omission is all the more striking given recent rulemaking incorporating an inappropriate social cost of carbon (e.g., Final Regulatory Impact Analysis: SAFE Vehicles Rule).[19] Moreover, the Government Accountability Office recently issued a report detailing recommendations on the social cost of carbon as well as applications of discount rates other than 3% and 7% for climate-related impacts. And a recent court ruling noting the problematic nature of the social cost of carbon that was used in the Bureau of Land Management's rescission of the 2016 Waste Prevention Rule further highlights the need to address this metric. *See California v. Bernhardt*, No. 4:18-cv-05712-YGR, 2020 WL 4001480, at *25-*28 (N.D. Cal. July 15, 2020). The proposal's failure to address these pressing issues—on which there is a demonstrated lack of transparency and consistency—is woefully inadequate.

The proposed rule also focuses inordinately on one side of the benefit-cost ledger. It spends significant time noting theorized and potential problems with studies related to benefits, but little to no time focusing on limitations, uncertainties, and potential lack of transparency in cost estimates. This is in contrast to EPA guidance on benefit-cost analyses, which have included entire chapters on the

[19] USEPA. Final Regulatory Impact Analysis: The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Year 2021-2026 Passenger Cars and Light Trucks. Available at: https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/final_safe_fria_web_version_200701.pdf.

estimation of costs. A biased rule that does not address transparency and uncertainty in costs with anywhere near the scrutiny it applies to benefits—particularly a rule purportedly aimed at addressing transparency and uncertainty—is arbitrary and capricious. *See, e.g., State Farm*, 463 U.S. at 42-43 (action is arbitrary and capricious if it lacks a "satisfactory explanation," "relies on factors which Congress had not intended it to consider," "entirely fail[s] to consider an important aspect of the problem," or is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise").

IV. Responses To EPA's General Requests For Comments

In Section V of the Proposal, EPA solicits comments on a broad range of highly consequential issues regarding the Proposal. 85 Fed. Reg. at 35,623. As noted above, and further explained below, we believe that the Proposal is too lacking in specificity to provide an adequate basis for comment and to support the adoption of a final rule, and EPA's request for input on these issues highlights that point. *See, e.g.*, 5 U.S.C. § 553(b); *Home Box Office, Inc.*, 567 F.2d at 35-36 (purpose of this requirement is to give the affected public an opportunity to provide meaningfully informed comment on an agency's proposals); *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) ("general notice that a new standard will be adopted affords the parties scant opportunity for comment"). At most, EPA should treat the Proposal as a supplemental ANPRM and only propose a final rule after it has answered the many questions posed and can provide stakeholders with a concrete proposal that allows for meaningful comment. Nonetheless, we provide preliminary responses to EPA's questions.

Specifying how benefit-cost analyses should inform EPA decisions. EPA solicits comment on how it could take the results of a benefit-cost analysis into account in future rulemakings under specific provisions of the Act. 85 Fed. Reg. at 35623. The States see no reason or legal basis for EPA to create constraints on its future actions in this way, as rulemakings, even those arising under a specific provision of the Act, may vary significantly. In particular, EPA should not impose a requirement that EPA take action under the Act only if the action's benefits justify its costs. *Id.* That blanket requirement would be both unnecessary, where relevant statutory provisions already establish a strict benefit-cost test for action, and unlawful, where Congress chose not to establish such a test. EPA has no authority to ignore or modify statutory directives.

In addition, there may be situations where distributional impacts or other equitable or policy factors counsel in favor of regulation or other agency action, even when an unweighted benefit-cost analysis might not. EPA has provided no reason to promulgate a mandate that the agency slavishly follow the outcome of benefit-cost analyses and thus rule out the possibility of making decisions based on such broader considerations.

For reasons similar to those discussed above, the notion of only approving a rule if its *monetized* benefits exceed its costs, *id.*, is irrational: if Congress did not mandate such a test, the agency should not do so. In addition, to the extent that EPA is arguing that weighing of the negative consequences and positive consequences of a rulemaking is necessary or appropriate for agency decision-making, an express prohibition on including *all* of the positive consequences because they have not been monetized is inconsistent with that reasoning. Indeed, EPA's premise that certain benefits have not been monetized does not address *why* the benefits have not been monetized. Thus, in

the construct EPA seeks comment on, EPA could intentionally decide not to monetize benefits to interfere with the comparison of costs and benefits, and then reject the action because the intentionally incomplete monetized benefits are less than the costs. This is a recipe for knowing irrationality and intentionally biased decision-making.

Moreover, it may well be the case that the administrative record shows that certain benefits, while not monetizable, may still exceed monetized benefits in importance, and the comparison of the total benefits, including the unmonetized benefits, against the total costs weighs in favor of the agency action. Under such circumstances, precluding consideration of unmonetized benefits would result in the analysis producing an inaccurate and irrational evaluation of the consequences of the project and thus result in an arbitrary and capricious basis for the ultimate agency decision.

Applicability. EPA requests comment on whether this rulemaking should apply only to Clean Air Act rulemakings that are economically significant. *Id.* Because EPA should abandon this rulemaking altogether, for the reasons set out throughout this comment letter, the rulemaking should not apply to any EPA action. In any event, as noted elsewhere in these comments, in no event should EPA give unfettered discretion to the Administrator to determine which EPA actions should or should not be subject to benefit-cost analysis, as that paves the way for inconsistent, arbitrary decision-making both as to the appropriateness of benefit-cost analysis in the circumstances and on the merits of agency actions.

Resource constraints. EPA asks whether certain, unspecified elements of this proposed rulemaking should consider resource constraints, *id.*, apparently inquiring whether the decision to undertake benefit-cost analysis for a particular action should depend on EPA resources. As explained in Section II.B.2.b above, EPA should evaluate the costs of this rulemaking before proceeding further, to let the public know the costs of a rulemaking that serves no purpose. Indeed, it is EPA, not commenters, that is best situated to explain, in the first instance, the potential resource constraints and associated consequences of the Proposal. As to making case-by-case decisions as to whether resources are sufficient to perform benefit-cost analysis for particular projects, that is again likely to lead to inconsistent, arbitrary decision-making for the reasons set out in the previous paragraph. Accordingly, EPA should not incorporate any such provision in its regulations.

Codification of "best practices." EPA requests comment on whether it should codify best practices for benefit-cost analysis in this rulemaking, and if so, what best practices should be codified. *Id.* at 35623/3. The answer to the first question is no, for several reasons. First, EPA has not established any need for such codification, as it has established no basis for concluding that EPA's current benefit-cost practices are inconsistent with the existing EPA or OMB guidance or otherwise problematic. There is no evidence that EPA has engaged in inconsistent or nontransparent benefit-cost analysis practices. Second, codification reduces flexibility, so that if new, better approaches to benefit-cost analysis are developed, they could not be used without EPA going through a full rulemaking process, which might take years to develop and finalize, if done at all, resulting in prolonged use of outmoded approaches. EPA's Guidelines for Preparing Economic Analyses and the OMB's Circular A-4 have proven adequate for preparation of benefit-cost analyses, and the change to binding regulations is unnecessary.

As for best practices regarding "assumptions about technological change and/or learning effects," *id.*, EPA has not specified that there are any such generally recognized assumptions that would merit being codified, let alone indicated what they are, so there is no basis to conclude codification of those purported assumptions would not be arbitrary or capricious or unlawful.

Broader application of requirements related to risk assessment. EPA requests comment on whether requirements it is now proposing for risk assessment in benefit-cost analysis should be applied to other risk assessments in CAA rulemakings. *Id.* Because, as explained in the parts of Section V below addressing Section 83.3(a)(7) and (9) of the Proposal, EPA's proposed requirements regarding risk assessment are flawed and should not be promulgated even for use in benefit-cost analyses, those requirements should not be made applicable in any broader context. In particular, EPA's selection criteria for studies characterizing concentration-response relationships and its proposed requirements for synthesizing evidence across the literature are arbitrary and capricious and unlawful and should not be codified or otherwise applied to any EPA activity.

The same is true regarding the imposition of additional requirements for risk assessments. *Id.* The three additional requirements EPA mentions—best practices relating to weight-of-evidence frameworks, additional requirements regarding assessment of bias and uncertainty, and additional requirements relating to study selection criteria, *id.*—respond to no identified need, are accompanied by no rationale, and are not described in any detail, so there is no basis to conclude that adding such requirements would not be arbitrary and capricious or unlawful.

For example, the Proposal seeks comment relating to the weight of evidence frameworks, but elsewhere proposes limiting use of benefit endpoints to those for which there is a "causal" or "likely causal" relationship with pollutant exposure, *see, e.g.*, *id.* at 35262 (proposed Subsection 83.3(a)(7)). But because these two subjects – weight of evidence frameworks and the standard for causality – are closely related, it is difficult to provide meaningful comments on the latter without knowing what the comments on the former, and EPA's response to such comments, will be.

Transparency. EPA also asks for comment on "alternative approaches to increasing transparency about the extent to which a rule is achieving its statutory objectives." *Id.* Since EPA has not demonstrated any problems in regulatory transparency under the currently applicable guidance, no such alternative approaches are necessary or appropriate. EPA should, and already does, separate out different types of costs and benefits. But the task of designating some benefits or costs as "achieving statutory objectives" and others as not, *id.*, is not necessary, not consistent with the economic principles governing benefit-cost analysis, may be impossible to do in a rational way or generally acceptable way because of statutory ambiguity, and may have the effect of biasing benefit-cost analyses, making them misleading for decision-making. Thus, there is no need to have a table drawing this distinction between benefits or costs that achieve statutory objections and those that do not in the preamble to any rulemaking, *see id.* at 35624, and imposing such a requirement would be arbitrary and capricious.

EPA additionally raises the idea of including a presentation of all benefit or cost categories or other factors that are specifically listed as factors EPA must consider under the relevant statutory provisions. *Id.* To the extent this would make the same distinction between benefits or costs meeting statutory objections and benefits and costs that do not, it should not be adopted for the same reasons set out above.

Retrospective Analyses. We are not providing remarks in response to EPA's request for comments on retroactive benefit-cost analyses, *id.*, because EPA has not provided any specific proposal for such retroactive analysis. Should EPA in the future provide sufficient additional specificity, in the form of a concrete rulemaking proposal or otherwise, we reserve the right to respond.

Sequence of Rules in Benefit-Cost Analysis. Similarly, we are not providing remarks in response to EPA's request for comments on "how sequencing of rules might affect the estimation of benefit and costs," *id.* at 35624, because EPA has not provided any specific proposal regarding this issue. Moreover, EPA has not even identified what issues or problems such sequencing might raise. Should EPA in the future provide sufficient additional specificity, in the form of a concrete rulemaking proposal or otherwise, we reserve the right to respond.

Making Information Public. EPA requests comment on "whether the proposed criteria regarding data, assumptions, and study selection reflect the Agency's commitment to be consistent and transparent." *Id.* As noted throughout these comments, we believe that the Proposal's provisions on these issues are not rational, necessary or appropriate, in part because they do not address any demonstrated problem with EPA consistency or transparency.

EPA's specific query regarding whether EPA should only use third-party models if the third party makes the models and assumptions "publicly available to the extent permitted by law," *id.*, is not sufficiently clear: for example, it does not specify what EPA means by "to the extent permitted by law." To the extent any such limitation on the use of third-party models would result in a bar on use of commonly used air quality modeling software that EPA or others with appropriate technical expertise have found reliable, EPA's suggestion is arbitrary and capricious and contrary to law and should not be adopted, for the same or similar reasons set out in comments submitted by many States and Cities on EPA's original and supplemental proposals to limit use of scientific evidence in rulemaking, which comments are incorporated herein; copies of those comments are attached.[20] Otherwise, we provide no comments on this issue at this time, but reserve the right to respond in the future should EPA provide sufficient additional specificity, in the form of a concrete rulemaking proposal or otherwise.

V. Comments On The Express Terms Of The Proposed Regulation

We provide the following comments on the specific provisions of the proposed rule. As a general comment and objection, EPA has not demonstrated that its benefit-cost analyses have suffered from any historic lack of consistency or transparency, and thus there is no need to promulgate any of the regulatory provisions below, and promulgation would be arbitrary and capricious. *See, e.g., Fed. Communications Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 513, 515 (2009) (agency must show that there are "good reasons" and "reasoned explanation" for action); *State Farm*, 463 U.S. at 42-43 (agency must provide a "satisfactory explanation" for action).

[20] Comments of Attorneys General of New York, *et al.*, at 4-5, 10-17 (Aug. 16, 2018) ("August 2018 Science Comments"); Comments of Attorneys General of New York, *et al.*, at 5-6, 22-30 (May 18, 2020) ("May 2020 Science Comments").

Proposed Section 83.1.

- The definition of "data" would require that data be "capable of being analyzed by . . . an independent party." 85 Fed. Reg. at 35625. Because this language could be interpreted to exclude anonymized medical data from the definition of "data" and therefore preclude use of studies relying on such medical data in EPA's benefit-cost analyses, this language is arbitrary and capricious and otherwise unlawful, and EPA should not adopt it. Such data is routinely used in epidemiological or other human health studies, and EPA has identified no problems with such use. Many States and Cities addressed this concern with excluding valid scientific studies in detail in their comments on EPA's original and supplemental proposals to limit use of scientific evidence in rulemaking, and we incorporate those comments here.[21]

- The definition of "regulatory options," *id.* at 35625, brackets the selected proposed or final option with one more stringent alternative and one less stringent alternative, and in so doing may result in a bias in favor of EPA ultimately choosing central options rather than a more environmentally protective one that is more consistent with statutory guidance or requirements. It is therefore arbitrary and capricious and potentially unlawful, and EPA should not adopt it.

- The definition of "significant regulation," *id.*, includes discretionary designation power for the Administrator, which as discussed in Section II.B.1 above, is arbitrary and capricious and otherwise not appropriate, and EPA should not adopt it.

- The definition of "social costs," *id.*, includes the "sum" of all costs, but the definition of social benefits, *id.*, does not. This apparent direction to include *all* costs but not necessarily all benefits is inconsistent with the general principles of benefit-cost analysis and would bias any such analyses. Accordingly, the definition of social benefits is arbitrary and capricious and potential unlawful, and EPA should not adopt it.

Proposed Section 83.3.

- Subsection (a) would require that benefit-cost analyses be prepared in accordance with "best available scientific information and best practices from the economic, engineering, physical, and biological sciences." *Id.* at 35626. But the proposed regulations do not define or otherwise indicate what these phrases mean, and therefore EPA could use them to inappropriately exclude otherwise appropriate information and practices from its preparation of benefit-cost analyses. To the extent that the use of the phrase "best available scientific information" in this provision is meant to have the same meaning as in Executive Order 13,783, the provision would be unnecessary. For these reasons, this requirement is arbitrary and capricious and potentially unlawful, and EPA should not adopt it.

- Subsection (a)(4)(iii) refers to the "degree of compliance by regulated entities with other regulations" as a factor to be considered in establishing a baseline for evaluating the proposed regulation. *Id.* at 35626. Because EPA does not explain what it means by this requirement, the

[21] August 2018 Science Comments at 5-6, 10-17; May 2020 Science Comments at 5-6, 22-30.

rationale for any such requirement, or how such a requirement would be implemented, this provision is arbitrary and capricious and potentially unlawful and EPA should not adopt it.

- Subsection (a)(5) states that EPA "must rely on the use of a framework that is appropriate for the characteristics of the regulation being evaluated and must provide an explanation for the approach adopted." *Id.* The proposed language of this provision does not provide any context or explanation of what the terms "framework," "characteristics," "appropriate" or "approach adopted" mean or refer to. To the extent that EPA intends this unmoored language in subsection (a)(5) to implement some or all of the discussion under the heading "Methods for Estimating Benefits and Costs" in the preamble to the Proposal at 35619-35620, that language does not suggest that, let alone make that clear. Moreover, that discussion at 35619-35620 does not appear to provide any more or different advice or instruction for performing benefit-cost analysis than the existing EPA Guidelines for Preparing Economic Analyses or OMB's Circular A-4. Accordingly, if EPA's intent is that this subsection (a)(5) would require compliance with that discussion, the subsection does not appear to serve any purpose not already served by the EPA Guidelines or Circular A-4, and accordingly would serve no purpose. As a result, this provision is arbitrary and capricious and potentially unlawful, and EPA should not adopt it.

- Subsection (a)(7) would require that regulatory requirements be linked to "the value that individuals place on the change in benefit endpoints that can be meaningfully attributed to those requirements" *Id.* EPA provides no rationale for the limitation of benefit figures to "the value that individuals place on the change" and does not provide a definition or other indication of what "meaningfully attributed" means. Accordingly, this provision is arbitrary and capricious and potentially unlawful, and EPA should not adopt it.

- Subsection (a)(7)(i) would require that any linkage between regulatory requirements and benefits be based on "a clear causal or likely causal relationship." *Id.* As discussed above, these terms are not adequately explained, and the restriction the provision would impose would artificially limit consideration of benefits of proposed Clean Air Act regulations. Accordingly, this provision is arbitrary and capricious and potentially unlawful, and EPA should not adopt it.

- Subsection (a)(7)(ii) would require use of "robust" scientific evidence, without defining or otherwise explaining what "robust" means in this context. EPA could therefore interpret this condition in an ad-hoc, biased way to inappropriately exclude appropriate or lawfully required information and practices from its preparation of benefit-cost analyses. Accordingly, this provision is arbitrary and capricious and potentially unlawful, and EPA should not adopt it.

- Subsection (a)(8)(ii) would require that EPA follow "well-defined economic principles using well-established economic methods." *Id.* To the extent that this phrase refers to the EPA or other relevant guidance, such as the EPA Guidelines for Preparing Economic Analyses or the Office of Management and Budget's Circular A-4, as suggesting in the preamble, *Id.* at 35620, then the provision serves no purpose, because EPA already follows this guidance and has provided no examples where it has not done so. To the extent that EPA means something else, then the provision is too unclear and vague. Either way, promulgation of this provision would be arbitrary and capricious and potentially unlawful, and EPA should not adopt it.

- Subsection (a)(9)(ii) would require a description of the "sources, extent and magnitude of significant uncertainties associated with the assessment." *Id.* at 35626. EPA does not define what "significant" means in this context. EPA could therefore interpret this requirement in an ad-hoc, biased way to inappropriately exclude appropriate information and practices from its preparation of benefit-cost analyses. More generally, as discussed above, EPA's repeated emphasis on uncertainty seems designed to, and may result in, inappropriate exclusion of appropriate, widely accepted information and practices from its preparation of benefit-cost analyses due to an excessive concern with uncertainty and an unrealizable desire for certainty in scientific, medical, or other analysis or evaluation. For these reasons, this provision is arbitrary and capricious and potentially unlawful, and EPA should not adopt it.

- Subsection (a)(9)(iii) places a number of limitations on selecting concentration-response relationships, *id.* at 35626, but these limitations are inappropriately and unnecessarily restrictive or otherwise flawed. With regard to subsection (a)(9)(iii)(B), as discussed in Section III.B above, EPA has not provided any rationale for the proposed requirement that the pollutant analyzed exactly "match[ ]" the pollutant at issue in the proposed regulation; there are many situations where different pollutants operate in the same or very similar ways with regard to human health or other consequences, either because the pollutants have similar structures or for other reasons, and studies for one of the similar pollutants may well be informative as to one of the other similar pollutants. With regard to subsection (a)(9)(iii)(C), EPA has not defined or otherwise provided guidance as to what "scientifically robust" means, leaving an opportunity for EPA to arbitrarily and capriciously make ad-hoc decisions to exclude or include studies on this basis.

With regard to subsection (a)(9)(iii)(D), there appears to be no rationale for excluding *all* studies that may not assess the influence of confounders, especially when there may be other means, outside the study at issue, to evaluate any such influence, or the role of alleged confounders may already have been addressed in other studies. Also, EPA has not defined or otherwise provided guidance as to what "appropriately matched" or "sufficiently similar" means, leaving an opportunity for EPA to arbitrarily and capriciously make ad-hoc decisions to exclude or include studies on these bases. For these reasons, this provision is arbitrary and capricious and potentially unlawful, and EPA should not adopt it.

- Subsection (a)(9)(iv) would require inclusion of studies that do not find a significant concentration-response relationship. *Id.* at 35626. Because inclusion of such studies may inaccurately suggest that no concentration-response relationship exists, this provision may provide a basis for EPA to inappropriately and irrationally exclude benefits that have a rational basis in other scientific studies. Because this appears to be yet another manifestation of EPA's intent to overemphasize uncertainty as a basis for reducing the amount of benefits to be considered and thus biasing benefit-cost analyses against benefits and in favor of costs, this provision is arbitrary and capricious and potentially unlawful, and EPA should not adopt it.

- Subsection (a)(9)(v) would expressly restrict EPA to consideration of one factor—technical feasibility—when determining the number of alternative concentration-response functions quantified for each endpoint. *Id.*. EPA does not explain why this should be the sole factor, to the exclusion of other factors, perhaps including the cost of developing alternative functions. Moreover, this restriction to consideration of only one factor is internally inconsistent, since in the preamble to the

proposed rule, EPA indicates that at least one other factor could be considered, namely, the "sensitivity of net benefits to the choice of concentration-response relationships." *Id.* at 35621. For these reasons, the provision is arbitrary and capricious and potentially unlawful, and EPA should not adopt it.

- Subsection (a)(9)(vi) would require EPA to select and identify concentration-response relationships "with the strongest scientific evidence, as well as evidence necessary to demonstrate the sensitivity of the choice of the concentration-response function on the magnitude and the uncertainty associated with air pollution-attributable effects." *Id.* at 35626. But EPA does not define or provide any guidance as to how to determine the "strongest scientific evidence" in this context. Moreover, the language in the provision after "as well as" is not clear, including, in particular what "magnitude" is at issue and what the "sensitivity . . . on" means. As a result, it is not possible to understand the meaning or import of this subsection or how it would operate. For these reasons, the provision is arbitrary and capricious and potentially unlawful, and EPA should not adopt it.

- Subsection (a)(9)(vii) identifies various aspects of selected concentration-response functions that EPA "must" characterize. *Id.* at 35626-35627. EPA has not provided any basis to conclude that EPA in the past has inadequately characterized or otherwise discussed aspects of concentration-response functions that it has used, and in the absence of such evidence, there is no need to codify such characterization requirements. Like many provisions of this proposed rule, this provision seems designed more to generate bases for rejecting concentration-response relationships, or fragmenting their applicability, so as to reduce the benefits of environmental regulations and thus bias the agency's benefit-cost analyses in favor of costs. Moreover, in some circumstances it may be impossible or unreasonably costly or difficult to provide the characterizations required, which constitutes another reason why requiring these characterizations is inappropriate. For all these reasons, the provision is arbitrary and capricious and potentially unlawful, and EPA should not adopt it.

- Subsection (a)(9)(viii) sets out proposed requirements relevant to use of probability distributions and certain statistics. *Id.*. at 35627. EPA has not defined or provided any other guidance as to what it means by "feasible" when it requires that EPA use a probability distribution when "feasible." Given that ambiguity, it may be "feasible" to generate a probability distribution but unreasonable because of cost or other factors. Indeed, EPA has provided no analysis of how much cost or other burden developing such probability distributions would impose on the agency, and likewise has not identified or otherwise provided any analysis of any benefits from requiring such creation and use of such distributions. In any event, EPA has not provided any basis to conclude that EPA's use of probability distributions or statistics in the past has been inadequate, so there is no demonstrated need for this provision.

Also, EPA has provided no rationale for its requirement that upper bound estimates only be used when central and lower bound estimates are presented. That requirement is irrationally asymmetrical, as EPA has not required that lower bound estimates only be used when central or upper bound estimates are presented. For all these reasons, this provision is arbitrary and capricious and potentially unlawful, and EPA should not adopt it.

- Subsection (a)(10) sets out proposed requirements regarding identification and analysis of uncertainties in the benefit-cost analysis. *Id.* at 35627. As discussed above, EPA's repeated emphasis on uncertainty seems designed to, and may result in, inappropriate disregard of, or

inappropriate reduction in the weight or consideration given to, certain benefits due to an excessive concern with uncertainty and an unrealizable desire for certainty in scientific, medical, or other analysis or evaluation, with the result of biasing benefit-cost analysis in favor of costs and against approval of proposed actions. In any event, EPA has not provided any basis to conclude that EPA's identification and analysis of uncertainties in the past has been inadequate, so there is no demonstrated need for this provision. EPA again has not defined or provided any other guidance as to what it means by "feasible" when it requires that EPA use quantitative methods to analyze uncertainty " to the extent feasible" or uses that term elsewhere in this subsection. It may be "feasible" to use quantitative methods for this purpose but unreasonable because of cost or other factors. Indeed, as discussed in Section II.B.2.b above, EPA has provided no analysis of the costs or other burdens that the Proposal would impose, and it specifically has not evaluated the costs or other burdens that using quantitative methods for this purpose would impose on the agency, and likewise has not identified or otherwise provided any analysis of any benefits from requiring such use.

In addition, the requirement in subsection (a)(10)(v) that EPA "must" characterize how probability distributions for input assumptions impact distribution of benefits and costs is subject to the same concerns as outlined in the preceding paragraph: EPA has provided no basis to conclude that the agency's past work has been inadequate on this point, EPA has not provided any discussion of the benefits and costs of this requirement or otherwise justified this requirement, and EPA has not even discussed the extent to which this evaluation of the relationship between input and output distributions could even be done. For all of these reasons, this provision is arbitrary and capricious and otherwise not appropriate, and EPA should not adopt it.

- Subsection (a)(11)(i) would require that EPA present the overall results of each option in a manner designed to be "objective, comprehensive, reproducible to the extent reasonably possible, and easily understood by the public." *Id.* at 35627. It is not clear what EPA means when it says that EPA's *presentation* should be "reproducible to the extent reasonably possible." This requirement seems nonsensical, as any presentation is reproducible by copying or excerpting, and the accuracy of such reproduction is generally not under EPA's control. And EPA has provided no basis for concluding that EPA has in the past not presented the results of each option in the manner that would be required under this provision. Because this provision is incomprehensible and serves no purpose, it is arbitrary and capricious and otherwise not appropriate, and EPA should not adopt it.

- Subsection (a)(11)(iii) would require that EPA's discussion of non-monetized and non-quantified benefits be "[c]onsistent with the best available scientific information." *Id.* EPA does not define or provide any other guidance as to how to determine what the "best available scientific information" is in this context, and an inappropriate interpretation could lead to exclusion of valid scientific evidence required by statute to be considered. As explained above in the first paragraph of the discussion of proposed Section 83.3, to the extent that the use of the phrase "best available scientific information" in this provision is meant to have the same meaning as in Executive Order 13,783, this provision would be unnecessary. In addition, EPA has provided no reason why such discussions could not be based on other, nonscientific information, such as facts about costs or benefits. For these reasons, this provision is arbitrary and capricious and potentially unlawful, and EPA should not adopt it.

- Subsection (a)(11)(iv) would require a detailed assessment and presentation of "sources of uncertainty that are likely to have a substantial effect on the results of the [benefit-cost analysis]". *Id.* EPA has not defined or provided any other guidance on how to determine a "substantial" effect in this context. EPA has presented no basis for concluding that in the past EPA has not given due consideration to uncertainty, or has not adequately discussed it in its benefit-cost analyses, consistent with EPA's guidelines for preparing economic analyses. In addition, as discussed above, EPA's repeated emphasis on uncertainty again seems designed to, and may result in, inappropriate exclusion of appropriate information and practices from its preparation of benefit-cost analyses due to an unwarranted concern with uncertainty and an unrealizable desire for certainty in scientific, medical, or other analysis or evaluation, resulting in a bias in favor of costs and against approval of agency action. For these reasons, this provision is arbitrary and capricious and otherwise not appropriate, and EPA should not adopt it.

- Subsection (a)(12) would require that all information EPA use be publicly available, and that, if EPA uses any proprietary information, EPA must make available, to the extent permitted by law, underlying inputs, assumptions and other information, while continuing to provide appropriate protection for confidential business information, personally identifiable information and other protected information. *Id.*. This provision presents many problems. EPA provides no reasons for imposing this requirement. Because the language contains undefined and unexplained exceptions, such as "to the extent permitted by law," and "continuing to provide appropriate protection" for various, not completely defined, types of information, it is not apparent what this provision would or would not require that EPA disclose. To the extent that ambiguity provides an opportunity for EPA to selectively make ad-hoc, unprincipled decisions as to what information to use, what information not to use, and what information to disclose, that would be arbitrary and capricious and contrary to EPA's purported goal in this proposed rulemaking of increasing consistency and transparency.

As discussed above, it would not be appropriate for EPA to use this provision or any similar provision to exclude use of epidemiological or other studies based on anonymized medical data on the ground that such data was not publicly available, as the incentive to provide inaccurate data does not exist in that context. Moreover, as noted above at the beginning of this Section V and in comments submitted by many States and Cities on EPA's proposed rulemaking on limiting use of scientific evidence, exclusions of such studies would be arbitrary and capricious and unlawful.[22] For these reasons, this new proposed provision is arbitrary and capricious and potentially unlawful, and EPA should not adopt it.

Proposed Section 83.4.

- For the reasons set out above, subsection (b), which would require a "presentation in the preamble of the public health and welfare benefits that pertain to the specific objective (or objectives, as the case may be) of the CAA provision or provisions under which the rule is promulgated," *id.* at 35627, is arbitrary and capricious and otherwise not appropriate, and EPA should not adopt it.

[22] August 2018 Science Comments at 5-6, 10-17; May 2020 Science Comments at 5-6, 22-30.

CONCLUSION

While EPA should seek to base its regulatory decisions on the highest-quality analyses, the Proposal would only decrease the efficacy and transparency of these decisions—and thus would lead to a decrease in protections afforded to public health, safety, and the environment in contravention of EPA's core mission. We urge EPA to abandon this damaging, arbitrary, and unlawful Proposal and instead conduct its benefit-cost analyses in conformance with well-established processes and guidance the agency has successfully employed for many years. If EPA nonetheless proceeds with the misguided Proposal, it should reclassify the proposal as an ANPRM given its numerous ambiguities and open questions, and should fulfill its duties to consult with state and local governments, and to acknowledge and fully address environmental justice impacts.

Sincerely,

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EXHIBIT A

August 13, 2018, Comment Letter on Advance Notice of Proposed Rulemaking (83 Fed. Reg. 27,524 (June 13, 2018)) submitted by the Attorneys General of New York, California, Illinois, Iowa, Maryland, Massachusetts, Minnesota (by and through it Minnesota Pollution Control Agency), New Jersey, Oregon, Vermont, Washington, the District of Columbia, and the Department of Environmental Protection of the Commonwealth of Pennsylvania.

THE ATTORNEYS GENERAL OF NEW YORK, CALIFORNIA, ILLINOIS, IOWA, MARYLAND, MASSACHUSETTS, MINNESOTA (BY AND THROUGH ITS MINNESOTA POLLUTION CONTROL AGENCY), NEW JERSEY, OREGON, VERMONT, WASHINGTON, THE DISTRICT OF COLUMBIA, AND THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE COMMONWEALTH OF PENNSYLVANIA

August 13, 2018

BY ELECTRONIC SUBMISSION TO REGULATIONS.GOV
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Re: Advance Notice of Proposed Rulemaking – Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process
83 Fed. Reg. 27524 (June 13, 2018)
Docket ID No. EPA-HQ-OA-2018-0107

Dear Acting Administrator Wheeler:

The undersigned twelve Attorneys General and State Agency appreciate this opportunity to comment on the advance notice of proposed rulemaking issued by former Administrator Pruitt regarding consistency and transparency in how the U.S. Environmental Protection Agency ("EPA") considers benefits and costs in in its rulemakings, 83 Fed. Reg. 27524 (June 13, 2018) (the "Administrator's notice"). For the reasons below, we oppose as unnecessary, ill-conceived, and unworkable, any rulemaking along the lines contemplated in the Administrator's notice, and respectfully ask that EPA not proceed with development of a proposed rule.

Introduction

Changes to EPA's consideration of cost-benefit analysis have wide-ranging implications for regulatory decisions on which our states rely. We have a strong interest in ensuring that these analyses faithfully follow the respective statutory regimes that govern their use and fully account for the benefits of federal regulation to the health and welfare of our residents and the environment. Some states' environmental laws and regulations expressly adopt EPA standards in all or some instances, or at the very least require an express justification for any deviation. A fundamental change in how EPA considers the relative costs and benefits of regulation would consequently affect standards that our states typically implement and enforce to protect public health and the environment. The balance of cooperative federalism in the implementation of these programs by the states depends on EPA fulfilling its duties under the statutes it administers as directed by Congress.

In light of the states' vested interests in EPA's faithful execution of its statutory duties, including the proper consideration of the costs and benefits of agency regulations, we are troubled by the fact that the Administrator's notice does not identify a problem that needs a solution. Although the notice expresses a desire to promote increased consistency and transparency in EPA's consideration of benefits and costs in rulemaking proceedings, the notice identifies no examples of EPA action where there was a lack of consistency or transparency. There is already ample guidance that promotes consistency and transparency in consideration of benefits and costs prepared by the Office of Management and Budget and EPA itself. Indeed, one of those guidance documents expressly states that its purpose is to provide consistency in agency treatment of benefits and costs, that is, to "standardiz[e] the way benefits and costs of Federal regulatory actions are measured and reported."[1]

The Administrator's notice identifies no instance where EPA has failed to follow that guidance. Nor does the notice explain why that existing guidance is inadequate. Instead, at most, the Administrator's notice identifies a few particular issues that have arisen in EPA rulemaking where an interested party has questioned EPA's approach to considering benefits and costs. To the extent, if any, that EPA needs to address such distinct issues – and the notice does not establish any such need – EPA can do so on a case-by-case basis and does not need to undertake a broad administrative rulemaking.

In addition, the Administrator's notice fails to distinguish between two types of analyses of benefits and costs: those done pursuant to statute ("statutory analyses") and those done pursuant to executive order or other authority ("nonstatutory analyses"). By definition, statutory analyses are constrained by relevant statutory language and structure established by Congress. In light of the large number of statutory programs that EPA administers, and the variety of statutory standards required by Congress that govern the consideration of benefits and costs in those programs, the possibilities for imposing consistency on analyses performed for these various programs may well be extremely limited or even nonexistent. More importantly, any requirement to impose a uniform benefit-cost analysis on EPA rulemaking across the board, notwithstanding specific statutory mandates, would invite arbitrary and capricious agency action, since any such requirement could potentially force EPA to rely on factors in its decision making that Congress did not intend it to consider, or otherwise fail to consider matters Congress deemed essential. EPA is not empowered to substitute its judgment for Congress's, and, as the Supreme Court recently held, where Congress has not required formal benefit-cost analysis, EPA is not required to undertake it. *See Michigan v. EPA,* 135 S. Ct. 2699, 2711 (2015).

In sum, the Administrator's notice has identified no problems regarding consistency or transparency in EPA's consideration of benefits and costs and therefore has established no reason for EPA to promulgate a rule or otherwise to change EPA's approach to that subject. Indeed, any broad-based attempt to impose additional consistency or transparency could unduly curtail EPA's flexibility to carry out its mandate. That mandate, as expressed in many statutes, is

[1] Office of Management & Budget, Circular A-4 at 1 (Sept. 17, 2003), available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.

to protect human health and the environment, and any EPA effort to address unidentified consistency and transparency issues, if undertaken at all, should not interfere with EPA's more important statutory tasks. As with EPA's other pending proposals initiated by former Administrator Pruitt that threaten to undermine the integrity of EPA's science- and data-based decision making, including the rule that would limit the use of scientific evidence in rulemakings[2] and the directive forbidding many of the most qualified experts to sit on EPA science advisory panels,[3] the Administrator's notice signals yet another unsupported attempt to undermine EPA's mission to protect public health and the environment. We urge you to discontinue further development of a proposed rule.

Statutory and Regulatory Context

I. EPA's Ability to Consider Costs and Benefits Necessarily Varies Under the Statutes it is Tasked with Administering

The Administrator's notice is by no means a complete survey of the environmental statutes under EPA's administration that require the agency to conduct some level of cost-benefit analysis. Without a comprehensive analysis, the Administrator's notice does not, and cannot, appreciate the difficulty of adopting any meaningful regulation that would both satisfy the statutory requirements and constraints of these disparate statutes, on the one hand, with the notice's stated desire to impose "consistency" and "uniformity" on the EPA's rulemaking process.

EPA administers a wide variety of major statutes, including, among others: the Clean Air Act, 42 U.S.C. §§ 7401-7671q; the Clean Water Act, 33 U.S.C. §§ 1251-1388; the Safe Drinking Water Act, 42 U.S.C. §§ 300f through 300j-26; the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675; the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k; the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2697; and the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-163y.

Within each of those statutes, there may be many separate regulatory programs, and the statutory standards for each of those programs may vary as to how they direct EPA's consideration of benefits or costs. The Clean Air Act, for instance includes, among others, the following interrelated but distinct programs: national ambient air quality standards ("NAAQS"), hazardous air pollutants, and new source standards of performance. Under each of these programs, Congress prescribed different approaches as to how and whether EPA could consider benefits and costs in rulemakings.

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[2] 83 Fed. Reg. 18768 (Apr. 30, 2018).

[3] Pruitt, E.S., "Strengthening and Improving Membership on EPA Federal Advisory Committees," Oct. 31, 2017, *available at*: https://www.epa.gov/sites/production/files/2017-10/documents/final_draft_fac_directive-10.31.2017.pdf.

For example, under the NAAQS program, EPA cannot consider costs in establishing primary and secondary standards that are "requisite to protect the public health" with an "adequate margin of safety." 42 U.S.C. § 7409(b)(1). The Supreme Court has interpreted that provision to "unambiguously bar[]" EPA from considering costs. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001).

In contrast, the section of the Clean Air Act's hazardous air pollutants program setting out the standard for deciding to regulate power plants, while also not mentioning costs, *see* 42 U.S.C. § 7412(n)(1)(A) (providing that EPA shall regulate if it "finds ... regulation is appropriate and necessary after considering the results of a [statutorily required public health] study"), has nonetheless been held in that particular context to require some consideration of costs. *Michigan*, 135 S. Ct. at 2708-2709.

As for the new source performance standards program, the statute expressly requires consideration of the cost of achieving emissions reductions in setting the emission control level. 42 U.S.C. § 7411(a)(1). Here, the D.C. Circuit has upheld EPA's decision not to apply a formal benefit-cost standard, but instead to use a standard that determined that a control level was acceptable unless "the cost of meeting [that level] would be greater than the industry could bear and survive." *Portland Cement Ass'n v. Train*, 513 F.2d 506, 508 (D.C. Cir. 1975). This structure is not unique to the Clean Air Act. As discussed below, the Clean Water Act similarly differentiates in its application of costs and benefits to different standards EPA is charged with setting. *See* pages 9-10, *infra*.

The Administrator's notice starts from a false premise that "uniformity" across these disparate statutes and provisions is lawful and possible. But, as noted above and explained further in the next section, what the notice terms a "perceived inconsistency" is actually variability dictated by statute and case law. Congress has given EPA discretion to consider costs and benefits very differently in its rulemaking and other activities, including the manner in which it must consider them. The Administrator's notice assumes, wrongly, that the "variety of concepts of 'costs' that may be considered across statutes and even under the same statute" is a problem in need of a rulemaking solution.

II. EPA Has Successfully Relied on Longstanding Guidance In Considering Costs and Benefits in its Rulemaking Activities

To the extent that EPA's consideration of costs and benefits is appropriate and allowed by statute, EPA's actions are subject to other directives, including executive orders and agency guidance, making it unnecessary for EPA to proceed with the rulemaking it contemplates here. For decades, and through previous administrations' regulatory reform efforts, this guidance, together with EPA's program-specific regulations, has sufficed to direct EPA's rulemaking efforts while balancing statutory constraints and providing necessary program-by-program flexibility. The Administrator's notice acknowledges that "many previous administrations" have reviewed EPA's cost-benefit analysis guidance and regulations, and have modified them from

time to time.[4] But the Administrator's notice cannot point to any previous attempt to abandon the previous guidance and to shoehorn all of EPA's programs into a single cost-benefit rulemaking. The Administrator's notice fails to make the case why such an imprudent attempt is warranted now, given the appropriateness of existing guidance on the same topic.

For example, Executive Order 12866 requires all executive agencies, including EPA, to analyze benefits and costs on "significant regulatory actions."[5] Specifically, for each significant regulatory action, the order requires an agency to provide, among other things, an "assessment of the potential costs and benefits of the regulatory action." *Id.* at 51741. For actions deemed to be significant regulatory actions under provision (1), often referred to as economically significant regulatory actions, the agency must provide a more detailed formal benefit-cost analysis, which must include "[a]n assessment, including the underlying analysis of benefits anticipated from the regulatory action . . . together with, to the extent feasible, a quantification of those benefits," as well as an analogous assessment and quantification of the costs anticipated from the action. *Id.* The order also directs agencies, as a general principle and to the extent permitted by law, to "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." *Id.* at 51736. In 2011, Executive Order 13563 reaffirmed these requirements and directed that, in applying these principles, agencies use "the best available techniques" to quantify benefits and costs as accurately as possible, and added that they may consider "values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts."[6]

The Office of Management and Budget has provided guidance regarding the implementation of Executive Order 12866 in its Circular A-4. One of the purposes of the Circular is to provide consistency in agency treatment of benefits and costs, that is, to

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[4] 83 Fed. Reg. at 27526 n.8.

[5] 58 Fed. Reg. 51735 (Oct. 4, 1993). The order defines "significant regulatory action" as:

> any regulatory action that is likely to result in a rule that may:
>
> (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
>
> (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
>
> (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
>
> (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Id. at 51738.

[6] 76 Fed. Reg. 3821 (Jan. 21, 2011).

"standardiz[e] the way benefits and costs of Federal regulatory actions are measured and reported." *Id.* at 1.

EPA itself has prepared a guidance document regarding consideration of benefits and costs, entitled Guidelines for Preparing Economic Analyses.[7] The Guidelines provide detailed discussion and guidance on all aspects of evaluating the benefits and costs of agency action "to support policy decisions and meet[] the requirements described by related statutes, [executive orders] and recommendations in guidance materials."[8] In particular, the Guidelines have chapters setting out EPA's considered approaches to implementing benefit-cost analysis, including not only evaluation of the benefits and costs themselves, but also choosing baselines and discount rates and addressing distributional issues. *See generally id.*[9]

In light of EPA's many years of successful reliance on the guidance already available, it would be both unnecessary and highly counterproductive for EPA to impose across-the-board reforms along the lines contemplated in the Administrator's notice.

Specific Responses to the Administrator's Notice

We have organized our comments here by the same headings used in the Administrator's notice.

I. Background

The title of the Administrator's notice invokes a search for increased "consistency" and "transparency" in EPA rulemaking, and the body of the notice uses those two terms repeatedly. But the notice identifies no inappropriate inconsistency or lack of transparency in EPA's past rulemakings.[10]

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[7] Guidelines for Preparing Economic Analyses (Dec. 2010, updated May 2014), *available at*: https://www.epa.gov/sites/production/files/2017-08/documents/ee-0568-50.pdf

[8] *Id.* at 1-1.

[9] We cite Circular A-4 and the Guidelines in this comment letter as examples of guidance that already direct EPA to consider the benefits and costs of proposed action in consistent and transparent ways. In citing those documents, we do not endorse, adopt or otherwise concede the appropriateness of any particular directive or suggestion set out in those documents.

[10] Indeed, recent EPA regulatory impact analyses for air pollution rules contain hundreds of pages discussing the benefits and costs of those rules, including detailed analyses of compliance costs, economic and employment impacts, health and welfare benefits (both quantified and unquantified), and uncertainty, with consistent reference to and reliance on the guidance contained in OMB and EPA guidance documents. *See, e.g.*, EPA, *Regulatory Impact Analysis of the Cross-State Air Pollution Rule (CSAPR) Update for the 2008 National Ambient Air Quality Standards for Ground-Level Ozone* at 1-3, 4-2 through 4-3, 4-8, n. 57, 4-26, 5-5, 5-15, 5-16 through 5-17, 5-23 through 5-29, 5-37, 6-1 through 6-32, 7-1 to 7-2 (Sept. 2016); EPA, *Regulatory Impact Analysis of the Final Revisions to the National Ambient Air Quality Standards for Ground-Level Ozone* at 1-3, 1-5, 4-13, 4-4, 4-36 through 4-44, 5-9 through 5-14, 6-16 through 6-20, 6-77 through 6-88, 6-89 through 6-92, 6-61, 6-63 & n.158, 8-1, 8-8 through 8-9, 8-16 (Sept. 2015); EPA, *Regulatory Impact Analysis for the Clean Power Plan Final Rule* at ES-12

In fact, existing guidelines already provide for how consistency and transparency should be addressed in agency cost-benefit analyses. Circular A-4 and the Guidelines provide significant guidance for EPA to apply when analyzing benefits and costs. For example, Circular A-4 has an entire subsection devoted to the considerations involved in "Developing a Baseline" against which to measure the benefits and costs of a proposed rule.[11] The Circular notes that the choice of an appropriate baseline is not a mechanical decision and "may require consideration of a wide range of potential factors." The Circular then cites EPA's 1998 polychlorinated biphenyl disposal rule as a "good example" of evaluating benefits and costs using multiple baselines, "each reflecting a different interpretation of existing regulatory requirements."[12]

Similarly, EPA's Guidelines have an entire chapter entitled "Analyzing Costs."[13] Among other things, that chapter discusses broad categories of costs, such as explicit and implicit costs, and direct and indirect costs.[14] The chapter then defines specific types of costs, including incremental costs, capital costs, operating and maintenance costs, industry costs, transaction costs and government regulatory costs.[15]

The Administrator's notice identifies no inconsistency between the directives or suggestions in those guidance documents and EPA's analysis of benefits and costs in any particular regulatory proceeding. Nor does the notice identify any way in which the directives or suggestions in Circular A-4, the Guidelines, or any other relevant guidance document are inadequate or should or could be revised. For example, the notice does not indicate how EPA could condense the detailed 21-page discussion of costs in the Guidelines chapter into a short, useful definition of "costs." Finally, the Administrator's notice does not identify any instance where EPA's consideration of benefits and costs suffered from a lack of transparency.

On a separate note, the scope of the advance notice is unclear. The title and much of the text refer to "rulemaking," but there are instances where the text purports to address an arguably broader set of "regulatory decisions." 83 Fed. Reg. at 27527. For the reasons we set out, EPA should not proceed with this rulemaking, but if it does, it should clarify its intent as to the scope of applicability of any rulemaking or other action it may take as a follow-up to this advance notice.

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through ES-14, 3-45, 4-19, 4-42 through 4-43, 5-1 through 5-7, 6-1 through 6-36, 7-1 through 7-21, 8-5 through 8-9 (Aug. 2015).

[11] Circular A-4 at 15-16.

[12] *Id.* at 15.

[13] Guidelines at 8-1 through 8-21.

[14] *Id.* at 8-7 through 8-8.

[15] *Id.*

II. Topics for Which EPA Is Seeking Input

A. The Nature of Potential Concerns Regarding Perceived Inconsistency and Lack of Transparency

The Administrator's notice identifies no circumstances in which an EPA rulemaking has lacked consistency or transparency, and it therefore provides no basis for any regulatory changes to address such perceived issues. Even if EPA could identify instances of inconsistency or lack of transparency in its rulemaking, the Administrator's notice is still unnecessary and potentially harmful to EPA's mission, as discussed herein.

B. Potential Approaches for Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process

1. What would increased consistency look like?

a. Given statutory constraints, how could EPA more consistently adhere to existing guidance on benefit-cost analysis principles, definitions and analytical techniques whether across the entire agency or specific programs? For example, to what extent, if any, should EPA develop a regulatory action that commits the Agency to following its existing peer-reviewed guidance documents on risk assessment and Guidelines for Preparing Economic Analysis *when developing future rulemakings?*

This set of questions is lacking in foundation, as the Administrator has identified no circumstances where EPA under previous administrations has failed to follow existing EPA guidance, such as the Guidelines, or other relevant guidance, such as Circular A-4. Because the Administrator's notice has not identified any instances in which EPA did not previously follow relevant guidance, it has identified no instances where deviation from applicable guidance was inappropriate.

By contrast, in some recent rulemakings, EPA has focused on compliance costs without adequately incorporating consideration of costs to society, inconsistent with the relevant guidance.[16] This is a problem EPA could cure, however, by simply following the guidance that is already in place.

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[16] *See, e.g.*, EPA, Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light-Duty Vehicles, 83 Fed. Reg. 16077 (Apr. 2018); and EPA, Regulatory Impact Analysis for the Review of the Clean Power Plan: Proposal 44 (2017), *available at* https://www.epa.gov/sites/ production/files/2017-10/documents/ria_proposed-cpp-repeal_2017-10.pdf; *see also* Comments of Attorneys General of New York *et al.* on Reconsideration of Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light-Duty Vehicles and Comment on Model Year 2021 Greenhouse Gas Emissions Standards, Docket ID No. EPA-HQ-OAR-2015-0827 (Oct. 5, 2017), *available at*: https://www.regulations.gov/document?D=EPA-HQ-OAR-2015-0827-10132; Comments of Attorneys General of New York *et al.* on EPA's proposed Repeal of Carbon Pollution Emission Guidelines for Existing Stationary

b. *Should EPA consider adopting uniform definitions of specific terms used in statutes* – e.g., *"cost," "benefit," "economic factors," "reasonable," "appropriate," and "weight of scientific evidence" – and specifying ex ante how they will be factored into subsequent regulatory decisions? How should EPA approach the scope of the uniformity of these definitions (*e.g., *within a particular regulatory program; within statute; across statutes)*

For EPA to adopt uniform definitions of these statutory terms is problematic for several reasons. First, any uniform or "one size fits all" definition may be inconsistent with statutory language. Second, assuming that EPA did seek to develop such cross-program definitions, it is far from apparent that any more specific, cross-program definition of costs is even possible.

- ***Adopting uniform definitions of statutory terms would be inconsistent or interfere with EPA regulatory action.***

First, it would be impossible to draft a single definition that encompasses and incorporates all of the relevant statutory standards that Congress has established. For example, the Supreme Court has acknowledged that the meaning of the term 'appropriate' depends on the statutory context. In *Michigan*, the Court held that "appropriate," in the context of the Clean Air Act's hazardous-air-pollutants program, required consideration of costs, 135 S. Ct. at 2707. At the same time, the Court noted that there are "undoubtedly" settings in which the term "appropriate" does not require consideration of cost. *Id.* Any effort to impose a uniform definition of such statutory terms would impose artificial consistency in EPA's actions under differing statutes and create likely conflicts with Congressional intent. Not only would this inevitably generate litigation over the validity of the rule, it would place EPA in the position of challenging federal court decisions that have validated EPA's prior determinations of costs and benefits. Instead, EPA must retain the legal flexibility to comply with and apply the varied directions and constraints set out in the numerous statutes that it implements in accord with the requirements and norms of sound administrative decision making.

Given the reality that the statutes governing EPA's actions differ in their purposes and approaches to regulation, it would be impossible to craft a single definition that is consistent with the purposes and approaches taken in all of the statutes that EPA administers – or even some subset of more than two or three of those statutes.

For example, different programs for establishing effluent limitations under the Clean Water Act allow EPA to consider costs to varying degrees. One statutory standard for setting effluent limitations for water pollution is "best practicable control technology," or BPT, which requires "consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application." 33 U.S.C. § 1314(b)(1)(B). The Supreme Court has held that this provision requires a comparison of the aggregate cost to

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Sources: Electric Utility Generating Units, at 38-43 (Apr. 26, 2018), *available at*: https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-20778.

industry with the aggregate benefits. *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 76-77 (1980). The Fifth Circuit has stated that EPA need not apply any particular approach in determining BPT so long as it considers total costs in relation to total benefits and the costs are not "wholly disproportionate" to the benefits. *Chem. Mfrs. Ass'n v. EPA*, 870 F.2d 177, 184 (5th Cir.), *decision clarified on reh'g*, 885 F.2d 253 (5th Cir. 1989).

A second standard under the Clean Water Act is "best conventional technology," or BCT, which requires "consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived." 33 U.S.C. § 1314(b)(4)(B). The Fifth Circuit has stated that BCT is subject to a form of benefit-cost analysis that evaluates "the extent that the increased cost of treatment [would] be reasonable in terms of the degree of environmental benefits." *Chem. Mfrs. Ass'n*, 870 F.2d at 205.

Another standard for setting effluent limits under the Clean Water Act is "best available technology economically achievable," or BAT, which requires selection of technology that is "economically achievable" for the relevant class of polluters, and "will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants." 33 U.S.C. § 1311(b)(2)(A). In particular, EPA must consider the "cost of achieving" the selected BAT limit. 33 U.S.C. § 1314(b)(2)(B). For this program, EPA does not need to ensure that benefits exceed costs, but instead can promulgate BAT limits "whose costs are significantly disproportionate to their benefits" so long as the selected limit is "economically feasible for the industry as a whole." *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 936 (5th Cir. 1998); *see also Entergy Corp. v. Riverkeeper*, 556 U.S. 208 (2009) (EPA permitted to use cost-benefit analysis in setting BAT standards for cooling water intake structures for power plants); *Am. Petroleum Inst. v. EPA*, 858 F.2d 261, 265 (5th Cir. 1988) ("a direct cost/benefit correlation is not required, so even minimal environmental impact can be regulated, so long as the prescribed alternative is technologically and economically achievable"); *Nat'l Ass'n of Metal Finishers v. EPA*, 719 F.2d 624, 662 n.64 (3d Cir. 1983) (for BAT, "cost is no longer considered in comparison to effluent reduction benefits. Instead, [EPA] only looks at the cost of achieving the requisite effluent reduction").

It would be exceedingly difficult if not impossible for EPA to set common definitions that could apply across these three programs given their different cost focuses, let alone to set common definitions that could apply to these programs as well as others under the Clean Water Act and other statutes. The statutes EPA implements require flexibility. As noted by the Office of Management and Budget, EPA's analysis cannot be set by formula; it must be specifically tailored to the statute EPA is implementing:

> You will find that you cannot conduct a good regulatory analysis according to a formula. Conducting high-quality analysis requires competent professional judgment. Different regulations may call for different emphases in the analysis,

> depending on the nature and complexity of the regulatory issues and the sensitivity of the benefit and cost estimates to the key assumptions."[17]

Moreover, if attempted, the development of uniform definitions may well serve no purpose. To apply broadly without running afoul of substantive statutory directives, any definitions of "costs" or "benefits" inevitably would be so generic as to provide little actual guidance in the context of very different programs, technologies, and industries, and interpreting such generic definitions might result in creating the perceived inconsistency or transparency concern(s) that they were designed to address. Use of such generic terms would also make it difficult for EPA to perform rigorous, evidence-based analysis consistent with its legal mandate.

Another approach contemplated by the Administrator's notice is the development of definitions that might only apply to a limited number of programs under a specific statute. But that task might not be much easier, as even within a single statute, such as the Clean Air Act, there are different programs that consider costs in different ways, as noted above. The development of multiple definitions, each of which applying to only a few programs under a single statute, could be resource intensive for no identified benefit.

- ***The Administrator's notice does not establish that uniform definitions of statutory terms are even possible.***

Second, assuming that EPA did seek to develop such cross-program definitions, nothing in the Administrator's notice suggests, let alone establishes, that any more specific, cross-program definition of costs is advisable or even possible. For example, as regards the term "costs," as noted above, the chapter entitled "Analyzing Costs" in the Guidelines is 21 pages long, and identifies and discusses a wide variety of categories and types of costs. As discussed below, the same difficulty applies to each of the other terms identified in the Administrator's notice – "benefit," "economic factors," "reasonable," "appropriate," and "weight of scientific evidence."

With regard to defining "reasonable" in particular, the Supreme Court has explained what constitutes unreasonable, or "arbitrary and capricious" agency action under the Administrative Procedure Act. That standard makes clear that "reasonable" is entirely context-dependent, and will vary based on the statute in which it appears and the factors that Congress has directed the agency to consider:

> [T]he 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. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not

[17] Circular A-4 at 3 (Sept. 17, 2003).

> intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 42-43 (1983) (internal quotations and citations omitted). Thus, what might be "reasonable" in one context may not be so in another, based on, for example, the factors that Congress has directed EPA to consider. Consequently, committing EPA to a single definition of "reasonable" (or any of the statutory terms listed in this question) would be at best unhelpful and will likely run contrary to many or all of the laws that EPA implements.

c. *To what extent should standard benefit-cost analysis principles (e.g., setting a standard to maximize net benefits) guide the selection of specific statutorily required metrics and thresholds (e.g., "reasonableness") against which to measure the effects of a proposed regulation?*

This question suggests that EPA might be required to interpret statutory terms such as "reasonableness" to mean application of formal benefit-cost analysis. As noted above, in the *State Farm* decision, the Supreme Court has already set out a standard for what constitutes unreasonable, or "arbitrary and capricious" agency action. The *State Farm* standard does not require use of benefit-cost analysis or reliance on any evaluation of numeric benefits or costs to guide EPA's decision making.

As regards the meaning of the term "reasonableness," or any other statutory standard that Congress may have enacted, if Congress had intended that a given statutory program rely on strict benefit-cost analysis or a maximization-of-net-benefits standard, Congress would have instructed EPA accordingly by using those terms in the statute, or by leaving some indication in the legislative history. *See Michigan*, 135 S. Ct. at 2711 (where Congress did not "unambiguously require[] [EPA] ... to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value," EPA had the discretion to account for cost without doing so).

More generally, as the Supreme Court noted in *Michigan*, the extent to which EPA may lawfully consider benefits and costs in rulemaking varies depending on the language used in a particular statute. Given the different language Congress has used in various statutes, there are many ways in which EPA may consider benefits and costs in various regulatory programs, and attempting to harmonize such consideration across different statutes would conflict with the language or interpretation of the statutes.

Assuming, for the sake of argument, the existence of agreement on what a term means, there may not be a consistent understanding of how to implement that term. As noted above, the Office of Management and Budget has spoken approvingly of EPA's use of different interpretations of a statutory term in one rulemaking. The Supreme Court, in turn, has endorsed

EPA's use of different interpretations of the same statutory term when used in different parts of the Clean Air Act. *See Envtl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 573-81 (2007) (upholding different interpretations of the term "modification" as applied to separate programs in the statute). Use of different interpretations may well be required and is likely to be even more appropriate when evaluating a term under different statutes.

Even within the context of consideration of benefits or costs, the Office of Management and Budget and EPA both acknowledge that in some circumstances approaches other than maximization of net benefits – use of cost-effectiveness analysis, for example – may be appropriate.[18] The Administrator's notice does not acknowledge this, and provides no basis for choosing one particular economic evaluation approach or another under any particular statutory program, let alone a basis for choosing a criterion that would somehow be consistent with a number of widely differing statutory standards.

> d. *What improvements would result from a general rule that specifies how the Agency will factor the outcomes or key elements of the benefit-cost analysis into future decision making? For example, to what extent should EPA develop a general rule on how the Agency will weigh the benefits from the reductions in pollutants that were not directly regulated (often called "co-benefits" or "ancillary benefits") or how it will weigh key analytical issues (e.g., uncertainty, baseline assumptions, limited environmental modeling, treatment of regulating multiple pollutants within one regulatory action) when deciding the stringency of future regulations? In addition, frequently scientific understanding is not adequate either to quantify or to monetize the effects of some pollutants or other impacts. How should these potentially important but non-quantified and/or non-monetized effects be included in decision making?*

Here, the Administrator's notice poses essentially two questions: whether to set general rules for using particular elements of benefit-cost analysis in decision making; and whether to incorporate in its decision making effects that are not quantifiable or reduced to a specific financial benefit or cost.

As a general matter, it is difficult to identify broad proposals responsive to the first question for a number of reasons. As noted above, different statutory programs require consideration of different factors in different contexts. Thus, attempting to impose uniformity is impractical and would likely create conflicts with the laws that EPA implements.

With regard to the specific issue of co-benefits, also known as ancillary benefits, the Administrator's notice identifies no reason to preclude EPA from considering them in its rulemaking, except to the extent the relevant statute would indicate otherwise. Circular A-4 and the Guidelines already address the issue of co-benefits, indicating that co-benefits should be

[18] *See, e.g.*, Circular A-4 at 9, Guidelines at 7-1 n.1, 11-2, A-14.

included in formal cost-benefit analysis.[19] This approach is consistent with the purpose of cost-benefit analysis as articulated by economists: the purpose is to sum up the monetary value of all consequences of the action that can be given a monetary value, whether positive or negative.[20] The standard economic theory of cost-benefit analysis does not exclude some costs or some benefits.[21]

Adhering to these guidelines, EPA has for decades taken co-benefits into account when evaluating Clean Air Act regulations.[22] Further, in evaluating EPA rules, courts have specifically required the agency to consider similar ancillary or indirect effects. *See Am. Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1051-52 (D.C. Cir. 1999) (Clean Air Act's protective public health purpose required EPA to consider all beneficial health effects when setting NAAQS, rather than only "half of a substance's health effects"), *rev'd on other grounds sub nom. Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001); *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1224-25 (5th Cir. 1991) (EPA's ban of asbestos-based brakes under Toxic Substances Control Act not supported by substantial evidence where it failed to consider indirect safety effects of substitute options).

Importantly, EPA's consideration of co-benefits in evaluating Clean Air Act regulations has led to dramatic improvements in public health and demonstrable economic benefits.[23] Overall, according to a 2016 report by the Office of Management and Budget, EPA's major rulemakings between 2005 and 2015 brought an estimated $175 to $678.1 billion in benefit,

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[19] Circular A-4 at 26; Guidelines at 11-2.

[20] *See, e.g.*, Boardman, A.E. *et al.*, *Cost-Benefit Analysis*, at 2, Prentice Hall (4th Ed. 2011).

[21] *See, e.g.*, Gramlich, E.M., *A Guide to Benefit-Cost Analysis*, at 8, Waveland Press, Inc. (1990).

[22] See, e.g., 75 Fed. Reg. 51,570, 51,578, 51,582-83 (Aug. 20, 2010) (considering indirect benefits from reducing carbon monoxide, volatile organic compounds, and nitrogen oxides in regulating hazardous air pollutants from reciprocating internal combustion engines); 72 Fed. Reg. 8428, 8430 (Feb. 26, 2007) (finding that "[a]lthough ozone and PM2.5 are considered criteria pollutants rather than 'air toxics,'" their reductions as "are nevertheless important co-benefits" of proposed controls on mobile sources to reduce emissions of benzene and other section 112 pollutants); 63 Fed. Reg. 18,504, 18,585–87 (Apr. 15, 1998) (discussing the indirect benefits of reducing co-pollutants like volatile organic compounds, particulate matter, carbon monoxide, and SO2 through section 112 standards for pulp and paper producers); 56 Fed. Reg. 24,468, 24,469, 24,473 (May 30, 1991) (justifying section 111(b) performance standards and section 111(d) emission guidelines for municipal solid waste landfills based in part on "the ancillary benefit of reducing global loadings of methane"); 52 Fed. Reg. 25,399, 25,406 (Jul. 7, 1987) (considering "the full spectrum of the potential impacts of regulation," including "indirect benefits accruing from concomitant reductions in other regulated pollutants" in deciding to regulate emissions from municipal waste incinerators under sections 111(b) and (d)).

[23] *See, e.g.*, EPA, *Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards*, EPA-452/R-11-011, at 5-1 (Dec. 2011), *available at*: https://www3.epa.gov/ttnecas1/regdata/RIAs/matsriafinal.pdf; *EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule*, EPA-452/R-15-003, at 4-27 (Aug. 2015), *available at*: https://www3.epa.gov/ttnecas1/docs/ria/utilities_ria_final-clean-power-planexisting-units_2015-08.pdf; *see also* Castle, Kimberly M. and Revesz, Richard L., Environmental Standards, Thresholds, and the Next Battleground of Climate Change Regulations (April 2, 2018). Minnesota Law Review, Vol. 103, 2018, Forthcoming; NYU School of Law, Public Law Research Paper No. 18-22; NYU Law and Economics Research Paper No. 18-12; *available at*: SSRN: https://ssrn.com/abstract=3154669.

measured by factors including the number of preventable deaths, hospital visits and lost work and school days, and $43.2 to $50.9 billion in costs.[24]

As for nonstatutory analyses pursuant to Executive Order 12866 or otherwise, we know of no reason to exclude co-benefits, and again, the Administrator's notice identifies no reason to do so. With regard to its Executive Order 12866 formal cost-benefit analyses in particular, EPA has no basis on which to exclude any monetizable benefits to human health or the environment from the analysis, and for EPA to adhere to its mission of protecting human health and the environment, co-benefits must be considered in cost-benefit analysis. In sum, absent some prohibition on consideration of a particular type of benefit or cost, EPA should incorporate all benefits and costs in its nonstatutory formal cost-benefit analyses.

In addition, guidance documents already instruct EPA and other agencies on how to weigh "key analytical issues" in the future regulatory actions. Uncertainty could affect virtually every aspect of an analysis of costs and benefits. Many different types of uncertainty arise in environmental rulemaking, including scientific uncertainty, economic uncertainty, and uncertainty about inputs, processes and outputs.[25] EPA may not be able to quantify all types of uncertainty, and even for different types of uncertainty that EPA is able to quantify, it may not be able to quantify them all in the same way or to the same extent.

That is not to say, however, that such uncertainties should not fall within consideration of EPA's consideration of benefits and costs. Indeed, many areas where costs or benefits are difficult to quantify—such as benefits of limiting contaminant exposure to humans and ecosystems—are essential in considering the costs and benefits of any particular regulation. The existing guidance documents already provide direction on how to address uncertainty in evaluating benefits and costs of proposed EPA rules. Circular A-4 devotes four pages to the subject of uncertainty.[26] The Guidelines address uncertainty as regards many specific aspects of evaluating benefits and costs, including setting the baseline against which the regulation's benefits and costs are evaluated, setting a discount rate to address future benefits and costs, and analyzing the benefits and costs themselves.[27] The Administrator's notice does not address any of this existing guidance applicable to EPA rulemaking, let alone explain why this existing guidance is inadequate, how this existing guidance could be improved, or in what instances EPA has failed to abide by this guidance.

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[24] *See* "2016 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act," Office of Management and Budget, *available at*: https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative_reports/draft_2016_cost_benefit_report_12_14_2016_2.pdf.

[25] *See, e.g.*, A. Myrick Freeman, III, *The Measurement of Environmental and Resource Values: Theory and Methods* at 40-41 (2nd Ed. 2003).

[26] Circular A-4 at 38-42.

[27] *See, e.g.*, Guidelines at 5-5, 5-13, 5-14, 6-16, 6-17, 6-19, 7-5, 7-6, 7-45, 7-49, 8-12, 10-16, 11-1, 11-3, 11-4, 11-9 through 11-12.

As regards "baseline assumptions," it is not clear what the Administrator's notice means by that term: the Administrator may be referring (a) specifically to the assumptions underlying the choice of the baseline against which the benefits and costs of the proposed regulation would be measured, or (b) more generally to all foundational assumptions for the analysis of benefits and costs.

If the Administrator is referring to the latter, more specificity would be necessary to provide a meaningful response. If the Administrator is referring to the former, both Circular A-4 and the Guidelines already provide full discussions – an entire chapter in the Guidelines – of the "wide range of potential factors" that EPA may need to consider to set an "appropriate baseline."[28] Since "developing a baseline is not a straightforward process, and analysts must make many decisions on the basis of professional judgment,"[29] there seems little room for any greater specificity than already provided in Circular A-4 and the Guidelines. In any event, the Administrator's notice provides no examples of instances where EPA has failed to abide by the existing guidance on the subject of baselines, no reason why the existing guidance is not adequate, and no description of ways in which the existing guidance could be improved or made more specific.

Limited environmental modeling would also seem to be a poor candidate for rigid, standardized treatment. The term "limited" is itself not specific, so EPA would first have to determine what exactly "limited" means in the context of environmental modeling, assuming that would be possible. Moreover, uniformity in the nature or degree of modeling across different programs may be detrimental, as the appropriate scope of modeling might well depend on the regulatory context. For example, relatively simple air emissions modeling for a single stationary source might use a model such as HYSPLIT, while another modeling problem involving multiple sources and photochemical reactions in the atmosphere might use a more complicated model such as CAMx. The former could be considered more "limited" modeling, but may nonetheless be entirely appropriate in the circumstances, and a definition suggesting that one was somehow inadequate or inappropriate would do more harm than good.

As for how EPA should treat regulation of multiple pollutants, the analysis and outcome is much the same as for the question of co-benefits above: the purpose of benefit-cost analysis is to evaluate all benefits and costs, so unless the statute directs otherwise, all benefits from regulation should be included.

The second broad question posed by this paragraph concerns the extent to which EPA should consider nonquantifiable or nonmonetizable effects in decision making. The short response is that EPA should consider such effects in decision making unless the statute says otherwise, and should include them in nonstatutory analyses unless the governing executive order or other directive says otherwise.

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[28] Circular A-4 at 15; Guidelines at 5-1 through 5-16.

[29] Guidelines at 5-16.

In environmental regulation in particular, proposed regulatory actions often have benefits to human health or the environment that cannot be monetized, or can at best only be partially monetized, but are still important. For example, in the Cross-State Air Pollution Rule Update, EPA was not able to monetize several human health benefits, various ecosystem effects and visibility impacts.[30] Similarly, EPA's amendments to the Risk Management Program regulations under the Clean Air Act (which EPA has delayed and now proposed to revise), could not quantify important benefits such as avoiding catastrophes, lost productivity, significant emergency response costs, transaction costs caused by accidents, property value impacts in nearby neighborhoods, and environmental damages from an accident.[31] Nonetheless, these were all important effects of the rule that were appropriately factored into the regulatory analysis regarding this rule.

More generally, OMB has warned of the dangers of failing to consider benefits that cannot be quantified or monetized: "When important benefits and costs cannot be expressed in monetary units, [benefit-cost analysis] is less useful, and it can even be misleading, because the calculation of net benefits in such cases does not provide a full evaluation of all relevant benefits and costs."[32]

Accordingly, in situations in which there are nonquantifiable and nonmonetizable effects, Circular A-4 already directs agencies to include them in their cost-benefit analysis. Specifically, the guidance directs agency staff to:

> exercise professional judgment in determining how important the non-quantified benefits or costs may be in the context of the overall analysis. If the non-quantified benefits and costs are likely to be important, you should carry out a "threshold" analysis to evaluate their significance. Threshold or "break-even" analysis answers the question, "How small could the value of the non-quantified benefits be (or how large would the value of the non-quantified costs need to be) before the rule would yield zero net benefits?" In addition to threshold analysis you should indicate, where possible, which non-quantified effects are most important and why.[33]

The Guidelines echo this, stating that "[n]on-monetized and unquantifiable benefits and costs" should be included in presentation of formal benefit-cost analyses and that "an economic analysis should assess the likelihood that non-monetized benefits and costs would materially

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[30] *See* EPA, Regulatory Impact Analysis of the Cross-State Air Pollution Rule (CSAPR) Update for the 2008 National Ambient Air Quality Standards for Ground-Level Ozone at ES-13, ES-19, 5-5, 5-39 through 5-43 (Sept. 2016), *available at*: https://www3.epa.gov/ttnecas1/docs/ria/transport_ria_final-csapr-update_2016-09.pdf.

[31] *See* EPA, Regulatory Impact Analysis, Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7), at 88-92 (Dec. 16, 2016), *available at*: https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0734.

[32] Circular A-4 at 10.

[33] *Id.* at 2.

alter the net benefit calculation for a given regulation."[34] The Administrator's notice does not explain why this existing guidance is erroneous or is not sufficient to address the issue of nonquantifiable, nonmonetizable effects, and does not identify any instances in which EPA has taken action inconsistent with this guidance.

e. *To what extent would it be helpful for EPA to require consideration of cumulative regulatory costs and benefits of multiple regulations during the rulemaking process, including how such consideration may affect the design or implementation of a regulation (i.e., longer or different compliance timeframes)?*

We are not providing comments on topic II.B.1.e at this time because of the lack of specificity as to what EPA means by "cumulative regulatory costs and benefits of multiple regulations" and what possible regulatory action EPA might propose to take regarding consideration of such cumulative effects. Should EPA provide additional specificity, we reserve the right to respond substantively.

2. *What would improved transparency look like?*

As noted above, the Administrator's notice identifies no instance in which EPA's consideration of benefits and costs has not been transparent. Accordingly, it is difficult to envision what increased transparency would look like. For example, the Guidelines state that "[t]ransparency requires that the analyst clearly state all assumptions."[35] The Administrator's notice does not identify any instance in which EPA has failed to meet this standard or otherwise has provided insufficiently clear analyses of benefits and costs.

a. *How might the documentation of how EPA considered costs and benefits in a regulatory decision be improved from current practices?*

The Administrator's notice does not cite any problems in EPA's documentation of how it considered costs and benefits in a regulatory decision under previous Administrations. To the extent that EPA's reference to "current practices" is meant to include rulemakings undertaken during this Administration, as noted above, the agency's overemphasis of compliance costs to industry and discounting of the benefits to society of regulations could be addressed through consistent use of longstanding guidance on the consideration of costs and benefits in rulemaking.

b. *In what ways can EPA increase transparency about the decision-making process in cases where the decision was based on information that is barred from release by law?*

The Administrator's notice has identified no instance in which EPA has failed to adequately discuss its reliance on information that could not be made public. However, we note

[34] Guidelines at 11-2 through 11-3.

[35] *Id.* at 5-13.

that the suggestion being raised in the Administrator's notice, that confidentiality concerns that limit the full public release of information may somehow compromise EPA's decision making, overlaps substantially with the concerns raised recently in EPA's proposal to limit the use of scientific evidence in rulemaking.[36] We respectfully refer the Administrator to the comments that many of the states here expect to submit in response to that proposed rulemaking,[37] for a full and detailed comment on why EPA should not proceed with any rulemaking on this issue.

With that said, one context in which such transparency problems can arise, however, is when EPA uses confidential business information submitted by regulated entities, which by its nature is not subject to verification. The transparency problems are particularly troubling if regulated entities are reporting the magnitude of compliance costs, because the regulated entities may have an incentive to overstate such costs. EPA can limit the transparency problems in this context by, to the extent allowable by statute or regulation, both (a) minimizing the amount of information EPA deems to be confidential business information, so that more information can be disclosed to the public, and (b) minimizing the amount of properly designated confidential business information on which EPA relies.

Limitations on public disclosure of information may also arise when EPA relies on peer-reviewed scientific studies based on confidential individual health records. Nonetheless, for at least two reasons, EPA should impose no bar on consideration of such studies in this proposed rulemaking or otherwise. First, such studies can constitute the best or latest available science, and various statutes that EPA administers require consideration of such science without any limitation based on data availability. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1314(a)(1) (requiring development of water quality criteria based on "the latest scientific knowledge"); Safe Drinking Water Act, 42 U.S.C. § 300g-1(b)(3)(A)(i) (requiring development of drinking water standards based on the "best available, peer-reviewed science"); Clean Air Act, 42 U.S.C. 7408(a)(2) (requiring development of air quality criteria based on "the latest scientific knowledge"). Second, it is the accepted practice of the scientific community to consider such studies.

3. *To what extent would requiring a systematic retrospective review element in new regulations help to provide ongoing consistency and transparency in how regulatory decision making will adapt over time to new information? Such a requirement might provide a more regular and systematic approach to ex-post (*i.e., *after regulations have been promulgated and become effective) evaluation of the costs and benefits of EPA regulations, as compared with the periodic regulatory reviews the EPA has historically conducted. This might help identify needed revisions, inform future regulatory approaches, and improve methods of ex ante analysis.*

We are not providing comments on topic II.B.3 and its subtopics at this time because of the lack of specificity as to what EPA means by "systematic retrospective review" and what

[36] "Strengthening Transparency in Regulatory Science," 83 Fed. Reg. 18768 (Apr. 30, 2018).

[37] Comments to be submitted in Docket ID No. EPA-HQ-OA-2018-0259.

possible regulatory action EPA would propose to take regarding consideration of such retrospective review. Should EPA provide additional specificity, we reserve the right to respond substantively.

C. Potential for Issuing Regulations to Govern EPA's Approach in Future Rulemakings

1. What are the most pressing economic or legal considerations that should be taken into account when deciding the appropriate level of specificity (all activities, by statute, by specific statutory provision) at which to formulate regulations?

As noted above, we see no need for the type of regulations suggested in the Administrator's notice. But if EPA were to proceed with developing such regulations, the most pressing legal consideration is the range of statutory standards that EPA implements and enforces. It seems unlikely that the widely varying statutes would allow for an agency-wide standard or definition for a particular subject relating to analysis of benefits and costs. Determining whether such broadly applicable standards would in fact be possible would itself be a time-consuming effort that would likely in the end prove to be unsuccessful or serve very little, if any, purpose.

It is unclear what the Administrator means by "economic . . . considerations" that should be taken into account when deciding the appropriate level of specificity. While uniform standards across some or all EPA programs might help to ensure comparability between economic analyses prepared for those programs, EPA's primary consideration must be in compliance with statutory criteria, and thus any such uniformity would have to be subordinated to statutory requirements.

2. What are the opportunities and challenges with issuing regulations to govern EPA's practice when statutory provisions do not mention costs or imply these are factors to be considered alongside benefits and other factors when setting pollution standards?

If a statute is silent or ambiguous about considering costs, then EPA could have some discretion whether to consider costs under the second step of the standard set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Statutory structure, purpose, or legislative history could constrain such discretion. The challenges and opportunities would thus depend on the statutory language and particular context: there may be situations where consideration of costs would be appropriate and others where such consideration would be inappropriate.

3. *How can EPA best promote more consistency and predictability while still leaving room for consideration of regulatory context and for flexibility to adapt to new information and methodological advances?*

Promulgating a regulation with specific, uniform definitions or requirements would necessarily limit flexibility. Any deviation from those regulatory requirements would then require promulgating a new regulation to accommodate the deviation.

If, consistent with relevant statutory requirements, a regulation were to provide multiple options for a definition or requirement, or to set criteria that would allow for deviation from a set definition or requirement, creating such flexibility would reduce consistency and possibly transparency. In addition, providing such options would increase the complexity and difficulty of preparing and applying the regulation.

The Administrator's notice does not identify what kinds of new information and methodological advances might develop. Once particular definitions or methodologies were set by regulation, attempts to adapt to new information and methodological advances would require further EPA rulemaking to amend those definitions or methodologies. That, however, would unnecessarily add more resource-intensive tasks to EPA's duties and would likely hinder EPA from fulfilling its mission to protect human health and the environment.

4. *In cases where current EPA practice reflects prior judicial decisions, a change in course may come with significant burden to the Agency. Is there a way to address this concern in regulations governing the consideration of costs and benefits?*

It is unclear what the Administrator's notice means by "a change in course." It is also unclear what the notice means by the "significant burden" of changing course when EPA's practice reflects prior judicial decisions. To the extent it is possible for EPA to change course under those circumstances, the burden would seem to be the standard burden associated with any rulemaking proceeding. Whether EPA can change course, however, would depend on the nature of the judicial decision. Of course, a way to obviate any burden to the agency caused by future judicial decisions is for the agency to forgo this proposed rulemaking.

5. *Are there ways to improve consistency and transparency using methods other than a regulatory approach (e.g., additional guidance)? What are the opportunities and challenges associated with these approaches?*

As noted above, there is already guidance from the Office of Management and Budget and EPA itself setting guidelines for analyzing benefits and costs in EPA actions. The Administrator's notice does not establish any need for further direction to EPA to assure whatever degree of consistency and transparency is appropriate in light of the variety of statutory standards to which EPA is subject. If further direction were appropriate, use of guidance documents might be more appropriate than a formal regulation since guidance is more flexible

and nonbinding, and therefore, if properly crafted, would be less likely to create conflicts with statutory directives.

6. *Are any of the opportunities and challenges identified above specific to a particular statute or statutes? If so, please provide examples.*

Many of the types of changes the Administrator's notice contemplates would be difficult to implement in light of the variety of statutory standards EPA implements and enforces. *See supra*, pages 3-4; 9-10.

Conclusion

EPA has not pointed to any legitimate need for new rules to govern cost-benefit analysis in its future rulemakings, let alone any statutory authority to undertake such a potentially far-reaching regulation that could affect more than a dozen federal statutes. The extensive and suitable directives and guidance already available to the agency, which by and large EPA has historically applied in an appropriate manner, provide the necessary level of clarity without recourse to new rulemaking. The Administrator's notice foreshadows a rulemaking proposal that would seek to weaken EPA's substantive rules by discounting public benefits and over-emphasizing costs. If pursued, such a rulemaking would likely run afoul of EPA's statutory obligations under any number of federal environmental statutes and therefore not survive judicial review. Therefore, we urge you to abandon any agency plans to proceed with a proposed rule.

Respectfully submitted,

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