

Congress of the United States

House of Representatives

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July 28, 2020

The Honorable Andrew Wheeler
Administrator
Environmental Protection Agency
1301 Constitution Ave. NW
Washington, D.C. 20460

Re: Docket ID No. EPA-HQ-OAR-2020-0044

Dear Administrator Wheeler:

I write to submit comment on the Environmental Protection Agency's (EPA) proposed rule entitled "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process." I am concerned that the proposed rule would distort EPA Benefit-Cost Analysis (BCA) in a manner that would undermine the Agency's ability to properly consider the environmental and health impacts of future Clean Air Act regulations on vulnerable communities. I urge EPA to comprehensively assess the environmental justice implications of the proposed rule and to eliminate provisions in the rule that threaten to weaken the Agency's commitment to pursuing environmental and health benefits for low-income communities, Tribal and indigenous communities, and communities of color.

There is much to be concerned about in this proposed rule. As with so many other recent EPA rulemakings, it is unclear what precisely the problem is that the rule intends to solve. It is also unclear why a formal rulemaking is necessary at all when the Agency is currently updating its existing BCA guidelines in a parallel process.¹ Substantively, the proposed rule calls into question the role of co-benefits in Clean Air Act (CAA) BCAs, contradicting the Agency's longstanding practice of incorporating co-benefits in order to consider the full sweep of scientific data when crafting environmental regulations. The proposed rule imposes arbitrary standards and criteria governing the inclusion of scientific studies to inform the Agency's understanding of concentration-response relationships, which could unduly restrict the scientific data being

¹ EPA's National Center for Environmental Economics (NCEE) is updating the Agency's "Guidelines for Preparing Economic Analysis," and the EPA Science Advisory Board (SAB) has released a draft report offering comments and revisions. The SAB has not yet finalized its review. Science Advisory Board Draft Report, "SAB Peer Review of EPA's Revised Guidelines for Preparing Economic Analysis," June 2, 2020, accessed here: https://www.eenews.net/assets/2020/06/08/document_pm_01.pdf.

considered by the Agency when conducting CAA BCAs. The proposed rule endorses the misguided view that making the data and models used to inform a BCA “publicly available” would improve the transparency of the analysis, when in fact it would merely serve to exclude critical scientific data from consideration. I take note of these significant problems, and I urge the Agency to remedy their defects or withdraw the relevant provisions altogether.

In the remainder of my comments, I wish to focus on the proposed rule’s potential impact upon environmental justice communities in CAA rulemaking. The proposal carries significant consequences for environmental justice communities that the Agency fails entirely to contemplate.

Environmental justice communities have long suffered from disproportionate exposure to elevated levels of air pollution. A large, and growing, body of scientific evidence in recent decades has further established a connection between communities of color and greater exposure to air pollutants such as particulate matter and ozone.² As recently as 2018, EPA’s own scientists compared particulate matter emissions data to census data and concluded that the pollution burden across the country was 1.28 times higher for non-whites than it was for the overall population.³ The pollution burden was 1.54 times higher for African American residents than for the overall population.⁴ The implications of these disparities for vulnerable communities are profound and multifaceted. In an ongoing and highly relevant example, preliminary research during the COVID-19 pandemic suggests a link between long-term exposure to air pollution and elevated COVID-19 mortality rates.⁵ The burden of this link would fall more heavily on communities of color due to the higher pollution burden that they experience. The need to reduce emission levels of dangerous air pollutants and improve air quality is inextricably tied to considerations of environmental justice.

EPA’s primary tool to diminish Americans’ exposure to dangerous air pollutants and improve air quality is the promulgation of regulations under the Clean Air Act. According to EPA’s own calculations, the Agency’s implementation of this landmark law has prevented hundreds of thousands of premature deaths in recent decades.⁶ Since communities of color experience a heavier air pollution burden than white communities, they possess an enormous stake in the regulations put forth under the CAA’s mandate and rely upon those regulations to properly

² Vann R. Newkirk II, “Trump’s EPA Concludes Environmental Racism Is Real,” *The Atlantic*, February 28, 2018, accessed here: <https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/>; see also, Cheryl Katz, “People in Poor Neighborhoods Breathe More Hazardous Particles,” *Environmental Health News*, November 1, 2012, accessed here: <https://www.scientificamerican.com/article/people-poor-neighborhoods-breathe-more-hazardous-particles/>.

³ Mikati, et al, “Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status,” *American Journal of Public Health*, Published Online March 7, 2018, accessed here: <https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2017.304297>.

⁴ *Id.*

⁵ Lisa Friedman, “New Research Links Air Pollution to Higher Coronavirus Death Rates,” *New York Times*, April 7, 2020, accessed here: <https://www.nytimes.com/2020/04/07/climate/air-pollution-coronavirus-covid.html>.

⁶ EPA Office of Air and Radiation, “The Benefits and Costs of the Clean Air Act from 1990 to 2020,” April 2011, accessed here: <https://www.epa.gov/clean-air-act-overview/benefits-and-costs-clean-air-act-1990-2020-second-prospective-study>.

consider and incorporate the best available science regarding racial disparities in pollution exposure.⁷

The proposed rule would enact a number of changes to EPA's methodologies and procedures for conducting BCAs as a part of CAA rulemakings. Since BCAs represent one of the main analytical frameworks utilized by the Agency to assess the prospective impact of CAA regulations during the rulemaking process, modifications to the Agency's methods for evaluating costs and benefits could carry substantial consequences for future air pollution regulatory standards promulgated under the CAA. In other words, the effects of the proposed rule would hardly be technical in nature; the impact would be felt in real and tangible ways across the nation, especially in communities of color. With this fact in mind, the environmental justice implications of the proposed rule are concerning. The proposed rule would modify CAA BCAs in ways that could distort their findings and undermine the Agency's ability to accurately consider the full environmental and health impacts of clean air regulations for vulnerable communities:

- *“Fitness for Purpose” Tests for Benefits Only:* The heavier pollution burden imposed upon environmental justice communities makes it even more crucial to those communities that CAA BCAs are permitted to consider the best available science in calculating both the benefits and the costs of a proposed regulation. The proposed rule, however, creates different standards for the scientific data used to inform benefits and costs by applying a more stringent “fitness for purpose” test only in the case of benefits. The proposed rule defines “fitness for purpose” tests whereby “information anticipated to have a higher impact must be held to higher standards of quality.” The proposed rule then applies the fitness for purpose test to the “benefits assessment” process but does not apply it to costs, asserting that “strength of scientific evidence should be strongest when the benefits are estimated.” In doing so, the Agency applies a tougher standard to the scientific evidence underlying the calculation of benefits than costs and increases the likelihood that certain studies may not be deemed “robust enough” to justify their consideration in a BCA benefit assessment. This dynamic creates a risk that CAA regulations could be arbitrarily distorted towards higher ratios of costs to benefits by excluding scientific data related to environmental and health benefits. Differential treatment of costs over benefits is inconsistent with the Agency's mission to protect human health and the environment; for example, as the proposed rule notes, EPA is statutorily prohibited in certain cases from considering costs. The environmental justice implications of the “fitness for purpose” test's uneven application could be particularly significant: if BCAs develop a systematic imbalance towards costs, vulnerable communities suffering from the heaviest air pollution burdens would experience the most severe impact from weaker pollution standards. EPA should treat benefits and costs equally and withdraw its proposal to apply the “fitness for purpose” test to the benefit assessment process.

⁷ For example, see Currie, et al, “What Caused Racial Disparities in Particulate Exposure to Fall? New Evidence from the Clean Air Act and Satellite-Based Measures of Air Quality,” *National Bureau of Economic Research*, January 2020, accessed here: <https://www.nber.org/papers/w26659>.

- Arbitrary Concentration-Response Criteria:* As noted above, a large and growing body of scientific evidence describes the relationship between elevated levels of air pollution and vulnerable communities. BCAs must be able to comprehensively evaluate the scientific literature regarding the health impacts of air pollutants in order to properly account for the benefits that would accrue to these communities. The rule, however, proposes additional criteria that would be imposed upon research studies pertaining to concentration-response relationships before those studies can be considered in a CAA BCA. The proposed rule would only permit BCAs to consider concentration-response studies that satisfied new “minimum standards,” with the strictest standards being applied to epidemiological studies, including that “the study location must be appropriately matched to the analysis” and “the study population characteristics must be sufficiently similar to those of the analysis.” These new geography and population-based constraints on epidemiological studies could severely limit the use of epidemiological data in CAA BCAs, which would prevent the Agency from considering the best available science and obscure the true environmental and health benefits of clean air regulations for vulnerable communities. The proposed rule does not explain or justify why these criteria are necessary, which only serves to highlight their arbitrary nature. EPA should withdraw this provision and avoid the imposition of any additional criteria on the consideration of concentration-response studies.
- Ambiguous Treatment of Non-Monetary Benefits:* It is a well-established feature of environmental rulemaking that many environmental and public health benefits cannot easily be quantified in monetary terms.⁸ It is difficult, if not impossible, to calculate with precision all of the benefits that accompany cleaner, less polluted air for a community and an improved quality-of-life for its residents. This dynamic is even more profound for vulnerable communities. The greater pollution burden endured by these communities both enhances the difficulty of quantifying the benefits that would result from clean air regulations targeted to address them, and heightens the risk of distortion should environmental regulations fail to comprehensively account for those benefits. The proposed rule, however, offers an ambiguous treatment of non-monetary benefits within CAA BCAs that calls their value into question. For example, the proposed rule asserts that if the “comparison of benefits to costs in the net benefit calculation” is difficult to measure in monetary terms, the Agency must provide a “robust explanation” in order to justify deviating from a simple monetary calculation. Any diminishment of the role or influence of non-monetary benefits in clean air regulations would carry significant environmental justice implications by risking the systematic underestimation of social benefits for vulnerable communities. EPA should clarify how the rule proposes to change its consideration of non-monetary benefits in order to reassure low-income communities, Tribal and indigenous communities, and communities of color that clean air regulations will continue to fully account for all potential benefits, including those not easily quantified.

⁸ For example, see Frank Ackerman and Lisa Heinzerling, “Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection,” *University of Pennsylvania Law Review*, Vol. 150, 2002, accessed here: https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3277&context=penn_law_review.

- *Doubts Regarding Co-Benefits*: The proposed rule raises similar environmental justice concerns related to co-benefits as for non-monetary benefits. The consideration of co-benefits is vital for the Agency to possess a complete understanding of the environmental and health benefits that clean air regulations will provide, and those calculations are magnified for environmental justice communities due to the heavier pollution burden that they confront. Yet the rule proposes to require BCAs to distinguish co-benefits as a distinct category from the “targeted” benefits of the CAA rulemaking. To the extent that such a disaggregation could undermine the Agency’s commitment to incorporating co-benefits in clean air regulations, it would have serious consequences for the communities that face the greatest danger from the full spectrum of harmful air pollutants. EPA should clarify that the proposed rule will not alter the Agency’s actual consideration of co-benefits in CAA BCAs, and withdraw any provision that could allow for such a change.

As I have described, EPA’s proposed changes to BCA methodologies and procedures are particularly concerning from the perspective of environmental justice communities. Equally concerning is EPA’s total lack of consideration of environmental justice during the crafting of the proposed rule. There is no question that the proposed rule carries significant environmental justice implications. The proposed modifications to the BCA process could result in weaker air pollution standards that would disproportionately harm communities of color due to the differential regulatory impacts of CAA regulations.⁹ Yet no trace exists of any sign that EPA contemplated how the rule would impact low-income communities, Tribal and indigenous communities, and communities of color. EPA appears to have summarily dismissed environmental justice as a factor to be considered at all.

The Agency’s decision to ignore environmental justice is particularly concerning in light of its responsibilities under Executive Order 12898, which requires Federal agencies to identify and address “disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations.”¹⁰ The proposed rule clearly has the potential for such a disproportionate impact on vulnerable communities; yet EPA simply waves its legal obligation away by claiming that the rule is exempt from EO 12898. The issue of environmental justice cannot be made to disappear at the Agency’s discretion. EPA’s failure to consider environmental justice is a serious omission and renders the rule legally defective. EPA must comply with the terms of EO 12898 by conducting a thorough review of the proposed rule’s environmental justice impact and incorporating the findings of that analysis into the rulemaking. The Agency should not move forward with the proposed rule until it has met its environmental justice responsibilities.

The proposed rule’s lack of consideration of environmental justice is indicative of the unfortunate extent to which EPA has neglected the importance of this issue. In its recent report on the “Top Management Challenges” for the Agency in FY 2020-2021, the EPA Office of the

⁹ Currie, et al, “What Caused Racial Disparities in Particulate Exposure to Fall? New Evidence from the Clean Air Act and Satellite-Based Measures of Air Quality,” *National Bureau of Economic Research*, January 2020, accessed here: <https://www.nber.org/papers/w26659>.

¹⁰ Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” Issued February 11, 1994, accessed here: <https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf>.

Inspector General (OIG) identified “Integrating and Leading Environmental Justice Across the Agency and Government” as one of the most significant challenges confronting EPA.¹¹ The OIG called upon the Agency to “enhance its consideration of environmental justice across programs and regions,” and noted that “with respect to environmental justice, gaps exist in almost all of the EPA’s activities, such as managing air quality, drinking water, toxic releases to surface waters, Superfund sites, emergency response, and environmental education.” The OIG asserted that these gaps constitute a “systemic problem with the Agency’s ability to address environmental justice across all program offices.” The OIG even specifically highlighted regulatory actions as a critical area for improvement, stating that “environmental justice should be a key consideration in devising and promulgating regulations.” This proposed rule perfectly illustrates the problems identified by the OIG. Rather than considering environmental justice as a priority during the rulemaking, EPA ignored it and dismissed it, perpetuating the gaps identified in the OIG’s report. EPA needs to change its approach to ensure that environmental justice is fully integrated into all aspects of Agency policymaking, and the proposed rule needs to reflect those changes.

The combination of the proposed rule’s harmful consequences for environmental justice communities and its outright dismissal of the need to consider their interests is disturbing. The situation must change and the proposed rule must change. The continuing legacy of environmental racism, which sees communities of color overburdened by a consistent exposure to higher levels of harmful pollutants, creates disproportionate environmental and health impacts of pollution on those communities. EPA has a responsibility to confront environmental inequity in every way that it can, with every tool at its disposal. Now and in the future, regardless of presidential administration or political party, environmental justice must be central to every aspect of EPA policymaking. I urge the Agency to change its approach to the proposed rule and demonstrate a newfound commitment to promoting environmental justice for all Americans.

Sincerely,



Eddie Bernice Johnson
Chairwoman
Committee on Science, Space, and Technology

¹¹ EPA Office of Inspector General, “EPA’s FYs 2020-2021 Top Management Challenges,” Report No. 20-N-0231, July 21, 2020, accessed here: https://www.epa.gov/sites/production/files/2020-07/documents/epaig_20200721-20-n-0231_0.pdf.