Regulatory Comment on EPA Docket Request ID: EPA-HQ-OA-2017-0190-0042

We thank you for the opportunity to comment on potential actions to repeal, replace, or modify prior Environmental Protection Agency (EPA) regulations as per docket request ID: EPA-HQ-OA-2017-0190-0042. We are a group of 85 administrative law and environmental law professors. We welcome the chance to contribute our expertise to this process, cognizant of Administrator Scott Pruitt's recent statement at the Texas Earth Day celebration that any comments on this proposal will be taken seriously. Scott Pruitt, Statement at Texas Earth Day (Apr. 21, 2017).

I. INTRODUCTION

At the outset, we respectfully request that the Administrator extend the comment deadline in response to this request by a minimum of sixty (60) days. Given the unbounded and apparently immense scope of the initiative, far more input from the public is needed before the Agency can craft a meaningful response. Moving forward without a significant expansion in the opportunity for public input risks making any Agency action arbitrary and capricious *a priori.*

The Administrator has also stated, "Regulations *exist* to give certainty to those that they regulate." U.S. EPA Media Relations, "Administrator Scott Pruitt Addresses EPA Staff, *at* https://www.epa.gov/newsreleases/administrator-scott-pruit-addresses-epa-staff-0 (Feb. 21, 2017) (emphasis added). Respectfully, we disagree. Although we recognize the need to streamline the process of compliance, streamlining is a means to achieve a goal; it is not the ultimate goal itself. *See* J.B. Ruhl et al., *Environmental Compliance: Another Integrity Crisis or Too Many Rules?*, 17 Nat. Resources & Env't. 24 (2002). It is not the primary reason why the regulations "exist." Rather, the purpose of EPA regulations—under this administration and prior administrations—is to help the EPA carry out the mandates of Congress to ensure healthy air, clean water, protection of endangered species, and security of the nation's most threatened natural resources.

To be sure, providing affected industries with regulatory certainty is often helpful in achieving the stated congressional goals, but on this point the Agency's efforts may be counterproductive. That is, broad-scale regulatory deconstruction on the level envisioned in Executive Order 13777 would actually introduce severe and destabilizing uncertainties, undercutting Administrator Pruitt's stated intentions. While there are sometimes areas of uncertainty concerning regulatory standards, these can actually provide flexibility and allow regulated entities to find the most efficient means to meet the standards. Accordingly, our comments set forth some important considerations for EPA to contemplate as it addresses presidential directives.

Specifically, our comments explain how wholesale repealing of existing EPA regulations would be unlawful because of requirements under EPA's statutory mandates as well as the Administrative Procedure Act (APA). First, Congress has charged EPA with a number of mandatory requirements with the intent to protect public health, preserve natural resources for future generations, and ensure the healthy functioning of the

ecosystems fundamental to the preservation of our wealth and welfare. The President and the EPA under his command is constitutionally obligated to follow these mandates. *See* U.S. Const. art. II, § 3 (requiring the President to "take Care that the Laws be faithfully executed"). Indeed, in passing these environmental statutes, Congress recognized the fundamental value of such protections, for citizens and the overall economy. Second, under the APA, the EPA is legally bound to issue a new, separate, proposed rule any time it wishes to change or repeal any prior EPA regulation. *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). As the Court explained:

> [T]he forces of change do not always or necessarily point in the direction of deregulation. In the abstract, there is no more reason to presume that changing circumstances require the rescission of prior action, instead of revision in or even the extension of current regulation. If Congress established a presumption from which judicial review should start, that presumption … is … *against* changes in current policy that are not justified by the rulemaking record.

Id. at 42 (emphasis in original).

II. EXECUTIVE SUMMARY

The substantive comments below outline three, broad areas where Agency action "regarding repeal, replacement, or modification" of regulations, *see* 82 Fed. Reg. 17793, may prove to be unlawful.

First, the comments outline some conditions under which wholesale repeal would be in violation of the Agency's responsibilities under various authorizing statutes (the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, the Endangered Species Act, *etc.*) and also in violation of the National Environmental Policy Act.

Second, the comments address concerns that modifications to weaken safeguards may be unlawful when premised on cost-benefit analyses that fail to adequately account for the public health and environmental benefits attributable to existing regulations. The comments go on to caution about over-reliance on cost-benefit scores and the inherent biases imbedded in those scores.

Third, the comments warn that, in certain contexts, EPA may be outright prohibited from considering costs to regulated industries. For example, with regard to setting National Ambient Air Quality Standards under the Clean Air Act, Justice Scalia has written, "Were it not for the hundreds of pages of briefing respondents have submitted on the issue, one would have thought it fairly clear that this text does not permit the EPA to consider costs in setting the standards." *Whitman v. American Trucking Associations*, 531 U.S. 457, 465 (2001).

III. REPEALING OR WEAKENING ENVIRONMENTAL AND PUBLIC HEALTH SAFEGUARDS UNDER THE GUISE OF "REGULATORY REFORM" MAY PROVE TO BE UNLAWFUL

Under a number of circumstances, rescission of environmental safeguards may not even be allowed. The following is a non-exhaustive list of such conditions.

- If the regulation is required by statute and not *ultra vires* —that is, if it is not clearly beyond the authority granted the agency in the statute or statutes under which it is authorized.

- If the regulation is required by statute and is not arbitrary and capricious or otherwise unlawful as a result of having been based on demonstrably flawed or inadequate scientific analysis. *See* 5 U.S.C. § 706(2)(A).

- If removal of the regulation is inconsistent with the express policies of the National Environmental Policy Act (NEPA): "[T]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment, [and] to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. Specifically, NEPA requires that "to the fullest extent possible" the policies, regulations, and public laws of the United States "shall" be interpreted and administered with the policies set forth in NEPA. *See* 42 U.S.C. § 4332 (1).

Modification of prior regulations must be conducted cautiously. We recognize that newly developed scientific or economic information may warrant reconsideration of prior regulations. As a starting point, given the statutory mandates of the EPA and its obligations under the APA, prudential concerns warrant the modification of prior regulations only where a newly performed cost-benefit analysis demonstrates that a previous cost-benefit analysis regarding the regulation under review was clearly incorrect, or is now no longer accurate due to an identified change in conditions. Such a newly performed, independent cost-benefit analysis must take into account not only costs for regulatory compliance, but also the myriad benefits that robust regulations provide: *e.g.,* reduction in public health costs and greater workforce participation due to reduction in sick days and other health issues. Moreover, such analyses should be established through peer-reviewed economic studies to avoid charges of acting arbitrarily or capriciously. Such a conservative approach to rescission would avoid many of the problems we outline in this comment.

Further, EPA should proceed cautiously with regard to its reliance on cost-benefit analyses since Congress has mandated that certain safeguards must be established *without* regard to cost. For example, Congress has dictated that EPA must seek the guidance of "an independent scientific review committee," the Clean Air Scientific Advisory Committee, before making any revisions to the National Ambient Air Quality Standards. *See* 42 U.S.C. § 7409(d)(2). *See also Whitman*, 531 U.S. at 465 ("Section 109(b)(1)

instructs the EPA to set primary ambient air quality standards 'the attainment and maintenance of which . . . are requisite to protect the public health' with 'an adequate margin of safety.' 42 U.S.C. § 7409(b)(1)..") (Scalia, J., delivering the opinion of the Court). *See also Lead Industries Association, Inc. v. Environmental Protection Agency*, 647 F.2d 1130, 1148-49 (D.C. Cir. 1980).

We derive the above words of caution from our own research and teaching. Our reasoning is as follows:

- With respect to avoiding the repeal of regulations unless that prior regulation is beyond the authority granted to EPA under its authorizing statutes, we emphasize that applying such a narrow standard would aid the EPA in fulfilling its statutory mandates and with complying with the U.S. Constitution to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

  Moreover, applying such a standard would allow the EPA to avoid costly and distracting litigation. Rather than having to engage in the costly effort of defending in court the compliance of any rescission action that fails to assist the Agency in meeting its statutory obligations, the EPA should limit its repeal efforts only to those actions warranted by law.

- We also draw our recommendations from the language of APA § 706(2)(A). Under this section of the APA, courts must "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." We agree that removal of prior regulations that are arbitrary and capricious or otherwise unlawful would again allow EPA to better comply with its statutory mandates. And again, an EPA focus on such regulations alone would be a more efficient use of EPA's resources by avoiding costly litigation, as described above, especially given the current budgeting circumstances.

- Given the uncertainties inherent in economic research, *unnecessarily* repeating cost-benefit analyses absent a significant change in circumstances is a waste of resources that would not pass a cost-benefit test itself. *See, e.g.*, National Academies of Sciences, *Environmental Decisions in the Face of Uncertainty* at 82-83 (2013) ("At the time of an economic analysis, the mean estimated values of anticipated benefits and costs and the corresponding net benefit or the benefit–cost ratio might indicate that a project is worth undertaking or that a rule is worth adopting, but after implementation the actual benefits and costs seen in retrospect can differ considerably from the estimated mean values because of uncertainties at the time of the analysis."). Moreover, regulatory impact analyses "are developed at 'the point when the least is known and any analysis must rest on many unverifiable and potentially controversial assumptions.'" Maureen Cropper et al., *Looking Backwards to Move Regulations Forward*, 355:6332 SCIENCE 1375 (2017) (citing M. Greenstone, in *New Perspectives on Regulation* at 113 (D. Moss & J. Cisterno eds., 2009).

Cost-benefit studies must capture the full range of economic impacts, including the benefits of a regulation (*e.g.*, public health benefits). An analysis that looks only at the costs of a regulation is an analysis that abandons cost-benefit principles and cannot be used to support repeal or modification of a regulation. As the Government Accountability Office (GAO) stated, "In 2012, OMB reported estimated annual benefits from major federal regulations totaling $141 billion to $691 billion and estimated annual costs of $42.4 billion to $66.3 billion for fiscal years 2001 through 2011, with EPA regulations accounting for 60 to 82 percent of the benefits and 43 to 53 percent of the costs." GAO, Report to Congressional Requesters, *EPA Should Improve Adherence to Guidance for Selected Elements of Regulatory Impact Analyses* (July 2014), *available at* http://www.gao.gov/assets/670/664872.pdf*; see also* Office of Management and Budget, *Regulatory Analysis: Circular A–4 to the Heads of Executive Agencies and Establishments*, 68 Fed. Reg. 58366 (2003), *available at* https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/ (describing the benefit side of cost-benefit analyses); and Organization for Economic Co-operation and Development, Executive Summary, *Cost-Benefit Analysis and the Environment*, at 19 (2006) ("Any project or policy that destroys or depreciates an environmental asset needs to include in its costs the [total economic value, or TEV] of the lost asset. Similarly, in any project or policy that enhances an environmental asset, the change in the TEV of the asset needs to be counted as a benefit. For instance, ecosystems produce many services and hence the TEV of any ecosystem tends to be equal to the discounted value of those services.").

A major contribution to these benefits—the value of which inheres to all Americans—has come from EPA's prior efforts stretching back over several administrations. We thus urge EPA to continue its long-standing practice of considering benefits such as reduction in asthma rates, lung cancer, cardiovascular disease, chronic obstructive pulmonary disease (COPD), and lost school and work days due to sickness related to air pollution. *See* American Lung Association, *State of the Air 2017*, at http://www.lung.org/assets/documents/healthy-air/state-of-the-air/state-of-the-air-2017.pdf.

Similarly, the benefits of reducing lead exposure are now repeatedly estimated as far higher than regulatory costs. *See* J. Schwartz, *Societal Benefits of Reducing Lead Exposure*, 66 ENVIRONMENTAL RESEARCH 105-24 (July 1994) (estimating that $17 billion could be saved with a 1 µg/dl reduction in blood lead concentrations). *See also* P. Grandjean, P.J. Landrigan, *Developmental Neurotoxicity of Industrial Chemicals*, 368 THE LANCET 2167–2178 (Dec. 16, 2006) ("Evidence has been accumulating over several decades that industrial chemicals can cause neurodevelopmental damage and that subclinical stages of these disorders might be common. … Neurobehavioural damage caused by industrial chemicals is, in theory, preventable. … Knowledge that a chemical is neurotoxic can prompt efforts to restrict its use and to control exposure.").

Significant regulatory benefits are not always easy to see, as for example when accidents *don't* happen. In a 2016 review of California's proposed refinery rules, the RAND Corporation found that in addition to the benefit to the public of prevented death and injury, each avoided accident was worth about $220 million to refiners, who would also see improvements in system reliability, community relations, labor–management relations, company reputation and public image. The public would also benefit from the avoided cost of fuel-supply disruption, (about $800 million per year), lower costs for emergency services and health care, and more stable property values. These benefits are only made apparent through analysis of accident histories. *See* D. Gonzalez, *et al.*, *Cost–Benefit Analysis of Proposed California Oil and Gas Refinery Regulations*, RAND Corp. (2016) *at* https://www.rand.org/pubs/research_reports/RR1421.html.

We also note that cost-benefit tests must be conducted within the overall context of meeting statutory mandates, and may not be used to counter the clear constitutional responsibility of the executive to faithfully execute the laws.

A list of EPA actions taking into account public health benefits, even when they are difficult to quantify, would stretch back at least through all of the last five administrations to President Reagan and would include:

- EPA, Final Rule, Fine Particulate Matter National Ambient Air Quality Standards: State Implementation Plan Requirements, 81 Fed Reg. 58010, 58012 (Aug. 24, 2016) ("Estimates show that attainment of the primary $PM_{2.5}$ standards will result in hundreds fewer premature deaths each year, prevent tens of thousands of hospital admissions each year and prevent hundreds of thousands of doctor visits, absences from work and school and respiratory illnesses in children annually.");

- EPA, Final Rule, Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_X SIP Call, 70 Fed. Reg. 25162, 25166 (May 12, 2005) ("we estimate that PM-related annual benefits include approximately 17,000 fewer premature fatalities, 8,700 fewer cases of chronic bronchitis, 22,000 fewer non-fatal heart attacks, 10,500 fewer hospitalization admissions (for respiratory and cardiovascular disease combined)…. We also estimate substantial health improvements for children from reduced upper and lower respiratory illness, acute bronchitis, and asthma attacks.");

- EPA, Final Rule, National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38652, 38656-57 (July 18, 1997) ("While the results of the epidemiological studies should be interpreted cautiously, they nonetheless provide ample reason to be concerned that there are detectable health effects attributable to PM at levels below the current NAAQS.

…Given the nature of the health effects in question, this finding … clearly indicates that revision of the current PM NAAQS is appropriate.");

- EPA, Final Rule, Maximum Contaminant Level Goals and National Primary Drinking Water Regulations for Lead and Copper, 56 Fed. Reg. 26460, 26541-42 (June 7, 1991) ("EPA estimated that corrosion control and source water treatment associated with the proposed regulation would reduce lead exposures for millions of people. The effects of the proposed rule were measured in terms of changes in blood lead levels among young children between the ages of 6 months and 5 years. … EPA estimates that the annual health benefits of corrosion control and source water using Scenario I [all large systems reducing 90th percentile lead levels to 0.005 mg/L] are approximately $4.3 billion.");

- EPA, Final Rule, National Emission Standards For Hazardous Air Pollutants; Standards For Inorganic Arsenic, 51 Fed. Reg. 27956, 27960-70 (Aug. 4, 1986) ("[N]either the [Clean Air] Act nor prudent public health protection policy requires absolute proof of health risks before the Agency invokes its authority to act under section 112. … As a result of this reduction in inorganic arsenic emissions, it is estimated that the number of incidences per year of lung cancer due to inorganic arsenic exposure for persons residing within 50 km of the affected smelter would be reduced….").

Independence in terms of financial support is key, given the prevalence of meta-studies that suggest that funding bias can affect the results of studies. *See, e.g.*, Sheldon Krimsky, *Do Financial Conflicts of Interest Bias Research? An Inquiry into the "Funding Effect" Hypothesis*, 38 Science, Technology, and Human Values 566-87 (2012); Paul M. Ridker & Jose Torres, *Reported Outcomes in Major Cardiovascular Clinical Trials Funded by For-Profit and Not-for-Profit Organizations: 2000-2005*, 295(19) Journal of the American Medical Association 2270-2274 (2006). There is no reason to think such concerns should not apply in the context of economic studies as well, and thus any reliance on external economic studies should consider the financial support behind them. *Cf.* Antonis Valachis *et al.*, *Financial Relationships in Economic Analyses of Targeted Therapies in Oncology*, 30 Journal of Clinical Oncology 1316-20 (2012) (finding potential "industry-related bias in economic analyses of targeted therapies in oncology in favor of analyses with financial relationships between authors and manufacturers").

- While the regulatory atmosphere's effect on our national economy is important, many economic analyses presented by regulated stakeholders have, in fact, failed to achieve predictive accuracy. The National Academies of Sciences observed that, "A few studies have compared the compliance costs estimated in regulatory impact analyses to estimates of actual compliance costs incurred after a regulation has been put into effect. Those comparisons indicate that compliance costs are

often overestimated." National Academies, at 87 (citing W. Harrington, Resources for the Future, *Grading Estimates of the Benefits and Costs of Federal Regulation* (2006); W. Harrington *et al.*, *On the Accuracy of Regulatory Cost Estimates*, *available at* http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-DP-99-18.pdf; *Office of Management and Budget, Regulatory Analysis: Circular A–4 to the Heads of Executive Agencies and Establishments*, 68 Fed. Reg. 58366 (2003), *available at* https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/); *see also* Pew Charitable Trusts, *Government Regulation: Costs Lower, Benefits Greater Than Industry Estimates* (2015), *available at* http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2015/05/government-regulation-costs-lower-benefits-greater-than-industry-estimates (pointing out that "it is instructive to look back at industry projections and compare them to the documented impacts and benefits of previous regulatory measures. … [There is] a clear pattern among corporate and trade association opponents of overestimating the costs of regulation in their economic data.").

In fact, real-world analyses of the 1990 Clean Air Act amendments (and implementing regulations) have shown that regulations have had a largely positive correlation with economic growth, with significant increases in Gross Domestic Product as the amendments were implemented. *See, e.g.*, Southern Environmental Law Center, Handout: "Don't Fall for It," at https://www.southernenvironment.org/uploads/publications/SELC_-_Quotes_and_Facts_About_the_Clean_Air_Act.pdf.

We recommend addressing this empirical bias by using a standard that focuses on adverse impacts on significant levels of net employment.

- Finally, we emphasize how Congress has required all federal agencies to comply with NEPA. Under NEPA, "major Federal actions significantly affecting the quality of the human environment" must produce an environmental impact statement, which can be quite costly and resource-intensive. *See, e.g.*, Bradley Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 Colum. L. Rev. 903 (2002) (describing the resource-intensive process of producing Environmental Impact Statements (EISs) under NEPA). Depending on the statute authorizing agency action, among other factors, the wholesale removal of a regulation may constitute a "major Federal action[] significantly affecting the quality of the human environment," *see* 42 U.S.C. § 4332 (2)(C), triggering the need for a robust and resource-intensive EIS. That is, the impact of a regulatory repeal initiative may be to require the expenditure of *more* resources at the Agency, not less.

IV. CONCLUSION

We support initiatives that examine how to achieve the aims of our environmental statutes more effectively, but the text of the Request for Comment, 82 Fed. Reg. 17793

(April 13, 2017) along with the text of Executive Order 13,777, have caused us to be gravely concerned that the Agency is proceeding down a path that fails to consider the core objectives of the country's canonical environmental laws.

The environmental laws of our country are not "job-killing" or a detriment to our economy, but have preserved the natural capital that we need to prosper.
While improvements in any administrative process can always be developed, wholesale reduction of our investment in environmental laws will not achieve prosperity. Instead, it will sacrifice the valuable gains we have made, and repudiate our responsibility to preserve the foundations of our health and well-being for current and future generations.

We hope the considerations outlined above will be helpful to the EPA as it moves forward with addressing administration directives.

Appendix

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