



March 19, 2019

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Via Electronic Mail: [wheeler.andrew@epa.gov](mailto:wheeler.andrew@epa.gov)

The Honorable Andrew Wheeler  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave, NW  
Washington, D.C. 20460

Re: **Request to Withdraw Rulemaking on Cost-Benefit Analysis**

Dear Administrator Wheeler:

**Advisory Council**

Patricia Bauman  
Frances Beinecke  
Eula Bingham  
W. Thompson Comerford, Jr.  
Sally Greenberg  
John Passacantando  
Henry Waxman  
Robert Weissman

We are a diverse group of 47 public interest, labor, health and safety, and grassroots organizations representing millions of Americans, and we are strongly opposed to the Environmental Protection Agency's (EPA) rulemaking on "Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process" (RIN: 2010-AA12) [hereinafter "CBA rulemaking"]. On the occasion of your recent confirmation as the official Administrator of the EPA, we now urge you to make the formal withdrawal of the CBA rulemaking one of your first acts in this position. Through this action, you can signal to the American people that you intend to return EPA to its congressionally mandated mission of protecting public health and the environment.

Decades of experience have now shown that strict regulatory cost-benefit analysis suffers from significant flaws that limit its value in contributing to higher quality regulatory decision-making. As a threshold legal matter, the vast majority of statutes under which the EPA operates forbid the use of strict cost-benefit analysis in regulatory decision-making,<sup>1</sup> rendering the methodology an unnecessary, expensive, and irrelevant distraction in most rulemakings.

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<sup>1</sup> See Amy Sinden, *Formality and Informality in Cost-Benefit Analysis*, 2015 UTAH L. REV. 93, 129-34; SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, *RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH* 32 (2003); Thomas O. McGarity, *Media-Quality, Technology, and Cost-Benefit Balancing Strategies for Health and Environmental Regulation*, 46 LAW & CONTEMP. PROBS. 159, 160-61 (1983); Lynn E. Blais, *Beyond Cost/Benefit: The Maturation of Economic Analysis of the Law and its Consequences for Environmental Policymaking*, 2000 U. ILL. L. REV. 237, 238-40.

Moreover, thanks to the effects of long-recognized practical limitations in estimating regulatory costs and benefits, the results of cost-benefit analysis are systemically skewed against protective safeguards. Retrospective studies of regulatory costs have consistently found that the initial estimates are often too high, rather than too low.<sup>2</sup>

At the same time, many types of regulatory benefits – particularly those produced by EPA regulations, such as premature deaths prevented and cancers avoided – defy simple quantification and are otherwise impossible to meaningfully capture in dollars-and-cents terms. As a result, entire categories of crucial benefits are simply left out of the analysis. A recent study shows that in over three-quarters of the cost-benefit analyses prepared by EPA for significant rules over a 13-year period, the monetized benefits estimate excluded categories of benefits that the agency itself described as either actually or potentially “important,” “significant,” or “substantial” because these benefits were unquantifiable due to data limitations.<sup>3</sup>

Rather than addressing these flaws in cost-benefit analysis, the EPA’s CBA rulemaking would only make them worse. First, according to the language of the Advance Notice of Proposed Rulemaking, it appears that the EPA intends to use the CBA rulemaking to make a strict form of cost-benefit analysis the standard it must use when developing new regulations pursuant to its various authorizing statutes.<sup>4</sup> This would amount to a “supermandate” that would override the existing decision-making standards in those authorizing statutes, which invariably call for stronger environmental and public health protections than would be provided under a strict cost-benefit analysis standard. The EPA lacks the authority to override Congress’s considered choices in setting decision-making standards, and any attempt to do so through the CBA rulemaking would be illegal and vulnerable to legal challenges.

The CBA rulemaking also contemplates mandating analytical practices that would further skew the results of cost-benefit analysis against protective safeguards. The most notable change in this regard would be the systematic exclusion of “co-benefits” from the analyses. Co-benefits, in contrast to “direct benefits,” are the incidental advantages that result from a regulation, even though the regulation was not intended to produce them.

The EPA’s recent proposed reconsideration of the “appropriate and necessary” finding that undergirds its Mercury and Air Toxics Standards (MATS) rule<sup>5</sup> offers a preview of the damaging impact this change would have on the agency’s ability to effectively protect public

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<sup>2</sup> See PUTNAM, HAYES, & BARTLETT INC., COMPARISONS OF ESTIMATED AND ACTUAL POLLUTION EXPENDITURES FOR SELECTED INDUSTRIES (Report prepared for the Office of Planning & Evaluation, Env’tl. Protection Agency, 1980); OFFICE OF TECHNOLOGY ASSESSMENT, GAUGING CONTROL TECHNOLOGY AND REGULATORY IMPACTS IN OCCUPATIONAL SAFETY AND HEALTH: AN APPRAISAL OF OSHA’S ANALYTICAL APPROACH 58 (1995); Eban Goodstein & Hart Hodges, *Polluted Data: Overestimating Environmental Costs*, 8 AM. PROSPECT 64 (Nov./Dec. 1997); Winston Harrington, Richard D. Morgenstern, & Peter Nelson, *On the Accuracy of Regulatory Cost Estimates* 14-15 (Resources for the Future, Discussion Paper 99-18, 1999), available at <http://www.rff.org/documents/RFF-DP-99-18.pdf>.

<sup>3</sup> Amy Sinden, *The Problem of Unquantified Benefits*, 49 ENVTL. L. — (forthcoming 2019).

<sup>4</sup> Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process, 83 Fed. Reg. 27524 (June 13, 2018).

<sup>5</sup> National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review, 84 Fed. Reg. 2670 (Feb. 7, 2019).

health and the environment. As part of that reconsideration, the EPA proposed to completely ignore the thousands of lives that the MATS rule would save – measured in billions of dollars – simply because they are co-benefits that result from reductions in particulate matter pollution, rather than direct benefits that result from reductions in mercury and other toxic air pollutants. Though the EPA’s proposal stops short of repealing the MATS rule itself, this action would remove the MATS rule’s legal foundation, making it susceptible to being struck down in court.

The EPA’s proposed reconsideration of the MATS rule’s “appropriate and necessary” finding has attracted significant controversy, and rightly so. The EPA should not compound and amplify this controversy by making the systematic rejection of co-benefits an official agency-wide policy.

As the forgoing demonstrates, the CBA rulemaking would inhibit the ability of the EPA to safeguard our health and environment, and it is therefore anathema to the agency’s congressionally mandated mission. The continued pursuit of this unnecessary and misguided regulatory action would represent a grievous waste of the EPA’s dwindling budgetary resources, particularly at a time when the agency faces so many critical public health and environmental challenges.

As the EPA Administrator, you now have an opportunity to move the EPA in a better direction, one that is more consonant with what the American public expects and deserves. One of the ways you should seize this opportunity is by formally withdrawing and abandoning the CBA rulemaking.

We appreciate your attention to these comments.

Sincerely,

AFL-CIO

Audubon Naturalist Society

Audubon Society of Northern Virginia

Baltimore Tree Trust

Breast Cancer Prevention Partners

Center for Auto Safety

Center for Progressive Reform

Chesapeake Legal Alliance

Chesapeake Wildlife Heritage

Citizens for a Better Eastern Shore (CBES)

Clean Water Action

Delaware Nature Society

Environmental Health Strategy Center  
Environmental Integrity Project  
Farmworker Justice  
Food & Water Watch  
Friends of Accotink Creek  
Friends of the Chemung River Watershed  
Greater Syracuse Council on Occupational Safety and Health  
Institute for Agriculture & Trade Policy  
International Union, UAW  
Interfaith Worker Justice of San Diego County (IWJSD)  
KidsAndCars.org  
League of Conservation Voters (LCV)  
Milwaukee Riverkeeper  
National Employment Law Project  
National Parks Conservation Association  
Otsego County Conservation Association  
Piedmont Environmental Council  
Potomac Riverkeeper Network  
Public Citizen  
Rachel Carson Council  
Rock Creek Conservancy  
Safe Climate Campaign  
SafeWork Washington  
Sciencecorps  
Sierra Club  
Sleepy Creek Watershed Association  
Southern Maryland Audubon Society  
St. Mary's River Watershed Association  
The Michael J. Fox Foundation for Parkinson's Research  
Virginia Association for Biological Farming  
Virginia Conservation Network  
Waterkeepers Chesapeake

WE ACT for Environmental Justice  
West Virginia Highlands Conservancy  
Women's Voices for the Earth